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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

NYAMEKYE ASARE

Grievor

and

DEPUTY HEAD (Department of Indigenous and Northern Affairs)

Respondent

Indexed as
Asare v. Treasury Board (Department of Indigenous and Northern Affairs)

In the matter of an individual grievance referred to adjudication and in the matter of a request for an extension of time to file a grievance

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

For the Grievor: Russell MacCrimmon, counsel

For theRespondent: Joshua Alcock and Joel Stelpstra, counsel

Heard at Ottawa, Ontario,
January 16 to 20 and June 1 and 2, 2017.

I. Individual grievance referred to adjudication

[1] On November 16, 2012, Gorazd Ruseski, Director, Policy Research and Coordination Directorate, Lands and Economic Development Sector, Indigenous and Northern Affairs Canada ("the Director"), wrote to Nyamekye Asare ("the grievor"), a junior research economist employed in the directorate, terminating her employment for abandoning her position.

[2] The letter was further to correspondence of January 25, April 26, August 3, and October 31, 2012. It noted that the purpose of all the letters had been to give her a chance to explain her absence from work since August 12, 2011, to seek her consent for a fitness-to-work evaluation, and to seek her consent to contact her doctor. The letter noted that she did not reply to any of the earlier letters and noted further that the October 31 letter had directed her to report to her director's office on November 9 to explain the reasons for her absence. She was advised that failing to comply with the direction could result in the termination of her employment.

[3] It was noted that Canada Post had returned the November 16, 2012, letter; Canada Post had indicated that the grievor had refused to accept it. It stated in part as follows:

…

> *I have reviewed the circumstances surrounding your "unauthorized" absence from work and taken into consideration the fact that you have not replied to letters that were sent to you. As you have not contacted me to explain the circumstances surrounding your absence from work, I have concluded that you have wilfully and with full intent abandoned your position ….*
>
> …
>
> *Therefore, in accordance with Section 12(1) (e) of the* Financial Administration Act*, I hereby terminate your employment for cause … effective November 16, 2012 ….*
>
> …

[4] On April 2, 2013, Ms. Asare grieved that her employer's decision to terminate her employment, which she alleged became known to her on March 7, 2013, was without cause and was discriminatory, in violation of article 16 of the Economics and Social Science Services collective agreement and of ss. 3(1) and 53(2) of the *Canadian*

Human Rights Act (R.S.C., 1985, c. H-6; *CHRA*). She contended that Mr. Ruseski and her direct supervisor contributed to the deterioration of her health as well as to her absence.

[5] By way of corrective action, she sought a declaration that her termination was null and void, reinstatement in her substantive position retroactive to November 16, 2012, with full pay and compensation for all losses in terms of wages and leave entitlements benefits, damages for pain and suffering, and any further compensation that the former Public Service Labour Relations Board deemed appropriate.

[6] The respondent Indigenous and Northern affairs final-level grievance response is dated July 16, 2013. In the reply, it took the position that the grievance was untimely. At the opening of its argument, it withdrew that objection.

[7] Nevertheless, the respondent did provide a response on the merits of the grievance that states that in January 2012, the employer became aware that the grievor was possibly working at the University of Ottawa while being absent from working for the employer due to illness. Management attempted to contact her several times by different communication means over the course of 2012 to obtain clarification on her status. All its attempts failed as the grievor did not pick up the letters or return the calls.

[8] The respondent stated that an employee has the duty to cooperate with it unless he or she is unable to, for compelling reasons. While the grievor had indicated that she had medical direction not to have contact with her managers, even though she did not provide a copy of that direction, she still had an obligation to review the correspondence management sent to her and to respond to it as necessary.

[9] In response to the grievor's position that because Sun Life had approved her disability insurance claim in July 2012, management should not have requested additional information from her, the respondent noted that the information available to Sun Life was not accessible to the employer as it was protected under the *Privacy Act* (R.S.C., 1985, c. P-21).

[10] The respondent concluded that the grievor had not provided evidence that she had compelling reasons preventing her from communicating with it or picking up or

answering the letters it had sent to her. As she had failed to contact her employer, management deemed that she had abandoned her position.

[11] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board 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 ss. 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 s. 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; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[12] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*"). Note that in this decision, "the Board" refers to the current Board and all its predecessors.

II. Background and issues in dispute

[13] Throughout this decision, I will use the term "employer" in relation to the grievor's employment with the department rather than in reference to Treasury Board. Starting in January 2010, Ms. Asare was employed with the employer on a casual basis until April 16, 2010, at which point she became an indeterminate employee.

[14] In the fall of 2010, with the permission of her supervisor and director, she established a flexible work arrangement that would allow her to pursue PhD studies at the University of Ottawa while maintaining a 37.5-hour workweek.

[15] In April 2011, she met with her director to advise him of a series of incidents involving her supervisor that she had perceived as harassing in nature. On her director's advice, she met with her supervisor in an attempt to work through their issues.

[16] Both her supervisor and director met with her for her year-end performance review, which was quite satisfactory.

[17] In July 2011, Ms. Asare filed a formal harassment complaint against her supervisor with the Assistant Deputy Minister who, some 10 days later, after reviewing the allegations, rejected the complaint on the grounds that the actions it described did not meet the threshold to qualify as harassment.

[18] Ms. Asare's director had not been aware that the complaint had been filed. He was debriefed only after it had been disposed of.

[19] Ms. Asare was disappointed and crushed when she learned that the complaint had been disposed of. On August 4, she sought medical attention at the University of Ottawa Health Services clinic, believing that her mental health was in decline. She was referred to a psychologist and saw a licensed counsellor.

[20] In early August, she submitted an application for leave without pay for a year with another director, on a day on which both her supervisor and director were absent.

[21] When her director returned, he advised her that he considered her application to be for education leave and asked her for more detail about the PhD program at the University of Ottawa.

[22] On August 11, 2011, the Director met with the grievor and her sister. He informed the grievor that her request for education leave would not be granted and that the flexible work arrangement that had been in place would be discontinued after a transition period, to allow her to wind down her current educational activities. She replied to the effect that he was making her choose between her education and her work.

[23] On August 12, 2011, Ms. Asare saw a physician who signed a medical certificate indicating that she would be off work by reason of illness until September 15, 2011. She faxed a copy to the Director's assistant.

[24] Without advising her employer, on September 13, 2011, she accepted a job as a teaching assistant at the University of Ottawa for the fall semester and enrolled in two courses in the PhD program.

[25] She saw a psychologist on September 23 and 30, 2011, who recommended that she not return to work until she had seen a psychiatrist. The psychologist advised her that the work environment was negatively impacting her health and that she should become involved in activities that would contribute to her well-being, such as working as a teaching assistant. Another recommendation was that a liaison be delegated to communicate information pertinent to her workload rather than it coming directly from her manager.

[26] Over the course of the ensuing few months, Ms. Asare sent more medical certificates extending the period of her leave on September 15, stating that she would be absent until October 15, 2011; on October 15, stating that she would be absent until November 18, 2011; on November 21, 2011, stating that she would be absent until January 3, 2012; and on January 2, stating that she would be absent until March 2, 2012.

[27] On January 9, 2012, the University of Ottawa contacted the Director, seeking information about the number of hours that Ms. Asare was currently working at Indigenous and Northern Affairs. The Director then became aware for the first time that she was enrolled as a graduate student and working as a teaching assistant during the fall 2011 semester and that she had applied for another teaching assistant position for the 2012 winter semester.

[28] He wrote a letter sent by email and courier and dated January 25, 2012, outlining his conversation with the university and requesting that Ms. Asare attend a fact-finding meeting on February 2, 2012, to explain the situation. The couriered letter was returned to the sender. Ms. Asare did not present herself at the meeting or otherwise communicate with her director.

[29] The Director again wrote to the University of Ottawa, requesting additional information concerning Ms. Asare's status with the university.

[30] The University of Ottawa advised Ms. Asare that her employer was seeking additional information and provided her with a copy of his letter. She delegated her

father to instruct the university not to provide the information to the employer.

[31] On February 22, 2012, Ms. Asare emailed the Director's assistant a medical certificate indicating that her leave had been extended indefinitely by Dr. Donald Kilby, Primary Care Physician at the University of Ottawa Health Services clinic. Dr. Kilby had seen Ms. Asare a number of times in November and December 2011. He had reviewed her medical record and the psychologist's report and had concluded that she was suffering from a serious anxiety disorder. He helped her complete a disability insurance claim and observed that she felt that she was a victim of harassment at work. He advised that she undergo psychotherapy. As of February 22, 2012, he was not able to see a timely end to the period of disability.

[32] Dr. Kilby advised Ms. Asare that while she was on sick leave, she should not take emails or phone calls from her managers while issues remained between her and the employer. His advice was to speak only to Human Resources.

[33] At or about this time, a conversation took place between a Labour Relations Officer with the respondent and Claude Vézina, Director of Professional Services with the Canadian Association of Professional Employees (CAPE or "the bargaining agent"). Mr. Vézina informed the Labour Relations Officer of Ms. Asare's instruction that she not be contacted by her managers during her sick leave.

[34] Ms. Asare applied for disability insurance benefits on March 20, 2012, with Sun Life.

[35] On April 26, 2012, the Director wrote a letter to Ms. Asare, requesting that she undergo a fitness-to-work evaluation with Health Canada. The letter also advised her that she was considered on unauthorized leave. It was sent by email and courier. It was returned as "refused to be accepted". She did not respond to the request.

[36] On July 3, 2012, Sun Life advised Ms. Asare that the employer considered her on unauthorized leave.

[37] Dr. Kilby provided a statement to Sun Life on July 9, 2012, supporting the grievor's disability insurance application. He noted that her symptoms were severe to the extent of totally and continuously preventing her from performing the duties of her occupation.

[38] On July 17, 2012, Ms. Asare informed Dr. Kilby that she had learned that she was considered on unauthorized leave. He advised her that she should deal with the situation either by going to the bargaining agent or by finding a lawyer.

[39] On July 31, 2012, Sun Life advised Ms. Asare that it had approved the payment of benefits, effective December 14, 2011. A copy of the letter was sent to Compensation and Benefits.

[40] On August 3, 2012, the Director again wrote to Ms. Asare, requesting that she consent to allow him to speak with Dr. Kilby. The letter was sent by email and by courier. The couriered letter was returned after it was unclaimed.

[41] On September 11, 2012, Ms. Asare met with Dr. Kilby. She sought assurances that he would not provide information to her employer. He confirmed that he would not do so without her consent.

[42] On October 31, 2012, Ms. Asare was directed to report to the Director's office on November 9, 2012, to explain the reasons for her absence. Failing to could result in termination. The letter was not picked up at the post office.

[43] On November 2, 2012, Ms. Asare met with Dr. Kilby and advised him that she was starting to feel better and that she had a psychiatrist appointment the following week.

[44] On November 16, 2012, Ms. Asare's employment was terminated for abandoning her position.

[45] She met with the psychiatrist in November and December 2012, who confirmed the anxiety and depression diagnosis and concluded that stressors at work were a contributing factor.

[46] Dr. Kilby met with Ms. Asare on January 14, 2013, at which time he signed a medical certificate indicating that she could return to work on February 1, 2013.

[47] Ms. Asare found out from Sun Life on or about February 4, 2013, of the termination of her employment.

[48] She contacted Human Resources and requested the outstanding letters, which she received on April 10, 2013.

[49] The following three interrelated issues are present in this richly complex factual case:

> 1: Was the respondent's decision deeming that Ms. Asare abandoned her position reasonable?
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> 2: Did the respondent discriminate against the grievor under the *CHRA* on the basis of her disability by terminating her employment?
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> 3: Did the grievor fail in her obligation to disclose to the respondent in a timely way the fact that she was pursuing her PhD and working as a teaching assistant while on approved sick leave?

[50] For the reasons that follow, I have concluded that the decision deeming Ms. Asare to have abandoned her position on the unique facts of this case was not reasonable; secondly, I have concluded that the respondent discriminated against her on the basis of her disability; and thirdly, I have concluded that she failed in her obligation to disclose to the respondent in a timely way that she was pursuing her PhD and working as a teaching assistant while on approved sick leave.

[51] At the parties' request, I remit the question of remedy to them, bearing in mind my conclusions in this case.

III. Summary of the evidence

[52] The respondent called two witnesses, Mr. Ruseski, Senior Director for Indigenous Programs at Fisheries and Oceans Canada, and at all material times to the grievance the Director, Policy Research and Coordination Directorate, Lands and Economic Development Sector, Indigenous and Northern Affairs Canada; and Tracy McFarlane, Administration Officer at Health Canada, and at all material times to the grievance Administrative Assistant at Indigenous and Northern Affairs Canada, working for Mr. Ruseski.

[53] The grievor called four witnesses, including herself; Kweka Asare, her father; Mr. Vézina; and Dr. Kilby.

[54] There is reference in this decision to allegations that the grievor was harassed in the workplace. The question of whether the grievor was in fact harassed is not dealt with in this decision. Evidence was admitted not for the truth of its contents but on the

basis that it was relevant to explaining why Ms. Asare left the workplace and did not respond to communications from the employer.

[55] At the outset of the hearing the parties on consent agreed to a sealing order with respect to the medical information relating to Ms. Asare. Much of the examination and cross-examination of Dr. Kilby pertained to very sensitive medical information about the grievor. Given the sensitive nature of this information and the parties consenting to the sealing of the related documents, I have endeavored in the summary of the evidence evidence to minimize references to medical information that need not be part of the public record

A. For the employer

1. Mr. Ruseski

[56] The Policy Research and Coordination Directorate, Lands and Economic Development Sector, is responsible for developing policy advice with respect to indigenous economic development for the department and other departments, with responsibility for the economic portfolio. The directorate is also responsible for corporate planning and reporting for the sector as well as economic research.

[57] The number of employees in the directorate varied from 11 to 14. It has three units, a policy unit, an individual planning and reporting unit, and an economic research unit. The grievor was employed in the economic research unit, which had four or five employees, including the supervisor.

[58] Ms. Asare commenced employment as a casual employee in January 2010 as a junior economist. In that position, she conducted economic research, gathered statistics, and prepared briefing notes. She participated in joint projects and staff meetings as required. She was employed as a casual employee for approximately four months until April 2010, when she was bridged into the public service as a student. She ultimately became an indeterminate employee after a year on probation. During this time, she performed duties similar to those she performed as a casual employee.

[59] During the summer of 2010, her supervisor recommended that Ms. Asare undertake a part-time program of academic studies while maintaining full-time working hours. Mr. Ruseski accepted the proposal on the recommendation of her

supervisor. It appeared to him to be an informal arrangement with the university that would involve auditing a few courses.

[60] In late April 2011, Ms. Asare requested a meeting with Mr. Ruseski with respect to a series of incidents that she had perceived as harassing in nature that had involved her supervisor.

[61] Coming out of the meeting, his first thought was to advise her to speak with her supervisor. He thought they needed to connect and find a way forward.

[62] Both the supervisor and Ms. Asare agreed that he should participate in the year-end performance review. At the review, they were both civil and constructive and appeared to be working through their issues.

[63] The year-end review reiterated the view that Ms. Asare's work had been quite satisfactory. Mr. Ruseski's impression was that issues had been aired, that the supervisor and Ms. Asare had found a way to interact more frequently, and that things were going all right for her.

[64] Unbeknownst to Mr. Ruseski, on July 15, 2011, Ms. Asare filed a formal harassment complaint with the Assistant Deputy Minister, naming her supervisor as the respondent. The complaint referred to actions that had occurred since June 2010.

[65] On July 26, 2011, the Assistant Deputy Minister, after reviewing the allegations, decided to reject the complaint on the grounds that the actions described in it did not meet the threshold to qualify as harassment as per the definition found in the Treasury Board's policy on the prevention and resolution of harassment in the workplace.

[66] While the complaint was rejected, the Assistant Deputy Minister noted that it was clear from the information provided that there had been inappropriate comments and incidents and that there was a need to mend the working relationship between the supervisor and Ms. Asare through mediation or other informal processes.

[67] Both the supervisor and Ms. Asare were advised of the disposition of the complaint on that date.

[68] The Assistant Deputy Minister advised Mr. Ruseski that a complaint had been filed and advised him verbally of its disposition later in the summer of 2011.

[69] Although he could not be certain of the exact timing, at or about the beginning of August 2011, Ms. Asare had raised with him the prospect of going on education leave.

[70] On August 8, 2011, Ms. Asare submitted an application for leave without pay for one year starting on August 31, 2011, to another director in the department. On August 8, both he and Ms. Asare's supervisor were absent on leave.

[71] When Mr. Ruseski returned, he learned that Ms. Asare had sought approval from another director for the leave.

[72] Mr. Ruseski wanted to formally sit down with Ms. Asare to discuss a number of issues he had observed about her workplace behaviour, along with concerns that she had expressed to him in a meeting they had had on August 2. He also wanted to clarify a way forward on her request for education leave.

[73] They met on August 9, 2011. He asked her to explain to him in more detail her education leave request. She told him that she had been in the PhD program in the Department of Economics at the University of Ottawa through an informal arrangement.

[74] The program was becoming more intense. She still had coursework remaining, a comprehensive exam, fieldwork, and a thesis to complete. She made the case to him that it would be a useful investment for the organization as it would keep her skill set up to date.

[75] Until that point, there had been an informal part-time arrangement, and she had taken two courses per semester. She required full-time education leave as she would not be able to complete her studies under a part-time arrangement.

[76] Based on his experience, Mr. Ruseski stated that completing several courses, writing four comprehensive exams requiring significant studying, and completing a thesis was a substantial amount of work. He stated that it had taken him five years to complete his PhD. During that time, he did not work full- or part-time, although he did some teaching.

[77] As she had had the part-time arrangement only for a year, Mr. Ruseski's assessment was that she would not be able to work full-time and complete her PhD studies. He did not think it was possible.

[78] Mr. Ruseski and Ms. Asare met on August 11, 2012. Ms. Asare's sister also attended.

[79] Mr. Ruseski had prepared a letter for Ms. Asare before the meeting outlining his position on a number of workplace issues and on her application for education leave. She was given the letter to read at the beginning of the meeting.

[80] Mr. Ruseski stated that the purpose of the meeting was to formally recount to Ms. Asare some of the growing concerns about her behaviour in the workplace and to provide her with some direction with respect to her education leave request.

[81] Ultimately, he rejected her request after considering an informal guide, which assisted him in his decision making. Directors can use that guide when evaluating education leave requests. He also took into account the informal arrangement in the past with respect to her education leave and what was happening in the workplace.

[82] He did not see an obvious benefit to the organization. The work required in the economics group did not require the skills of a PhD. He needed someone in the organization to perform the work. He perceived her education leave request as an attempt to get away from the workplace and the pressures she was struggling with. It was clear to him that full-time work and full-time PhD studies were not compatible.

[83] He evaluated her education leave request in the same way he had dealt with two previous requests that others had made. He reached the same conclusion and denied hers.

[84] He told her that she would have to wind down the informal arrangement that had been in place with respect to her part-time studies. He advised her that being a full-time PhD student would not allow her to fully contribute to the team and that the informal arrangement under which she had pursued two courses per semester might have contributed to her workplace difficulties.

[85] In his view, the two courses were quite demanding, especially because she was working full-time. It would have been very onerous, and it would have been difficult

for her to do well in both her education and her work. It could have led to fatigue, distracted her from her work, and made it difficult for her to work with others.

[86] Ms. Asare responded, stating to the effect the following: "So you are forcing me to make a choice between working here and my education."

[87] Mr. Ruseski responded that receiving education leave is a privilege and that granting it was within the management team's discretion. His view was that matters had been left in Ms. Asare's hands to either redouble her efforts in the workplace or pursue her education.

[88] Ms. Asare had requested a change in supervision despite the efforts both parties were making to improve their relationship. She was not getting along with her supervisor and wished to report to someone else.

[89] Mr. Ruseski thought it was premature to change her supervision, and he wanted to allow more time to see if the current arrangement could work. More tools were available that had not been used, such as the employee assistance program (EAP) and informal conflict resolution. In addition, it would have been difficult to find another position for Ms. Asare, given that she was working in an economics unit. He wanted to try to make it work.

[90] Ms. Asare advised him that the university had recently informed her that it could not support her continuing part-time as she had been, through the informal arrangement.

[91] The next day, August 12, 2011, Ms. Asare did not report for work. She faxed a copy of a medical certificate to Mr. Ruseski's administrative assistant dated that day, which had been signed by a medical doctor at the Rideau-Friel Medical Centre and certified that Ms. Asare had been seen at the clinic and had been granted time off until September 15 for medical reasons.

[92] When he was made aware of the situation, Mr. Ruseski's impression was that it was an important time for Ms. Asare, as she had decisions to make and she might have to work through her workplace issues. He took it on faith that there was a legitimate medical issue.

[93] On August 16, 2011, Mr. Ruseski wrote to Ms. Asare to confirm a few matters of an administrative nature and to reiterate a number of points that had been discussed during their August 11 meeting. He advised her that she had only 29.125 hours of sick leave with pay remaining and that to avoid any overpayments, he had advised Compensation to place her temporarily off pay, effective immediately and until further notice. He also advised her that she would be provided with a record of employment so that she could apply for employment insurance benefits. He confirmed that at the August 11 meeting, she had requested to be reassigned to another supervisor, to which he had replied that it was premature to consider doing so at that time.

[94] In addition, he confirmed that she had made a claim that her supervisor was bullying her, but she had not provided any substantiation to support those allegations. He noted that the claim had already been raised with the supervisor and that it had been denied. He also confirmed that they had discussed her request for long-term education leave, which he had indicated he was not prepared to approve.

[95] He advised her to forward the original medical certificate to his attention to cover her absence from work due to illness. He also advised her that her access to the office had been temporarily suspended and that should she need access before her return, she was to call him. He had been advised that this was standard practice in situations involving long-term sick leave. He also advised her of the availability of confidential counselling through the EAP.

[96] On September 15, 2011, Ms. Asare emailed her supervisor and copied Ms. McFarlane. She informed him that her doctor had granted her time off until October 15, 2011, for medical reasons. Attached to the email was a copy of a medical certificate from the University of Ottawa Health Services clinic certifying that she would be absent for medical reasons from September 14 to October 14, 2011, by reason of illness. She faxed a copy of the medical certificate and said she would provide the original on her return to work.

[97] On October 17, 2011, Ms. Asare emailed her supervisor, again copying Ms. McFarlane. She informed him that her doctor had granted her time off until November 18, 2011, for medical reasons. Attached to the email was a copy of the medical certificate from the University of Ottawa Health Services clinic certifying that

she would be absent for medical reasons from October 14 to November 18, 2011. In the remarks column, it was noted that when Ms. Asare did return to work, it would be on a gradual basis.

[98] On November 21, 2011, Ms. Asare emailed her supervisor, advising him that she was still not feeling well and that her doctor had extended the leave. She attached a copy of a medical certificate extending her leave until January 3, 2012.

[99] Mr. Ruseski was asked whether he took any action with respect to Ms. Asare's absence. He replied that he did not and that he gave her the benefit of the doubt that there was a legitimate health concern.

[100] On January 2, 2012, Ms. Asare emailed her supervisor, enclosing a copy of a medical certificate extending her leave to March 2, 2012, by reason of illness.

[101] On January 9, 2012, Mr. Ruseski received a telephone call from the Operations Coordinator of the University of Ottawa's Department of Economics. She informed him that Ms. Asare had been a graduate student since the fall of 2011, that she had been a teaching assistant during the fall term, and that she had applied to be a teaching assistant for the winter term.

[102] She explained to him that the Economics Department had rules about the number of hours that candidates worked outside it and that they were limited if they wished to qualify for a teaching assistant job. She was looking for information from Mr. Ruseski on the number of hours Ms. Asare was putting in at work.

[103] Mr. Ruseski attempted to be discreet and informed her that he would have to contact Ms. Asare before he could release that kind of information and that he would get back to her.

[104] He thought it was necessary to formally communicate with Ms. Asare as he had received information that she was enrolled in the graduate program and was employed as a teaching assistant. This development required an explanation. It cast doubt in his mind about the legitimacy of her sick leave.

[105] He wrote a letter to Ms. Asare, reciting that she had been absent from work due to illness since August 15, 2011. He advised her that the University of Ottawa had contacted and informed him that she had been employed as a teaching assistant

during the fall 2011 semester and that she had applied for another teaching assistant position during the winter of 2012. He asked her to attend a fact-finding meeting on February 2, 2012, to explain the situation and advised her that she could be accompanied by a person of her choice or by her bargaining agent representative. The original of the letter was couriered to her home address, and in addition, a scan of it was emailed to the address from which she had been forwarding her medical certificates.

[106] A courier attempted to deliver the letter to the address, and a notice card was left indicating where it could be picked up. The addressee did not collect it, and it was returned to the sender. The email did not bounce back. Mr. Ruseski concluded that she had received the email.

[107] The grievor did not attend the meeting or otherwise contact Mr. Ruseski.

[108] Mr. Ruseski decided to follow up with the University of Ottawa. On February 6, 2012, he wrote to the Operations Coordinator who had contacted him on January 9, 2012, and advised her that he was unable to provide the information she had requested without the grievor's consent and noted that he had taken steps to inform Ms. Asare of the request. As her employer, he requested additional information on her status with the university, namely, the following:

> - confirmation of her enrolment as a graduate student;
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> - the number of graduate courses she had taken in the fall 2011-winter 2012 semesters;
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> - confirmation of work on a graduate thesis;
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> - confirmation of employment as a teaching assistant in the fall 2011-winter 2012 semesters;
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> - the number of hours of work per week associated with that appointment;
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> - confirmation of the number of hours per week that she had informed the university she had worked for the employer in the fall 2011-winter 2012 semester; and

- the maximum hours graduate students could be off campus and still remain eligible for teaching assistantships.

[109] On February 10, 2012, the Operations Coordinator for the Economics Department replied, advising that it did not have the grievor's authorization to disclose the required information.

[110] Mr. Ruseski concluded that Ms. Asare was aware that he had learned that she was a graduate student and a teaching assistant at the University of Ottawa and that she was not going to respond.

[111] He was of the view that as the director, he had the right and responsibility to account for his employees and to decide whether he should approve sick leave in such circumstances. The department still had not received any original medical certificates.

[112] Ms. Asare's absence from the workforce necessitated prioritizing the files and projects among the other staff as it was difficult to replace her temporarily.

[113] On February 22, 2012, Ms. Asare emailed Ms. McFarlane. She enclosed a copy of a medical certificate with the request that Ms. McFarlane forward copies of it to management. The certificate stated that Ms. Asare would be absent from August 12, 2011, for an indeterminate period, for medical reasons. It was signed by Dr. Kilby.

[114] In Mr. Ruseski's opinion, that situation was very different from what he had understood until that point. His attempt to secure information had not been successful, and now there was a medical certificate suggesting that the grievor would be absent for a much longer period. He was suspicious and confused. The longer the sick leave continued, the more he was led to believe that she was clearly pursuing her education while working as a teaching assistant.

[115] He consulted with Hugh Hards in Labour Relations about how to proceed. Shortly after that, Mr. Hards called him to brief him on a phone call he had had with Mr. Vézina, of the bargaining agent. Ms. Asare had informed her bargaining agent representative that her doctor had indicated that she should have no contact with her director.

[116] As a result of the debriefing, Mr. Ruseski learned that the bargaining agent was aware of Ms. Asare's circumstances; perhaps, it could assist in communicating with her.

[117] This was the first time he had learned that Ms. Asare did not want to be in contact with him. He did not understand why it was with him. He was the responsible director. The sick leave forms were being sent to him.

[118] He consulted with Mr. Hards, who in turn consulted with a physician at Health Canada, who suggested that they proceed by way of requesting that Ms. Asare undergo a fitness-to-work evaluation.

[119] On April 20, 2012, Mr. Ruseski notified Compensation and Benefits that Ms. Asare was considered on unauthorized leave without pay from August 9, 2011, until further notice. This was done in consultation with Labour Relations and Compensation and Benefits, as they had not received any original medical certificates or appropriate leave application forms from Ms. Asare.

[120] On April 22, 2012, Ms. Asare wrote to Compensation and Benefits with respect to the completion of the employer's statement to finish processing her disability insurance claim with Sun Life.

[121] On April 23, 2012, Michèle Caron, a pay and benefits advisor, called Mr. Ruseski to advise that she had had a difficult telephone conversation with Ms. Asare's mother, who had advised her that Ms. Asare was sick and that Sun Life was waiting for the employer's paperwork for her disability insurance claim. When Ms. Caron advised her that she should speak with Mr. Ruseski, she hung up.

[122] On April 26, 2012, Mr. Ruseski wrote to Ms. Asare with respect to her continued absence from work. The letter was also forwarded to Ms. Asare's email addresses. In it, he set out the events that had transpired since August 2011 and requested that she undergo a fitness-to-work evaluation by Health Canada to determine her fitness to return to work. He enclosed two consent forms, which were to be returned directly to Health Canada.

[123] He also advised her that in the meantime, she was considered on unauthorized leave until further notice and that as such, her disability insurance claim could not be completed. He also advised her that if she failed to sign the consent forms,

administrative measures could result.

[124] The letter was sent under his signature as he was still the responsible director. He was hoping that the bargaining agent would contact Ms. Asare.

[125] If she consented to the fitness-to-work evaluation, a fitness-to-work professional would be in touch with her, and Mr. Ruseski would not be directly involved.

[126] The letter was couriered to her home address. It was scanned and sent to several of her email addresses. Some bounced back. Ms. McFarlane called Ms. Asare's telephone number to advise her that formal correspondence would be delivered.

[127] On April 30, 2012, Ms. Asare's father telephoned Mr. Ruseski. According to Mr. Ruseski, Mr. Asare told him that he was not permitted to contact the grievor and stated, "How dare you, how dare you", and then hung up. Mr. Ruseski was not given any opportunity to explain the contents of the correspondence.

[128] The letter and information package and consent forms were returned, and it was indicated that they had been "refused to be accepted".

[129] Mr. Ruseski completed most of the form for Ms. Asare's disability insurance application. He wanted to ensure that whoever reviewed the file at Sun Life knew that no proper leave forms had been signed and that attempts had been made to contact the grievor. Sun Life never contacted him; nor was he aware of the disposition of the claim.

[130] He tried again to communicate with Ms. Asare. On August 3, 2012, he sent her a letter and sent copies of it to several of her email addresses. The letter stated in part that he was writing to seek her consent to contact Dr. Kilby, who had provided a medical certificate indicating that she was away from work for medical reasons for an indeterminate period.

[131] He enclosed a consent form that would be sent to her doctor to determine her return-to-work date and any limitations for which accommodation measures might be required. She was asked to sign and return it by August 31, 2012. She was also advised that if she did not consent, administrative measures could be taken, which could include the termination of her employment for cause.

[132] He was asked why he did not copy the letter to the bargaining agent or Sun Life. He stated that he had prepared the letter with advice from Labour Relations. He was uncomfortable about privacy concerns if he copied the bargaining agent or Sun Life. No one had said that the bargaining agent was representing Ms. Asare.

[133] He did not receive a response to his request that he contact Dr. Kilby. The package was returned by courier on September 19, 2012. The reason for the return was "unclaimed". All the email sent to the different addresses bounced back except the one sent to Ms. Asare's University of Ottawa address.

[134] On October 31, 2012, since Ms. Asare had been absent from the workplace for over a year and had not responded to any inquiries, he sent her a letter by courier and by email reciting the chronology of events since she left the office on August 15, 2011, and instructing her to report to his office on Friday, November 9, 2012, at 10 a.m., to explain the reasons for her absence. He observed that if she failed to comply with the direction, it could result in the termination of her public service employment.

[135] Delivery at her home address was attempted, and a notice card was left indicating where the item could be picked up. It was not picked up. The record from Canada Post indicates that the item was refused delivery. It was returned to sender.

[136] There was no response to the email.

[137] Mr. Ruseski decided that that was the end of the road. The organization had gone without a resource for over a year. He concluded that Ms. Asare was not interested in her position; nor was she interested in returning to work. She had decided to pursue her education.

[138] On November 16, 2012, a letter was couriered to Ms. Asare's home address. It recited the background and stated in part as follows:

…

> *I have reviewed the circumstances surrounding your "unauthorized" absence from work and taken into consideration the fact that you have not replied to letters that were sent to you. As you have not contacted me to explain the circumstances surrounding your absence from work, I have concluded that you have wilfully and with full intent abandoned your position as Junior Research Economist ….*

…

> *Therefore, in accordance with Section 12(1) (e) of the* Financial Administration Act, *I hereby terminate your employment for cause … effective November 16, 2012 at the close of business.*
>
> *Should you feel this action is unwarranted, you have the right to file a grievance.*

…

[139] It was copied to the bargaining agent.

Cross-examination

[140] Before August 2011, Ms. Asare had had an informal working relationship with respect to her studies.

[141] Her supervisor had approached Mr. Ruseski about an arrangement involving an informal program of studies and a rearrangement of her full-time hours to accommodate her. On the supervisor's recommendation, he agreed to go ahead.

[142] Mr. Ruseski acknowledged that the grievor's supervisor had approved her taking two classes and that he had no reason to dispute that in the fall of 2010, she had a flexible work schedule.

[143] Mr. Ruseski acknowledged participating in her performance review for the fiscal year of April 1, 2010, to March 31, 2011, on June 9, 2011. It was noted that she had successfully completed her year and had fulfilled her deliverables. He acknowledged that until March 31, 2011, he had had no concerns with respect to her performance.

[144] Mr. Ruseski was asked whether any concerns were identified at the meeting. He stated that this was a sensitive time in the grievor's relationship with her supervisor, which was why he attended the meeting. Ms. Asare had come to him in late April 2011, expressing concerns about her supervisor.

[145] Mr. Ruseski acknowledged that he is responsible for responding to concerns of staff or management with respect to ensuring a safe and healthy work environment and for finding solutions to problems.

[146] He was referred to his August 11, 2011, letter concerning her request for education leave along with a number of workplace issues and to a paragraph in the letter that reads as follows:

…

> *… on April 26, 2011, during a bilateral meeting with me, which was held at your request, you described a series of accumulated complaints about your supervisor since last August 2010. You noted that you had been advised to wait until your probationary employment period was over before raising them. You had also indicated beforehand that a representative from your union would be attending the meeting, however they never appeared.*
>
> *The complaints against your supervisor at that time included the following:*
>
> *-bumping your arm once without apologizing*
> *-calling you ugly once in front of other employees*
> *-suggesting that you did not adequately cite sources/references in a report you were working on once*
> *-asking someone else to proofread your work for quality control once*
> *-being told to attend a meeting once when other employees were given the option of attending.*
>
> *When you subsequently raised these complaints with your supervisor, as I advised, he denied that the events took place and/or that you misinterpreted what was said, but nevertheless he indicated that he was sorry if he did in fact bump your arm (though he did not recall doing so].*

…

[147] He could not recall whether Ms. Asare provided written details outlining her complaints.

[148] Mr. Ruseski was referred to a line in the letter that stated that it had been reported to him that she had raised several other unsubstantiated allegations or concerns with her supervisor. He was asked about his basis for concluding that they were unsubstantiated. He responded that he had found some of them shocking. She had not given him any specifics. He could not make sense of it. He was made aware that she had made a harassment complaint against her supervisor in July 2011.

[149] Between April and July 2011, when some of these issues were raised, Mr. Ruseski met with the grievor's supervisor, who had been surprised by, had disagreed with, or did not recall the incidents. Some of them had occurred 9 or 10 months earlier. In his view, it might have been better had they not been allowed to accumulate.

[150] Mr. Ruseski acknowledged that it was possible that some of the allegations were serious. He was asked whether they were true or not, whether he perceived them as impacting Ms. Asare's health. He said that he did not know but that he did observe that they affected working relationships. He was not certain that they were all serious, and he encouraged her to address them with her supervisor and urged her to seek the EAP's assistance if she had concerns about her well-being.

[151] The grievor filed her harassment complaint against her supervisor on July 15, 2011, with the Assistant Deputy Minister. Mr. Ruseski was not involved in the process. He was not privy to the complaint; nor was it shared with him.

[152] Mr. Ruseski acknowledged that Ms. Asare had raised concerns about bullying in the workplace when she and her sister met with him on August 11, 2011. He stated that he had been taken aback. This was the first time he heard the allegations. It was pointed out to him that she did raise issues of bullying by her supervisor at the April meeting. He replied that it was unexpected and inconsistent with his familiarity with the individuals on the team.

[153] He gave her the August 11 letter at the meeting. The letter did more than deny the request for education leave; it stated that she was engaged in a course of disruptive behaviour.

[154] Mr. Ruseski did not pursue a further investigation because it had been concluded that there had been no harassment. The Assistant Deputy Minister had debriefed him on the outcome of her harassment complaint but not on the substance of the allegations. He acknowledged that her behaviour was a concern and that it needed to be addressed. There was also a need for her to communicate more frequently with her supervisor, which he hoped would occur.

[155] He was asked whether the supervisor was given a letter. He responded that he did not observe any disruptive behaviour by the supervisor in the workplace.

[156] Ms. Asare's disruptive behaviour in the workplace started to manifest itself sometime after May 2011.

[157] He did not provide a copy of the August 11 letter to the bargaining agent, based on advice from Labour Relations. In that letter, she was advised that her supervisor was the appropriate contact for leave requests and for issues she was having in the workplace. This was done in response to her seeking approval for long-term educational leave with another director to whom she did not report when Mr. Ruseski and her supervisor had not been available for one day.

[158] On August 12, 2011, Ms. Asare faxed a medical certificate to Ms. McFarlane granting her time off until September 15 for medical reasons.

[159] Mr. Ruseski acknowledged that the August 16, 2011, letter to Ms. Asare was a follow-up to the August 11 letter. Ms. Asare did not receive this letter and did not see it until the hearing. The letter confirmed that he would not reassign her to another supervisor as it was premature to consider doing so at that time, that her claim that she was being bullied by her supervisor was not substantiated, and that he was not prepared to approve her request for long-term education leave. It also confirmed that she should forward Mr. Ruseski the original medical certificate covering her absence from work due to illness since August 15, 2011, as well as a sick leave application form. Finally, it confirmed that her building access had been temporarily suspended and that should she need access before returning, she should call him.

[160] On September 15, 2011, Ms. Asare forwarded a copy of another medical certificate, granting her time off until October 15, 2011, to her supervisor and Ms. McFarlane. Mr. Ruseski did not respond to tell her that she had to do anything differently with respect to this application for leave or to any of the subsequent leave applications made in 2011. He stated that up to that point, her absence on sick leave had not been questioned.

[161] Mr. Ruseski was asked if he had been aware at the beginning of December 2011 that Ms. Asare was considering applying for disability insurance benefits. He stated that at that time, the department's relationship with her was more with the compensation advisor than with line management.

[162] He was asked about the letter sent to Ms. Asare on January 22, 2012, reflecting his discussion with the University of Ottawa on January 9 and requesting to meet with her on February 2, 2012. It was noted that the letter was copied to Labour Relations but not to Compensation and Benefits or to Ms. Asare's bargaining agent.

[163] With respect to the letter dated February 6, 2012, to the University of Ottawa, he was asked whether he had requested Ms. Asare's consent from the university. He stated that he had sought her consent in his letter to her and that he had felt that contacting the University was the appropriate next step.

[164] He was aware that she had provided medical certificates with respect to her absence.

[165] He did not recall approaching anyone in Compensation and Benefits before writing to the University of Ottawa.

[166] Mr. Ruseski was surprised when he received the medical certificate dated February 22, 2012, stating that she would be absent for an indeterminate period, for medical reasons. He was asked if it was possible that she had been ill and that she could not have returned to work for medical reasons. Based on the information he had received from the University of Ottawa, he knew that she had been working. He did not know what to believe. On Labour Relations' advice, he decided to go the Health Canada route.

[167] On April 20, 2012, Mr. Ruseski advised Nadine Lalonde in Compensation and Benefits that Ms. Asare was considered on unauthorized leave without pay from August 9, 2011, until further notice. He did not ask her to follow up with Ms. Asare. The appropriate leave forms had not been filled out.

[168] With respect to the April 26, 2012, letter to Ms. Asare, he was asked if he could confirm that she had received it. He replied that he did not know how he could without a confirmation receipt.

[169] Mr. Ruseski was asked whether the statement that if she failed to sign the consent forms and return them to Health Canada, it could result in administrative measures, differed from disciplinary measures. He stated that he saw no difference. He acknowledged that the bargaining agent had not been copied; nor had Compensation and Benefits. There might have been discussions with Labour Relations.

[170] He was referred to a paragraph in the letter that stated that he had been advised that she had submitted a disability insurance claim and that as she was on unauthorized leave, her claim could not be completed. His impression was that the appropriate leave forms as well as the original medical certificates had to be submitted in support of the claim. He was asked whether he had seen a letter from Ms. Asare to Ms. Lalonde dated April 22, 2012, with respect to outstanding documents from the employer to Sun Life with respect to the claim. He stated that he had not seen it.

[171] He was referred to his notes of a telephone discussion with Ms. Caron, who had informed him of the difficult telephone conversation with Ms. Asare's mother, who, when directed to speak with Mr. Ruseski, said she was not to talk to him.

[172] Mr. Ruseski was asked whether he had asked Ms. Lalonde or Ms. Caron from Compensation and Benefits to telephone Ms. Asare on his behalf with respect to her status at the university and to advise her that unless the situation was clarified, it could result in her termination. He replied that he had not and that they were both compensation and pay advisors.

[173] To the best of his recollection, Sun Life never contacted him about completing the employer's statement with respect to the disability insurance claim. He was asked when he had learned that Sun Life had approved Ms. Asare's disability insurance claim. He answered, "Today", as in the day of the hearing.

[174] A letter dated July 31, 2012, from Sun Life to Ms. Asare advised her that her disability insurance benefits application had been approved, effective December 14, 2011. Mr. Ruseski was not copied on it. It was copied to "Compensation Advisor". He did not recall asking about or being informed of the status of her claim.

[175] The August 3, 2012, letter seeking Ms. Asare's consent to contact her doctor was prepared on the advice of Labour Relations. He was asked whether he really needed her consent because he wrote to the University of Ottawa without it. He stated that he had been acting on advice.

[176] Mr. Ruseski was referred to a paragraph in an email that Mr. Hards sent him dated February 24, 2012, which states the following: "If the employee refuses to cooperate / refuses to sign the consent forms / refuses to attend the FTWE, then Dr. Given advised that we … will write to her doctor with our concerns and questions.

Dr G indicated he would guide us in the preparation of the letter."

[177] He did not write to Dr. Kilby; nor did he have any evidence that Health Canada had written to him. He never called Dr. Kilby or any of Ms. Asare's doctors.

[178] Mr. Ruseski completed the employer's statement with respect to Ms. Asare's disability insurance claim on May 15, 2012. After describing the main duties of the position, the claim sets out the following question: "When did the employee's illness or injury first appear to affect his or her work?" The answer provided is, "27/04/2011".

[179] The next question is the following: "From your observations, did the employee's ability to perform his/her job change?" The answer box chosen is, "Yes". Under "If yes, explain", is the following: "Since late April 2011, the immediate supervisor began noting that the employee's behaviour became increasingly erratic and her performance deteriorated. More specifically, she was unable to concentrate, confused, anxious, withdrawn and disruptive."

[180] The next question is the following: "Were any changes made in the employee's job as a result of the illness or injury?" The answer box chosen is, "Yes". The following was written under "If yes, what changes were made and when were they made?":

> *The organization took steps to provide a different work environment: the employee was encouraged to use the EAP; learning plan was structured to facilitate employee's fit in professional workplace; and communication with manager and other staff was made more frequent.*

[181] The next question is the following: "If the employee could return to work on a reduced hours basis, or with a change in duties, would a position be available?" The answer box chosen is, "No". Under "Give reasons" is the following:

> *The organization is small and is frequently called upon to undertake urgent and ad hoc requests or participate in meetings called on short notice. The employee has a specialized background that is not suitable for work in other parts of the Branch/Sector.*

[182] He was asked whether he had any recollection of Ms. Asare being deemed fit to return to work in or about February 2013. He seemed to recall that she got in touch with the department; however, he was not certain if it aligned with that time frame.

[183] In the termination letter dated November 16, 2012, there is no reference to the Sun Life disability insurance claim. The bargaining agent was copied on the letter at the direction of Labour Relations.

[184] On November 29, 2012, Ms. Asare wrote to Mr. Vézina of the bargaining agent. She attached a complaint against Mr. Ruseski that stated that she would like to file a grievance against him for failing in his duty to protect her health and safety, for indicating the unauthorized absence on the Sun Life employer statement, and for his attempt to sabotage her disability insurance claim.

[185] A number of the allegations in the complaint were raised with Mr. Ruseski. The following was alleged:

> *On July 26, 2011, Mr. Ruseski informed the senior colleague that I had filed a harassment complaint. Three days later, he went to the office of the senior colleague where he informed him that the harassment complaint had been rejected and they both cheered that my harassment complaint was rejected within my earshot.*
>
> …

[186] Mr. Ruseski did not recall cheering when he learned that the harassment complaint had been rejected.

[187] It was alleged that on August 9, 2011, Ms. Asare went to his office to submit a formal request for personal leave for about a year and that he insisted that it be for educational leave. He did not recall that happening. However, he did recall seeing a personal-leave request form that she had requested another director to sign. He recalled having a discussion with her, following which she submitted an application for education leave.

Re-examination

[188] No grievance was filed about Ms. Asare's education leave request being denied. Nor was one filed about her request to be assigned to a new supervisor.

[189] The August 11, 2011, meeting was held at Mr. Ruseski's instigation. To the best of his recollection, he personally was never asked to investigate claims of harassment by Ms. Asare's supervisor.

[190] No grievance was filed because an investigation was not conducted into her written complaint. Mr. Ruseski thought she was sufficiently aware of why her complaint had been rejected as a result of the debriefing he had had from the Assistant Deputy Minister.

[191] Ms. Asare had been told that she could bring a bargaining agent representative to her meeting with him on August 11, 2011. She brought her sister.

[192] Before Mr. Vézina's call to Mr. Hards, Mr. Ruseski did not have any information that she wished to have the bargaining agent involved in her affairs.

[193] Mr. Ruseski did not recall informing Ms. Asare's supervisor that Ms. Asare had filed a harassment complaint against him. He certainly did not recall cheering when he learned that the complaint was dismissed and stated that he would go so far as to deny it.

[194] Mr. Ruseski acknowledged insisting that following their August 9, 2011, meeting, her application should be for education leave.

[195] He denied boasting that he was on the supervisor's side.

[196] Mr. Ruseski stated that he was aware of the harassment policy and the guidelines to employers and managers. The delegated manager must review all relevant information. The Assistant Deputy Minister was the delegated manager. He understood that it was a confidential process.

2. Ms. McFarlane

[197] At all times material to this matter, Ms. McFarlane was Mr. Ruseski's administrative assistant. She monitored his email, booked his appointments, reviewed his calendar, and handled travel for some 8 to 18 staff.

[198] On or about November 14, 2011, Ms. Asare emailed her and requested that all copies of medical certificates and correspondence starting from August 12, 2011, to date be forwarded to Ms. Caron.

[199] Ms. McFarlane described the process she used when couriering a letter on Mr. Ruseski's behalf. She would contact Labour Relations and arrange for it to courier the letter. Labour Relations would then forward the tracking notice to her.

For example, the letter dated April 26, 2012, and couriered to Ms. Asare was returned to sender as it was not collected within 10 days after delivery had been attempted and a notice card had been left.

[200] Ms. McFarlane used the home address, email addresses, and telephone numbers Ms. Asare had used on her cover letter dated November 26, 2009, when she applied for her position. The home address was in Gatineau, Quebec, and the email addresses were at the University of Ottawa and at the Internet email provider, Yahoo. One telephone number provided had an 819 area code and the other a 613 area code, which was identified as a cell phone.

[201] Ms. McFarlane received copies of medical certificates in the fall of 2011 from a Yahoo email address different from the one used in the grievor's cover letter. It happened again on February 22, 2012, and that time, the Yahoo address differed from the one used in the fall of 2011.

[202] Ms. McFarlane was asked what happened with respect to the courier delivery to Ms. Asare on April 26, 2012.

[203] On April 27, 2012, she emailed Ms. Asare to inform her that the employer had mailed some important correspondence to the Gatineau address identified in her cover letter and that she should receive it on Monday, April 30, 2012. It was also noted that Ms. McFarlane had sent copies of the correspondence to five email addresses, including the two identified in the grievor's cover letter and to the email addresses that she had used in the fall of 2011 and 2012 to submit the copies of medical certificates. The email also stated that Ms. McFarlane would call three phone numbers to inform the grievor of the correspondence or leave a voicemail to advise her of the correspondence being delivered. Two of the telephone numbers were listed in Ms. Asare's cover letter.

[204] She telephoned the number in the 819 area code that had been listed as a home number and was advised that the line had been disconnected. She telephoned the number that had been identified as Ms. Asare's cell number. It rang nine times before someone answered. She asked to speak to Ms. Asare and was advised that she had the wrong number. The other number rang six times. She was advised that the voicemail was full.

[205] She sent emails to the four Yahoo addresses and was advised that the user or users did not have an account. One email to the University of Ottawa email account was delivered.

[206] On the afternoon of April 27, 2012, Ms. McFarlane answered Mr. Ruseski's telephone. She was advised that it was Mr. Asare calling. He wanted to know who had called his home that afternoon. He also informed her that Ms. Asare's mother was on the line. Ms. McFarlane advised them that she had couriered an envelope to Ms. Asare and that she should have it on the Monday. Mrs. Asare asked her what was in the envelope, and Ms. McFarlane advised her that she did not know. Mrs. Asare advised her that she would not open anything until she knew what was in the letter and that it would be sent back. Ms. McFarlane did not tell them what was in the letter. It was sealed, and Mr. Ruseski told her it was confidential. To the best of her recollection, the package was refused.

[207] On August 7, 2012, Ms. McFarlane wrote to Ms. Asare at the five email addresses on record, advising her that the department had couriered important correspondence to the Gatineau address to her attention and that she should receive it on Wednesday, August 8, 2012.

[208] All the emails to the Yahoo addresses were returned. It was not so with the University of Ottawa email account.

[209] The package was returned by Canada Post; it indicated that it had been unclaimed.

[210] The letter dated October 31, 2012, to Ms. Asare was couriered to her. Ms. McFarlane stated that she assumed that she had followed the same procedure as with the earlier mailings. The recipient at the Gatineau address refused the letter, and it was returned to sender.

[211] The letter dated November 16, 2012, which was the termination letter to Ms. Asare, was couriered to her. Delivery was attempted on November 20, 2012, at the Gatineau address, and a notice card was left indicating where the letter could be picked up. It was returned as unclaimed.

Cross-examination

[212] Ms. McFarlane confirmed that she was not aware of the contents of the April 26, 2012, letter when she so informed Mr. Asare. She did not know whether he had called her from his work. She heard a beep. She did not know whether the telephone call had been recorded.

[213] Ms. McFarlane was asked if it was possible that the grievor's parents had advised her that Ms. Asare was sick. She answered that it was not possible and that had they done so, so she would have put it into an email to Mr. Ruseski.

B. For the grievor

1. Herself

[214] Ms. Asare started working at Indigenous Affairs and Northern Development in January 2010 shortly after she finished her master's degree. An email had been sent to the University of Ottawa advising that the employer was looking for economists. She had felt quite happy that she had been able to find a position in an area in which she could use her master's degree, with good salary and benefits.

[215] Her duties at the time were providing data and research and economic services to the directorate, branch, and sector. The research branch, where she was assigned, had 4 to 5 people, and in the directorate overall, there were 14 to 15 people.

[216] She had completed her master's degree in 2009 and had started applying for jobs. She had done some tutoring. At that time, she did not consider continuing her education.

[217] In the summer of 2010, she had a discussion with her supervisor and told him that it was her dream to both work and pursue studies for her PhD. He had seemed receptive and had said that he would speak with the Director, Mr. Ruseski, about it.

[218] She envisioned that she could pursue both her career and her studies by working flexible hours to maintain 37.5 hours per week.

[219] In the fall of 2010, she applied for admission to the PhD program in the Economics Department at the University of Ottawa. She enrolled in two courses in the fall semester. Each involved three hours per week of class time. Her weekends and evenings were spent studying. She worked flexible hours.

[220] Her supervisor advised her that he was quite satisfied with her work performance during that time.

[221] She enrolled in two classes for the winter term in 2011. She wrote to her supervisor and advised him that she had classes on Tuesdays and Thursdays and that she had arranged a work schedule that added up to 37.5 hours.

[222] Her supervisor advised her that he was fine with the proposed schedule.

[223] Shortly after that, she dropped the courses out of a growing concern with bullying and harassment in the workplace.

[224] She described her working relationship with her supervisor at the outset of her employment as quite good. She thought that he was a good manager and that she could learn a lot from him. She held him in high regard and trusted him.

[225] At some point, the relationship deteriorated. She started to notice changes in his behaviour that she thought she could ignore.

[226] She stated that he insulted her in front of a co-worker. At a pizza party, a co-worker said that she had taken her son to see a movie called “Inception” starring Brad Pitt. The grievor said that if Brad Pitt was in the movie, she would see it. Her supervisor said that Brad Pitt would not want to see someone as ugly as her. The grievor’s documentary evidence indicates that this incident occurred on August 13, 2010.

[227] The respondent objected to this evidence as this incident had been raised in Ms. Asare’s harassment complaint, which had been dismissed, and the dismissal of the complaint had not been challenged.

[228] The bargaining agent stated that it was not interested in submitting this evidence for the truth of its contents and that it was not asking the Board to make any determination of whether in fact harassment had occurred. The evidence was relevant to explaining why Ms. Asare left the workplace and did not respond to communications from the employer.

[229] After hearing the arguments, I ruled that the issue of whether the grievor was in fact harassed was not before me but that my role was to determine whether she had

abandoned her position. I ruled that the evidence was arguably relevant to that issue.

[230] As she could no longer ignore her concerns with respect to her supervisor, Ms. Asare went with her parents to see a bargaining agent representative. The representative suggested that she meet with Mr. Ruseski, which she did at the end of April 2011. A bargaining agent representative was supposed to be present; however, none attended the meeting.

[231] She told Mr. Ruseski that some workplace issues were bothering her that involved her supervisor. She told him about incidents that had arisen over the past year, things he had said about her, the fact that he had bumped into her, and the impact it was having on her. At the time, she was on probation, and she did not want any issues to escalate. She stated that she had been quite scared.

[232] After discussing the situation, Mr. Ruseski gave her three options. One was that she raise the issues with both the supervisor and Mr. Ruseski present. The second was that he speak with the supervisor. The third, which he preferred, was that she speak with the supervisor herself. At the end of the meeting, she agreed that she would approach the supervisor.

[233] She met with the supervisor the next day, in the afternoon. She told him that she wanted to have a positive working relationship; however, some of the things he had said, she did not like. She said that he was angry and that he yelled at her. She ended up crying. The supervisor sent her home early.

[234] On May 31, 2011, she attended her performance management meeting with both her supervisor and Mr. Ruseski. The review was positive. She was advised that she had successfully met her objectives.

[235] The supervisor denied engaging in improper conduct that had anything to do with her. He felt the harassment issue could be resolved because the overall performance review was positive and that they could find a way forward.

[236] From then on, from Ms. Asare's perspective, things escalated. While working in her cubicle, she overheard information to the effect that she was harassing her supervisor. At one point, she heard her supervisor say that he and the Director were friends; they were the same age and held the same views. Her supervisor went from person to person and stated that the grievor was harassing him and that he wanted her

fired.

[237] A co-worker suggested to her that she could not stand her, that she was on the way out, and that her files were being assigned to someone else.

[238] She referred to the July 26, 2011, letter addressed to her from the Assistant Deputy Minister rejecting her harassment complaint, which had been received on July 15, 2011. The complaint had been rejected because the incidents it mentioned did not meet the threshold to qualify as harassment. However, the letter noted that the Assistant Deputy Minister had no doubt that she found the events described in the complaint as very stressful.

[239] Ms. Asare stated that she was disappointed and crushed. She had tried to seek help from every manager and had tried to resolve matters with her supervisor. She thought that in this work place, someone would say, “Stop!”

[240] After she received the letter, on August 4, 2011, she sought medical attention and saw a licensed counsellor.

[241] The grievor saw Dr. Wong at the University of Ottawa Health Services clinic. Ms. Asare thought her mental health was in decline and that she was starting to feel depressed. The doctor asked her about her workplace. The grievor advised her that her boss was gossiping about her and calling her names in front of her coworkers. She told the doctor that she had filed a harassment complaint that was going nowhere because of the close relationship between her boss and the Director. She told the doctor that she had been missing days at work due to stress and that she was feeling ill.

[242] The doctor referred her to a psychologist, discussed that she was working in a toxic workplace, and suggested that she should look elsewhere for a position in a different department or for a new job altogether. She returned to work but stated that she was near the end of the road.

[243] On August 8, 2011, she prepared an application for leave without pay for personal needs for the period commencing August 31, 2011, and ending August 31, 2012. She applied for personal leave as the toxic work environment was having a major impact on her health. She needed time to regain her health. She did not want to leave the workforce permanently. She approached another director as both her supervisor and Mr. Ruseski were absent that day.

[244] She provided the application to Mr. Ruseski the next day. He looked at it and said that it should be for educational leave and that it should state how it would benefit the organization. She thought it should be for personal leave. She had not filed an application for educational leave.

[245] She and her sister met with Mr. Ruseski on August 11, 2011. He had requested the meeting and wanted to discuss events that had occurred over the last few months, including her request for education leave.

[246] She had major concerns about how Mr. Ruseski was handling the issues between her and her supervisor. Not long after Mr. Ruseski had learned that her harassment complaint had been rejected, he had come to her cubicle and, with a senior analyst nearby, had cheered that her complaint had been rejected.

[247] She was concerned about retaliation for filing her harassment complaint.

[248] The meeting lasted about an hour. He provided her with the letter dated the same day. He read it to her. He observed a growing concern that her behaviour was having disruptive effects on him, her supervisor, and other employees. She felt outraged and that it was a major betrayal.

[249] He told her that her supervisor was the appropriate person to deal with requests for long-term leave.

[250] She felt that this was retaliation for filing the harassment complaint. He told her that her supervisor was the appropriate person in the immediate workplace with whom she should discuss any ongoing difficulties, which she saw as a reprisal.

[251] He advised her that the procedure for requesting leave for absences other than sick leave was to seek approval in advance and, for sick leave, to provide a medical certificate.

[252] She felt that she was being singled out and that he wanted to put all the blame on her.

[253] The letter concluded that he did not accept her education leave request and stated that the earlier arrangement with her supervisor, under which she could take a full course load during normal working hours and make up the time outside those

hours, would not be renewed.

[254] She was outraged. She wanted to both work and pursue her education at the same time. Her dream was being shattered. She thought that she had the ability to do both, and she has demonstrated that she has that ability.

[255] On August 12, 2011, she faxed to Ms. McFarlane a copy of a medical certificate from the Rideau-Friel Medical Centre certifying she was granted time off until September 15 for medical reasons. The fax noted that she would supply the original upon her return. She stated that this was evidence of going out of her way to provide a medical certificate as opposed to waiting until she returned to work. She went to that centre because she wanted to distinguish it from the University of Ottawa Health Services clinic.

[256] She told the doctor that she was feeling depressed and anxious due to the toxic work environment and of the effect it was having on her health. She also emailed her supervisor, informing him that she had been granted time off until September 15 by her doctor for medical reasons and that she would forward him a copy of the medical certificate and provide the original upon her return. She sent the email to her supervisor following the procedure outlined by Mr. Ruseski in his August 11 letter.

[257] She did not receive any reply from him or Ms. McFarlane and concluded that they had no problem with this process.

[258] She did not receive Mr. Ruseski's August 16, 2011, letter summarizing their August 11 meeting and outlining the process for submitting medical certificates. The first time she saw the letter was before the hearing, as it was in the employer's book of documents.

[259] On October 21, 2011, she wrote to the department's compensation advisor and requested disability benefit forms to apply for disability insurance through Sun Life. The Compensation Advisor sent her a copy of the employee section of the disability forms together with one for her physician. She also provided a leave application and absence report. The grievor was advised that she needed to complete it for the period she was off work and that she had to supply a medical certificate.

[260] She saw Dr. Eva Fisher, a psychologist, on September 23 and 30, 2011. Dr. Fisher recommended that she not return to work until she had seen a psychiatrist,

which took a long time. As a result, she had a difficult time completing the forms. There was uncertainty about when she could return to work as she was on a waiting list to see the psychiatrist. She did not want to send them to the compensation advisor as she did not know of a return to work date.

[261] She worked as a teaching assistant during the fall of 2011. She worked 10 hours per week from September 12 until December 23. The hourly rate was $38.97. She was not paid but was given a tuition credit. She occupied this position at the same time as she was providing medical certificates to her employer stating that she was sick. She stated that Indigenous Affairs had a toxic work environment involving bullying that adversely impacted her mental health.

[262] Her doctor and her counsellor advised her that the work environment was negatively impacting her health. Her counsellor advised her to become involved in activities that would contribute to her well-being. She told her counsellor about working as a teaching assistant. Her counsellor thought it would be a good and therapeutic contribution to her recovery as the atmosphere was different from Indigenous Affairs, since she would not face a toxic work environment, with people insulting her.

[263] As part of the PhD program, each student is entitled to one teaching assistant position. The grievor saw it as part of the PhD program. It lasted one semester. She did not continue as a teaching assistant in 2012; nor did she work anywhere else in 2012.

[264] She met with her counsellor between 20 and 30 times.

[265] She referred to Dr. Fisher's report dated October 4, 2011, which was introduced in evidence not for the truth of its contents but as evidence of Ms. Asare's state of mind at the time. Following her assessment, two of Dr. Fisher's recommendations were as follows:

…

> *4) … that a liaison be delegated to communicate information pertinent to Ms. Asare's work load* [*sic*] *(rather than directly from her manager)*
>
> …
>
> *6) … that Ms. Asare continue to seek employment in another*

department.

…

[266] Ms. Asare stated that the fourth recommendation helped influence Dr. Kilby, who advised her that she should not have any contact with her supervisor or Mr. Ruseski.

[267] Counsel for the respondent objected to this evidence. There was a consensus that it should not be given much weight as Dr. Kilby would be called as a witness.

[268] From that recommendation, Ms. Asare took an acknowledgement that the workplace was quite toxic and that it would not be a good idea for her to communicate with either her supervisor or Mr. Ruseski and that a third party would have to be involved in any communications with the department.

[269] She was asked whether she continued to seek employment at a different department. She said that she did not because she did not want to leave Indigenous Affairs. She felt that Mr. Ruseski was pushing her out. She did start looking around after receiving the August 11 letter.

[270] After she received Dr. Fisher's report, she reached out to Compensation and Benefits to apply for disability insurance.

[271] On November 21, 2011, she emailed her supervisor, Compensation and Benefits, and Ms. McFarlane, advising them that she was still not feeling well and that her doctor, Dr. Kilby, had extended the leave. She attached a copy of a medical certificate dated November 2, 2011, with January 3, 2012, as the return date. She did not receive a response and took it that everything was okay.

[272] She had seen Dr. Kilby on November 2, 2011. At some point, he had become her family doctor.

[273] She told him that she was a PhD student in economics, that she had been ill, and that she had seen a psychologist. She told him about the harassment complaint, that Dr. Fisher had recommended that she go on full-time leave, and that the workplace environment was toxic for her.

[274] Dr. Kilby advised her to remove herself from the environment that did not appreciate her and did not value her contribution to the team. At or about that time, he asked her why she did not just resign from her position.

[275] She stated that it was a dream to work as an economist and to pursue her PhD. She just wanted to get better and return to work. She did not want to abandon her position. She thought she could get better and deal with the situation.

[276] On November 30, 2011, Ms. Caron, from Compensation and Benefits, wrote to the grievor, noting that she had received a leave form from her but not from her manager, which stated that she wanted to be on personal leave without pay, effective August 31, 2011. Ms. Caron asked that since the grievor had been providing medical certificates, did she want to request sick leave without pay and thus be able to claim disability insurance benefits? Ms. Asare replied, asking her to disregard any personal leave form.

[277] Ms. Asare explained that initially, she thought the leave would be only short term, and she had just wanted to show that she was cooperating with Compensation and Benefits.

[278] On January 2, 2012, she emailed her supervisor and copied Ms. McFarlane. She advised him that her doctor had extended the leave, and she enclosed a copy of the medical certificate extending it until March 2, 2012, which Dr. Kilby had signed.

[279] On February 22, 2012, she emailed Ms. McFarlane, requesting that she forward to management the copy of the medical certificate dated that day and attached to the email. It had been signed by Dr. Kilby, and it extended indefinitely her leave for medical reasons from August 12, 2011.

[280] It was not sent to her supervisor because her counsellor suggested to her that she should not have contact with her two managers. She did not receive any response to the email and took it that it was accepted.

[281] She wrote to Ms. Lalonde in Compensation and Benefits on April 22, 2012. She attached a letter from Sun Life requesting certain documents from the employer, namely, its statement and the grievor's job description. She asked for the employer's cooperation in completing the forms.

[282] She was asked about her health status in early 2012. She stated that thanks to the work she had done, she felt some relief and was working to getting herself healthy, although she was not there yet. She followed the advice of her counsellor and doctor and did schoolwork.

[283] The next step was to see the psychiatrist, which was to occur in October or November 2012.

[284] During the 2012 winter semester, she took two courses that were scheduled for three hours each per week.

[285] She did not receive the January 25, 2012, letter sent to her that referred to the contact by the University of Ottawa and that requested a meeting with her on February 2, 2012. The first time she saw it was on April 10, 2013, when she received all of the employer's letters.

[286] The employer had emailed the letter to her correct email address; however, based on advice from her counsellor and her doctor to not have contact with her managers, she had blocked email originating from her supervisor and Mr. Ruseski.

[287] She was asked whether at some point she had learned that the employer had sent her a letter. She stated that it was not this letter. She had found out from the University of Ottawa that Mr. Ruseski had contacted it for information. The university emailed her and asked whether she would consent to it providing him information to confirm that she was a graduate student and whether she was teaching.

[288] Her father went to the university on her behalf and refused to provide the information because of the grievor's toxic work environment. Mr. Ruseski had tried to push her out, and she did not think it was appropriate to provide the information. She was concerned about her privacy.

[289] She was asked what steps she took to inform the employer of those facts. On February 21, 2012, she contacted Mr. Vézina and told him that Mr. Ruseski had contacted the University of Ottawa without her consent. She told him that because of what had happened in the workplace, her psychologist had recommended that she have no direct contact with Mr. Ruseski.

[290] On February 22, 2012, she wrote to Mr. Vézina, asking if he had been able to contact Human Resources to pass on the message that the Director was not to have any contact with her during her medical leave. He replied on February 23, advising her that her message had been relayed to Human Resources. She also provided him with a copy of the most recent medical certificate that she had provided to the employer.

[291] She applied for disability insurance benefits on March 20, 2012. She provided a copy to Ms. Lalonde, the compensation advisor. In the statement, she is asked whether she has been involved in any activities for wage or profit since she became disabled. She replied as follows: "To the best of my knowledge, I was advised to take on activities (paid or not) to improve my health".

[292] On April 22, 2012, the grievor wrote to Ms. Lalonde, seeking her cooperation in obtaining the employer's statement and job description. The grievor had spoken to her during the week of April 9, 2012, after sending her a copy of the employee's statement. Ms. Lalonde had indicated that she would get it done that week, but as of April 22, 2012, the grievor had not heard from her, so she followed up.

[293] Dr. Kilby provided a statement to Sun Life on July 9, 2012, supporting her application.

[294] On July 31, 2012, Sun Life wrote to the grievor, acknowledging its receipt of her long-term disability (LTD) benefits claim for an absence from work that had begun on August 9, 2011, and advising her that it had completed its assessment of her claim and that it had approved paying her benefits, effective December 14, 2011. The letter indicates that a copy of it was sent to Compensation and Benefits at Indigenous Affairs and Northern Development Canada.

[295] She would have expected that Ms. Lalonde would have advised Mr. Ruseski that she was on approved leave from Sun Life.

[296] She referred to a copy of the employer's statement dated May 15, 2012, with respect to her disability insurance claim, which she received much later. The statement reads in part as follows: "Unauthorized leave without pay from Aug. 9, 2011. No application for leave has been submitted." She was outraged when she read that. She had provided copies of medical certificates that covered the entire time she had been away, and she had been in contact with Compensation and Benefits, which had

not expressed any concern to her.

[297] On July 23, 2012, she emailed Mr. Vézina. She included a complaint. She requested that he file a grievance against Mr. Ruseski for failing in his duty to protect her health and safety, for his statement that her absence was unauthorized on the Sun Life employer statement, and for his attempt to sabotage her disability claim. She could not pursue a grievance on her own as the relevant collective agreement contained provisions on disability insurance.

[298] At or about this time, July 2012, she and Dr. Kilby were waiting to hear from a hospital in Gatineau with respect to her psychiatrist appointment. She stated that she could not sleep or perform chores. She was afraid to leave the house. She felt sick and was suffering from major depression and anxiety. Dr. Kilby prescribed antidepressants, to keep her going. This was the first time she had taken medication. She stopped in 2014.

[299] She was referred to the April 26, 2012, letter that among other things requested that she undergo a fitness-to-work evaluation. It also stated that her disability insurance claim could not be completed because she was on unauthorized leave. She stated that she did not receive the letter until 2013.

[300] The grievor was shown the list of email addresses that Ms. McFarlane had used to attempt to email her. The University of Ottawa address was not correct. The grievor had not been using one of the Yahoo email accounts. She had discontinued another one in February 2012. She could not recall whether another one might have been used sometime earlier. And she had not been using the last Yahoo account. Two of the telephone numbers had been replaced. The one remaining number was her home phone.

[301] She was asked whether she was aware that her parents had had a discussion with Mr. Ruseski about the letter. She stated that she was aware of the call. She was asked why she did not pick up the letter.

[302] Mr. Ruseski knew through her parents and the bargaining agent that he was not to have any contact with the grievor, based on the advice of her doctors.

[303] In April 2012, she was suffering from major depression and anxiety and was seeing Dr. Kilby quite frequently, on a monthly basis.

[304] In the early part of 2013, she felt much better. Dr. Philippe Lageix, who was the psychiatrist, and Dr. Kilby cleared her to return to work. She contacted Sun Life and advised it that she was ready to return to work.

[305] She wrote to the Human Resources Manager on January 23, 2013. She attached a medical certificate from Dr. Kilby stating that she was ready to return to work on February 1, 2013. Sun Life notified her that she was cleared to return to work by that date. She spoke to the bargaining agent and told it that she was cleared to return to work.

[306] She found out from Sun Life that her employment had been terminated. She had no idea that she had been fired. She was shocked and stunned and could not believe it.

[307] She contacted Human Resources on February 7, 2013, and asked it to send all correspondence to her home address.

[308] On March 15, 2013, she filed a grievance in which she claimed that the respondent's decision to terminate her employment on November 16, 2012, which became known to her on March 7, 2013, was without cause and was discriminatory.

[309] On April 10, 2013, the Human Resources Manager sent her a letter summarizing the attempts to reach her by both letter and email since January 25, 2012, noting that as she did not accept or reply to the letters, her employment had been terminated as of November 16, 2012. Copies of all the letters were included.

[310] She stated that she never received the November 16, 2012, letter declaring that she had abandoned her position or any of the other letters. They were all included in the correspondence from the employer in April 2013.

Cross-examination

[311] Ms. Asare confirmed her address. She had been living with her parents at the Gatineau address throughout the relevant period.

[312] It was suggested that she had started full-time in the PhD program in 2011. She replied that she had done so in the fall of 2010, when she enrolled in two courses, econometrics and an audited course in microeconomic theory.

[313] In the winter of 2011, she abandoned her courses due to harassment. The academic record indicates that she dropped her courses.

[314] In the summer of 2011, she did not attend the university.

[315] She acknowledged that in 2010 to 2011, her supervisor had allowed her the flexibility to attend classes as long as she maintained a 37.5-hour workweek and to make up hours in 2011 for time missed in the previous semester.

[316] She acknowledged that in the beginning, it was a dream job. She had been quite happy to work and to pursue her education. She thought her supervisor was a good manager, and she trusted him and talked about her PhD program with him. She acknowledged that he supported her and that he had recommended the flexible work schedule to Mr. Ruseski.

[317] It was suggested to her that her leave request in August 2011 was made due to a combination of work pressure and school pressure. From her perspective, the request was due to workplace issues. She was trying to find a way out because of the toxic work environment.

[318] At the August 9, 2011, meeting, Mr. Ruseski asked her to make a case for educational leave.

[319] It was suggested to her that she had taken one course, had audited one course, and had abandoned courses and then she had asked to take on a full course load that would require many years of study, comprehensive exams, and a thesis.

[320] She agreed that she and Mr. Ruseski talked about schooling and about workplace pressures.

[321] She was asked if she had advised Mr. Ruseski that she was at a difficult point and that if she took a year off, she would be better able to handle work and school. She answered, “No”, and stated that he had wanted her to make a case as to why it would be worthwhile to grant the leave. The notes indicate that she felt that it was important to update her skill set.

[322] It was suggested to her that Mr. Ruseski told her that the University of Ottawa wanted her to cease her work. She replied, “No.” The university allows students to

work full-time and to pursue academic studies full-time.

[323] She requested personal leave. Mr. Ruseski asked her why. She replied that it was because of the workplace issues. He said that it should be educational leave. He was upset with her because of the situation involving her supervisor. He then said that they would meet to discuss educational leave. She did not want to aggravate him. He said that it should be educational leave, but her formal request was for personal leave.

[324] As of August 2011, she had one credit course and one audit course towards her PhD. She had been able to transfer two comprehensive courses from her master's program. She acknowledged that the lion's share of the work was still outstanding as of August 2011.

[325] The leave request was made to another director who was the acting director general. She discussed it with Mr. Ruseski the following day. He expressed concern that she had taken a leave request to a different manager. Until that point, she had trusted Mr. Ruseski. She felt that it was a loss of trust and a betrayal.

[326] In April 2011, when she brought her concerns about her supervisor to Mr. Ruseski, she still trusted him. When he cheered after her harassment complaint was rejected, trust was lost.

[327] The August 11, 2011, meeting lasted a long time and took place late in the day, at around 4 o'clock. Her sister was there to support her. Mr. Ruseski read the letter. She acknowledged that he had concerns about her in the workplace. She replied, "Yes", after the complaint was rejected. She was very suspicious.

[328] He outlined his concerns. During the course of the meeting, he denied her educational leave.

[329] On August 12, she sent Ms. McFarlane the first medical note. She stated that she believed that she had called Ms. McFarlane. She had seen a doctor that day, who had granted her one month off for medical reasons.

[330] She was reminded that at that time, she had a long relationship with the University of Ottawa Health Services clinic. The medical records filed at the hearing start in February 2011. There are some 30 pages of them from that clinic from before

August 12, 2012. She stated that at that time, she did not have a family doctor. She attended a walk-in clinic close to the University of Ottawa on August 12, 2012.

[331] She did not see the letter from Mr. Ruseski dated August 16, 2011.

[332] She acknowledged receiving Ms. Caron's email on October 21, 2011. She explained that she had dealt with Ms. Caron with respect to the disability insurance benefit forms. She acknowledged that she had had a number of points of contact with the department, including Ms. Caron and Ms. Lalonde, with respect to medical certificates, leave forms, and her disability insurance application.

[333] Until January 25, 2012, she had communicated with several people in the department. Until then, she had not communicated that Mr. Ruseski should not contact her. She did not feel the need to at that time because she thought the employer would let her recover.

[334] She stated that in February 2012 she contacted her bargaining agent to ask it to advise the employer that she should have no contact with Mr. Ruseski. She did so in light of being advised by the University of Ottawa that Mr. Ruseski had tried to obtain information from it behind her back. At that point, she had not been aware that he was trying to contact her until the University of Ottawa told her about it.

[335] Due to health reasons and her doctor's recommendation, she took the precaution to block emails from Mr. Ruseski and her supervisor. She later blocked emails from Ms. McFarlane.

[336] In the August 11, 2011, letter, she was directed to send leave requests to her supervisor. She stated that she was off sick. The health professional said not to have contact with her managers. She had to do what she had to do to get better.

[337] She did not receive the January 25, 2012, letter and did not see it until April 20, 2013. She did not pick it up in the post office. She was ill at the time.

[338] She did see the letter dated February 6, 2012, from Mr. Ruseski to the University of Ottawa. The university had provided it to her. In it, Mr. Ruseski referred to the telephone discussion of January 9, 2012, in which the university requested information about the grievor's working hours. The letter continues as follows:

…

> *Further to this, and in my capacity as her employer at AANDC, I would like to request additional information about Ms. Asare's status within the University of Ottawa, Department of Economics:*
>
> *-confirmation of enrolment as a graduate student;*
> *-the number of graduate courses taken in Fall 2011/Winter 2012 and confirmation of work underway on a graduate thesis;*
> *-confirmation of employment as a teaching assistant in Fall 2011/Winter 2012;*
> *-the number of hours per week associated with this employment in Fall 2011/Winter 2012;*
> *and*
> *-confirmation of the number of hours per week that Mrs. Asare has informed you she has been working at AANDC in Fall 2011/Winter 2012, as well as the maximum off-campus hours for graduate students to remain eligible for Teaching Assistantships.*

…

[339] The two email addresses listed on her employment application dated November 26, 2009, were from the University of Ottawa and Yahoo. The email address listed on her application for employment as a research assistant dated August 1, 2013, is the same University of Ottawa address as was listed in November 2009. She stated that it was the same email address but that she received email from the Internet email provider, Hotmail. The Yahoo email address was being used at the time of her application; however, she stopped using it.

[340] On October 18, 2011, in an email to Dr. Fisher, she used a Hotmail account. On November 4, 2011, she used a University of Ottawa email account. Ms. Asare stated that she did not use the Hotmail account for everything at that time.

[341] On September 15, 2011, in an email to her supervisor advising that she had been granted time off until October 15, 2011, for medical reasons, she used a Yahoo account. She had separate accounts for work and school. On January 2, 2012, she corresponded with Ms. McFarlane and her supervisor using the Yahoo account.

[342] On November 29, 2012, she emailed her bargaining agent her complaint against Mr. Ruseski using a Yahoo mail account. She stated that she had an email account specifically for communicating with her bargaining agent. She created

different email accounts for different purposes. She forwarded a copy of the email to her bargaining agent to her own email address using the Hotmail account. She stated that she decided to organize work around the Hotmail account.

[343] On February 22, 2012, she used a new Yahoo address for the first time when corresponding with Ms. McFarlane. Until then, she had used a different Yahoo email account, and the new account differed from the one she had used on January 2, 2012, to communicate with Ms. McFarlane.

[344] When she received the letter addressed to the University of Ottawa and dated February 6, 2012, from Mr. Ruseski, she understood that he was trying to find out more about her status.

[345] She acknowledged that at that point, she contacted her bargaining agent and requested that Mr. Vézina contact Human Resources. She stated that she was trying to get better.

[346] She was asked whether this had been the first time she became aware that Mr. Ruseski was trying to reach her. She had not heard from him, and he was trying to obtain information from the University of Ottawa.

[347] She wanted her bargaining agent to send a letter to inform her manager not to contact her during her medical leave. She told Mr. Vézina that she was quite ill and that her doctors had recommended to her that her directors not have any contact with her during her medical leave. The date of the discussion with Mr. Vézina was February 21, 2012. That is when she changed her email address. The employer did not know that she had that address.

[348] She acknowledged stating in examination-in-chief that when she found out that her employment had been terminated, she was shocked and stunned, as she was on disability leave.

[349] On February 6, 2012, she had learned that Mr. Ruseski was trying to find out about her status from the University of Ottawa. In April 2012, she learned from her father that he was trying to contact her at home. She stated that the employer knew at that time not to contact her.

[350] She found out that Ms. McFarlane was trying to send a package to her home.

[351] She found out sometime between May and July 2012 that the employer had submitted a statement with respect to her disability insurance application. She received the form in July 2012. She was referred to page 7 of the employer's statement with respect to the disability insurance claim that under the heading "Additional information" reads as follows: "Please contact Gorazd Ruseski for further information. A number of attempts to contact the employee have been unsuccessful. Consequently, the employee has been placed on unauthorized leave without pay since Aug. 9, 2011."

[352] She was referred to her complaint against Mr. Ruseski that she forwarded to Mr. Vézina on July 23, 2012. She stated that it was her chronology of the events and that she had typed it. In it, she commented on her disability insurance application as follows:

…

> *I contacted Compensation Benefits Consultant on April 23, 2012. She informed me that that she met with Mr. Ruseski and the Compensation Advisor and that nothing had been done with the disability application and will not proceed. She refused to provide any more information. She suggested that I contacted Mr. Ruseski, to which I told her that I could not do. She once again brought up leave application form to which I asked her how I can fill out a leave application form when the sick leave is indefinite. She continued to say that I should contact Mr. Ruseski. That very day, I contacted Sun Life to inform her that the Employer had refused to send the Employer's Statement and they advised me to contact the union to deal with this matter. I had been in contact with Sun Life since.*
>
> …
>
> [*Sic* throughout]

[353] Ms. Asare acknowledged writing that excerpt. She also acknowledged that on April 27, 2012, Mr. Ruseski had tried to contact her and that she was aware that he had attempted to send a package to her.

[354] The notes she wrote in the chronology read as follows:

…

> *On April 27, 2012, Mr. Ruseski attempted to contact me, despite being told not have any contact with me. A call was*

> *placed to my parents' phone. Not knowing where it was from, my parents called the phone number, and it went to his administrative assistant. The administrative assistant informed them that Mr. Ruseski tried to contact me and wanted to send a package to me by courier. My parents pressed her to tell them what was in the package. She said that she did not know what it was but that it was to arrive on April 30, 2012. My parents asked her for Mr. Ruseski's phone number and that they will call him that day. On April 30, 2012, my parents contacted Mr. Ruseski to warn him to not ever try to contact me and every time he tries to contact me, he is impeding my recovery. My parents then refused to accept the package upon delivery and asked for it to be returned to sender.*
>
> …
>
> [*Sic* throughout]

[355] She confirmed that on July 3, 2012, she spoke with Sun Life and that she was informed that Mr. Ruseski had written that she was on unauthorized leave on the employer part of the disability claim form. She stated that she was shocked as he had ignored the letters confirming her absence from work due to illness.

[356] She stated that it was almost impossible to have any meaningful communication with Mr. Ruseski. He said that he did not want her around. He ignored her.

[357] Mr. Vézina had told her that when she returned to work, she would have to sit down with Human Resources and her director and sort everything out.

[358] She was referred to the concluding paragraph in her chronology, which reads as follows:

> …
>
> *I have not been able to return to work due to illness. Upon my return, I believe would be subjected to further harassment, reprisal, and abuse as the issues have not been resolved, despite first reporting this matter in April 2011. Though it is a practice to have a meeting with management to discuss return to work and absence issues, in light of above, I believe it is almost impossible to have any meaningful or productive communication with Mr. Ruseski.*
>
> [*Sic* throughout]

[359] Ms. Asare acknowledged writing that paragraph.

[360] She was referred to Dr. Kilby's notes of her visit on July 17, 2012, which state that her employer said that she was on unauthorized leave, that she was fighting an uphill battle as she was not able to fight it on her own and without her lawyer, and that she needed to get on with her life as she would be constructively dismissed at best and fired at worst as the employer had stated that she was on unauthorized leave.

[361] Ms. Asare stated that she spoke to the bargaining agent again, which told her to focus on her recovery.

[362] She stated that two weeks later, Sun Life approved her disability insurance claim. She considered Sun Life her employer.

[363] She was asked about the letter sent to her on August 3, 2012, including a consent form permitting the employer to speak with Dr. Kilby. She stated that she did not receive it until April 2013 and that she did not know that the employer wanted to speak with Dr. Kilby.

[364] She was referred to Dr. Kilby's notes of her September 11, 2012, visit, which refer to the fact that she had received a copy of the employer's statement and that she had said that Mr. Ruseski writes things that are not true. The next sentence reads as follows: "I have reassured patient we will not share info with her employer without her written consent". When asked about the sentence, Ms. Asare stated that Mr. Ruseski had tried to sabotage her disability insurance claim. Comments in the employer's statement were not true.

[365] Dr. Fisher had recommended to her that she return to work on a graduated basis. However, the employer's statement commented that it would not accommodate her.

[366] The employer's statement requests information about rehabilitation and a reply to the following question: "If the employee could return to work on a reduced hours basis, or with a change in duties, would a position be available?" The answer box chosen is "No", and this comment follows:

> *The organization is small and is frequently called upon to undertake urgent and ad hoc requests or participate in meetings called on short notice. The employee has a*

> *specialized background that is not suitable for work in other parts of the Branch/Sector.*

[367] The October 31, 2012, letter directing Ms. Asare to report to Mr. Ruseski's office on Friday, November 9, 2012, to explain the reasons for her absence was returned with a tracking history indicating that on November 5, 2012, the recipient refused it. She was asked whether she had been aware that the employer had been sending her correspondence. She stated that her father had taken care of it for her. He had contacted the Jean Coutu location (presumably the postal franchisee) and had learned that it was from the employer. He then refused to receive it.

[368] It was suggested to her that she had refused any contact with the department. She answered in the negative, stating that it had been only with Mr. Ruseski. She had dealt with Ms. Caron with respect to the disability insurance claim.

[369] She testified that she had found out from Sun Life on or about February 4, 2013, of her termination when it wrote to confirm that she had been cleared to return to work as of February 1, 2013. She stated in her grievance that she learned of her termination on March 7, 2013, and that she did not receive the termination letter that February.

[370] When speaking with the Abilities Case Manager at Sun Life, she learned that Mr. Hards had been trying to contact her. On February 7, 2013, she wrote to the Human Resources Manager, requesting that all correspondence be sent to her home address. She copied the bargaining agent.

[371] On March 1, 2013, Compensation and Benefits wrote to her, outlining the effect the termination of November 28, 2012, would have on her benefits. The subject line reads in part "Termination of Employment for Job Abandonment". She received the letter and saw for the first time that her employment had been terminated for abandonment. She contacted Human Resources and asked for the letters. She received them on April 10, 2013.

[372] She had spoken with Mr. Vézina in early January 2013, when the psychiatrist and Dr. Kilby had cleared her to return to work.

[373] When she found out that her employment had been terminated from the Abilities Case Manager at Sun Life in early February 2013, she again got in touch with

Mr. Vézina. They spoke on the telephone. She asked him to file a grievance.

[374] In November and December 2012, the grievor had finally seen the psychiatrist to whom she had been referred by Dr. Sarah Giles. His reports were not transcribed until January 24, 2013. The psychiatrist had last seen her on December 4, 2012. He had provided her with a favourable diagnosis, noting that she had a good level of energy and that she was eager to return to work. He recommended that she change employment. He shared that recommendation with Dr. Kilby.

[375] She was referred Dr. Fisher's report. Dr. Wong had recommended that she be seen for a psychological assessment. The grievor acknowledged that the report chronicles her bullying concerns and that it refers to difficulties she had had with coworkers when working at a previous job. Dr. Fisher made a number of recommendations.

[376] Ms. Asare stated that Dr. Fisher asked her about applying for work with other departments. She stated that she did not want to but that she did look for other employment. She had been thinking about applying elsewhere. Once her condition had improved, she was ready to return to work.

[377] On July 6, 2013, the grievor applied to the Conference Board of Canada for employment as an economist. The application does not contain any reference to her economist position at Indigenous Affairs and Northern Development under her relevant work history. She stated that the work she had performed at Indigenous Affairs was not relevant to the economist position at the Conference Board of Canada. She stated that she had come out of a bad experience and that she had been forced out of a job.

[378] On July 15, 2013, the grievor applied to the Canada Mortgage and Housing Corporation for employment as a senior econometrician. The application also does not contain any reference to her previous economist position under her relevant work history. She stated that one of her professors encouraged her to apply for this position.

[379] It was suggested to her that she had left that position off her applications because of the bad experience and that she did not want it to reflect adversely on her. She replied she did not include it because of what the people had done to her at

Indigenous Affairs.

[380] On August 1, 2013, the grievor applied to a research assistant position at the University of Ottawa. Again, no reference was made to her previous economist position. She was hired into this position.

[381] She stated that this shows that she wanted to return to work as Indigenous Affairs and Northern Development had said that she could not return on a graduated basis. Even though she had been cleared to work as of February 1, 2013, she tried to build up her stamina, and she was still a PhD student.

[382] Her résumé indicates that she worked as a research assistant at the University of Ottawa between January and April 2013. Ms. Asare confirmed that she did so at that time. She was asked if she had made her employer aware that she was working as a research assistant. She stated that she had been waiting for Dr. Kilby's clearance to return to work and that then she contacted Sun Life.

[383] She replied that Sun Life had told her to build up her tolerance. Dr. Kilby gave her the clearance to return to work on February 1, 2013. The employer would not let her return to work on a graduated basis. She started to teach in late January 2013.

[384] The grievor acknowledged receiving Mr. Ruseski's letter that he had sent to the university in January 2012. She understood that he was looking for information from her because she had applied for a teaching assistant position in the winter of 2012. She replied that she was on sick leave and that based on advice from her counsellor, she had undertaken this activity. The grievor told her counsellor that she was away from her workplace. She had found that working as a teaching assistant during the fall of 2011 had been soothing. She saw that position as part of the PhD program. Graduate students are entitled to one such position. She held more teaching assistant positions after her termination. She stated that she was not paid for the teaching assistant positions but that the remuneration had been applied to her tuition. The rate was $39.97 an hour.

[385] She was referred to her testimony in which she had stated that she had the ability to work full-time and to attend school and that she had done so. She stated that in September 2010, she both worked full-time and went to school. She had not been able to continue because of the toxic work environment, but she would have preferred

to do both at the same time.

[386] Her restricted availability to attend the adjudication hearings occurred after she had been terminated. The fact that she no longer had a full-time job does not mean that she could not have done both worked full-time and studied.

[387] She was referred to Dr. Kilby's notes of her visit on March 19, 2013, which read as follows:

…

> *Still issues with insurance and previous employer*
>
> *She was paid through Sun Life for disability for the period she was off work*
>
> *She was told by previous employer that she abandoned her job*
>
> *She talked to her lawyer she needs a note*
>
> *She needs to have her file cleared to be able to apply to feds [sic] in the future*
>
> *She wants a letter saying she be re-instated [sic] to her work*
>
> *She has been ready to go back to work since Feb 1st*
>
> *She is now in school and not actively seeking work*
>
> *Her lawyer consulted the union and she wants something from doctor*

[388] She stated that she did everything she could to get back to work. Dr. Kilby did say that he did not want her to return to Indigenous Affairs and Northern Development.

Re-examination

[389] The doctoral program is flexible depending on the courses and the number of hours as well as whether a student finds the program difficult. The thesis consists of writing. There are no classes to attend.

[390] The grievor ramped up her academic pursuits because she was not working and she had more time on her hands.

[391] In the medical certificate dated October 17, 2011, Dr. Giles wrote that the grievor's return to work was indeterminate. Ms. Asare explained the reason for that note was that she would have had to be cleared to return to work by a psychiatrist.

[392] She stated that the research assistant position she accepted in January 2013 was for only 10 hours per week. In her view, she could have done that job and returned to work full-time.

2. Dr. Kilby

[393] I noted at the outset that the parties, on consent, agreed to a sealing order with respect to the medical information relating to Ms. Asare. Much of the examination and cross-examination of Dr. Kilby pertained to very sensitive medical information about the grievor. Given the sensitive nature of this information, and the parties consenting to sealing the related documents, I have endeavoured in the summary of Dr. Kilby's evidence to minimize references to medical information that need not be part of the public record.

[394] Dr. Kilby has been a family doctor since 1979 and is a primary care physician at the University of Ottawa Health Services clinic. He has been its director since 1987. He completed the hospital-based training required for a general licence and certification in family medicine. Although he has no designated specialization, his practice has involved diagnosing and treating psychiatric disorders. His curriculum vitae lists his comprehensive and wide experience and involvement with both the Ottawa and Gatineau hospitals. He had approximately 2600 patients at the time he testified in these proceedings.

[395] He recognized his notes in his handwriting from the University of Ottawa's electronic medical records. He recalled that the first time he saw Ms. Asare was when she came in for a consultation on November 2, 2011.

[396] She had been seen by another physician at the clinic. She had been absent from work for medical reasons. He knew she had an issue with mood disorders. He noted that she was clearly sad and downcast, with a mild depressed affect. He made a diagnosis of two mental disorders at that time and used a coding system for research and billing.

[397] The plan included filling out forms for disability insurance. He advised her to get out of the environment that did not appreciate her and value her contribution to the team and to seek employment elsewhere.

[398] He signed a medical certificate dated November 2, 2011, certifying that Ms. Asare would be absent from August 12, 2011, until January 3, 2012. He recommended that she be absent for medical reasons and that she not go back to work until January, at which time there would be a need to reassess her.

[399] He had reviewed Dr. Fisher's report, which was part of Ms. Asare's file that was received on October 4, 2011. He acknowledged that the report formed part of his diagnosis.

[400] Dr. Kilby made an entry in the medical report on November 8, 2011, concerning workplace stress and bullying arising from work related conflict, her need to deal with issues, and return to work eventually or leave the department.

[401] He completed a disability insurance claim on her behalf on December 2, 2011. He described her symptoms as the following: "Poor concentration, anxiety, insomnia, appetite [down arrow], isolation". He stated the symptoms first appeared in "August 2011". He stated that the condition was due to injury or illness caused by employment, noting that she "[f]eels she is victim of harassment at work. Traumatized by experience, shaken depressed". He noted that she was "[u]nable to face employer, anxiety level++". He advised that she undergo "psychotherapy, EAP [and] job change". Dr. Kilby stated that when it comes to anxiety levels, three plusses is the highest rating.

[402] He explained that when diagnosing a disability, he tries to obtain a corroborating report, which in this case were the reports of the psychologist and ultimately the psychiatrist.

[403] On February 22, 2012, he extended the medical leave indefinitely. He stated that he prefers to set a goal to work toward for the patient to return to functionality. He stated that on that date, he was not able to see a timely end to the grievor's period of disability.

[404] Ms. Asare saw Dr. Kilby on July 5, 2012. He stated that they had been trying to access a psychiatric service and that he had her in a queue to be assessed. At that

point, he understood that she was not working.

[405] He prescribed medication, which she had not taken them before July 5, 2012.

[406] On June 5, 2012, Sun Life had written to Ms. Asare, advising her that there was insufficient evidence to support how her reported symptoms were severe to the extent as to totally and continuously prevent her from performing the duties of her occupation. On July 9, 2012, Dr. Kilby wrote to Sun Life in support of her disability insurance claim.

[407] He met with Ms. Asare on November 2, 2012. She was beginning to respond to medication and was feeling better. She advised him that her psychiatrist appointment would take place in the next week and that she did not want to return to her workplace.

[408] He met with her again on January 14, 2013. He signed a medical certificate indicating a return-to-work date of February 1, 2013, based on his assessment. He said that he had developed a professional relationship with her.

[409] If people believe that they are working in an unfriendly environment, then their perception is affected. They need to move to an environment in which their views are more valued.

[410] She was also assessed as being well enough to carry out all the functions of daily living. He recommended that she remain on medication and that she continue psychotherapy.

[411] They met again on March 19, 2013. His notes reflect that they discussed the issues of insurance and the employer, which had told her that she had abandoned her job. She wanted her file cleared so that she could apply to the federal government in the future. Her lawyer said that she needed a note.

[412] Dr. Kilby testified that he felt responsible. His advice to her while she was on sick leave was that she should not take emails or phone calls when there were issues between her and the employer. The general advice that he gives patients appeared sound at the time; however, he felt that he was in part responsible for her not communicating with the employer.

[413] Dr. Kilby distinguished between communicating with the employer and Human Resources. His advice was to speak only to Human Resources, which as opposed to managers, should deal with employees with respect to their sick leave.

[414] On March 20, 2013, Dr. Kilby wrote a letter addressed to "To Whom It May Concern" with respect to Ms. Asare that stated as follows (I have included this excerpt as it does not disclose sensitive medical information):

…

> *This patient was on disability for several months, because of conflict with her supervisor, she was advised during this time not to interact with her department head or supervisor. To her knowledge the only attempted at communication with her came from her department and she was not aware of any attempt by human resources to contact her.*
>
> *She has learnt that her failure to interact with her department has resulted in her dismissal from the Public Service of Canada. This is unfortunate as this occurred at a time of emotional disturbance in part related to past communications with her supervisor.*
>
> *Although we have strongly recommended she not return to her previous job, we would hope that her HR records reflect only that she resigned from her job from the date of her return to work date as recorded with her disability insurance and that she therefore be allowed in the future to apply to another job within the Public Service of Canada*
>
> [*Sic* throughout]

[415] He met with Ms. Asare on July 12, 2013. His notes reflect that since leaving her job, at which her colleagues were psychologically abusive, she had felt much better. She was able to concentrate better, and her sleep had improved. She was looking to finish her schooling, was off disability insurance, and felt that she had fully recovered.

Cross-examination

[416] It was suggested to Dr. Kilby that he had no special expertise in psychiatry. He responded that he had four years of continuing medical education in this area. He was asked whether he had special expertise in psychometrics. He answered "No", and stated that neither would a psychiatrist or a psychologist.

[417] It was suggested to Dr. Kilby that when Ms. Asare met with him on November 2, 2011, what she reported to him was subjective and that he relied on what she had told him when making his diagnosis. He replied that he relied on his objective observations as well as the clinical observations and reports of Dr. Fisher and Dr. Wong.

[418] He was asked if he was familiar with the *Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision* (DSM) handbook for diagnosing mental disorders. He replied that he was.

[419] Dr. Fisher's report concluded that Ms. Asare suffered from a valid disorder. She recommended that Ms. Asare be referred to a psychiatrist. Dr. Kilby confirmed that this referral was made. Dr. Fisher recommended that Ms. Asare remain on short-term disability until this was done. Dr. Kilby confirmed that this was done. Dr. Fisher recommended that a return-to-work schedule should be implemented on a gradual basis. Dr. Kilby confirmed that this could not be done at the time. Dr. Fisher recommended that a liaison be delegated to communicate information pertinent to Ms. Asare's workload rather than directly from her manager. Dr. Kilby stated that the liaison should not be to her manager.

[420] Dr. Kilby was referred to his attending physician statement dated December 2, 2011, in support of Ms. Asare's disability insurance claim. He acknowledged that the description of her symptoms, i.e., poor concentration, anxiety, insomnia, appetite decrease, and isolation were subjective, as was the conclusion that her illness was caused by employment due to her feelings that she was a victim of harassment at work and that she had been traumatized by the experience and shaken and depressed. The conclusion that she was restricted by the condition because she was unable to face the employer with anxiety at "level++" was also subjective.

[421] On April 24, 2012, Dr. Kilby made notes of his visit that day with Ms. Asare that stated that the employer had refused to complete its portion of the disability insurance application. He advised her to get a lawyer to help her with her file.

[422] On June 5, 2012, Sun Life advised Ms. Asare that there was insufficient evidence to support how the reported symptoms were severe to the extent as to totally and continuously prohibit her from performing the duties of her occupation. It was

unable to approve her claim.

[423] Dr. Kilby confirmed that on July 9, 2012, he wrote to Sun Life and provided further details concerning her disability.

[424] He acknowledged that on September 11, 2012, he reassured Ms. Asare that he would not share her medical information with her employer without her written consent. This was shortly after the employer had written to her on August 7, 2012, seeking her consent to contact Dr. Kilby.

[425] Dr. Kilby stated that he considered it inappropriate for a manager to write directly to a physician and that it should be taken up through Health Canada. Managers do it all the time. The only information managers are entitled to is whether an employee is fit for work. Dr. Kilby stated that he works with a team of occupational health and safety practitioners. Managers are no longer allowed to ask questions about an employee's diagnosis.

[426] He was asked if he ever wrote a letter stating that the grievor should not work with her previous supervisor. He stated that if there is no letter on file, then he did not write one.

[427] He was asked if he had ever written a letter stating that the only communication from the department to the grievor should be through Human Resources and not her manager. He replied that discussions concerning accommodation and restrictions would have come only after she was invited to return to work.

[428] On March 19, 2013, he found out that she had lost her job through abandonment. Ms. Asare requested a letter from him. Dr. Kilby was not aware if Human Resources had attempted to reach her. He stated that if there had been communications from Human Resources, his advice to Ms. Asare would have been different because Human Resources could have involved the occupational health and safety branch in the file.

[429] He was aware that the employer had tried to communicate with her and that that had caused her stress.

[430] Dr. Kilby acknowledged faxing a letter on July 17, 2015, from the University of Ottawa that stated that Ms. Asare was not registered in the spring-summer session for 2011. He could not recall whether she or her lawyer had requested the fax.

[431] He was asked if he had any way of knowing whether medical certificates provided to an employer had been accepted. He answered that he did not.

[432] On July 17, 2012, Dr. Kilby noted that during a visit with Ms. Asare, she informed him that the employer stated that she was on unauthorized leave and that he urged her to take action. He stated that he can take care of only the medical side of things. She needed to get the bargaining agent involved as she was in no condition to fight on her own.

[433] Dr. Kilby was asked whether he was aware that while pursuing her PhD, she had been a teaching assistant. He answered that he might have been. He did not recall advising her in this respect. He stated that it might have been therapeutic for her to work in another environment.

[434] He reiterated in re-examination that it was not his practice to speak with line managers as doing so would breach a patient's privacy.

3. Mr. Vézina

[435] Mr. Vézina is the CAPE's director of professional services. At the time of the hearing, he had been in this position for three years. In 2012, he was a labour relations officer with the CAPE. At that time, there were eight labour relations officers, each of whom had a portfolio of six to eight departments. One of his portfolios was Indigenous Affairs.

[436] He first came into contact with Ms. Asare in 2010 or 2011 when she contacted him with respect to events occurring in the workplace. She raised harassment allegations. He advised her to draft the allegations, summarize the events, and file them with a person in authority. If she required assistance, the bargaining agent would provide guidance. He recalled the discussions but did not recall any follow-up.

[437] He spoke by telephone with her on February 21, 2012, and made notes of the discussion. The notes reflect that he spoke with her with respect to her manager contacting the university. She wanted the CAPE to send a letter or to advise Human

Resources to tell management not to contact her at home during her medical leave.

[438] He telephoned Mr. Hards, his employer equivalent, and relayed to him that the employer was not to have contact with Ms. Asare during her medical leave. Mr. Hards said he would talk to the Director.

[439] Ms. Asare wrote to Mr. Vézina on February 22. She included a copy of her most recent medical certificate and asked if he had been able to contact Human Resources to pass on the message that the Director was not to have any contact with her during her medical leave. He replied that he had relayed the message.

[440] On or about November 16, 2012, he received a copy of the letter advising Ms. Asare that her employment had been terminated by reason of abandonment.

[441] He placed the letter on file and stated that the bargaining agent waits until it receives a call from the member. He did not know whether Ms. Asare received the letter due to her instructions with respect to communications with the Director. The bargaining agent did not send a copy of it to her; nor did it receive any other letters related to her. He could not recall whether he had any discussions with Mr. Hards with respect to Ms. Asare between February and November 2012. He recalled receiving an email on February 8, 2013, from Ms. Asare that had attached a copy of a letter that she had sent to Human Resources, advising it to send all correspondence to her home address.

[442] At some point later on, Ms. Asare went to the CAPE's offices and saw a colleague, Claude Archambault. A grievance was drafted. Mr. Vézina signed on behalf of the bargaining agent. Mr. Vézina did not recall drafting the grievance.

[443] The grievance was filed on March 15, 2013. Mr. Vézina was asked about the timing and stated that that was when Ms. Asare was able to deal with the termination letter. He did not think the letter had come from the bargaining agent.

Cross-examination

[444] Mr. Vézina recalled that during his conversation with Mr. Hards in February 2012 that Mr. Hards raised other concerns the employer had with respect to Ms. Asare. He was asked whether those concerns had triggered an expressed hope that Ms. Asare would undergo a fitness-to-work evaluation at Health Canada. He answered that it was

possible.

[445] He recalled sitting on a panel with Dr. Given, a Health Canada physician, at a symposium on wellness. He recalled discussing with Dr. Given about writing to a member's physician. He was asked whether he and Mr. Hards had discussed doing that. He replied that it was possible, very possible.

[446] Mr. Vézina was asked whether he informed Ms. Asare that an employer has a right to know that an absence is justified. He answered that generally, an employee must properly inform an employer of an absence.

[447] He vaguely remembered receiving a copy of Ms. Asare's complaint against Mr. Ruseski dated November 29, 2012. He remembered perusing it and speaking with Ms. Asare about harassment and discrimination.

[448] He was referred to a statement in the complaint that on February 9, 2012, the University of Ottawa contacted her to inform her that Mr. Ruseski had attempted to obtain personal and school-related information about her without her consent. He stated that Ms. Asare related that information to him.

[449] Mr. Vézina did not remember if she had been on sick leave. He was asked whether if she had been on sick leave and going to the university it would have suggested a problem to him. He stated that that would be hypothetical advice.

[450] The bargaining agent did not file a complaint on her behalf. Generally, members file harassment complaints on their own.

[451] When he received a copy of the termination letter, he was asked whether he recalled talking with Mr. Hards. He replied that it was possible but that he did not remember.

[452] Mr. Vézina was asked whether he recalled talking with Mr. Hards about Ms. Asare undergoing a fitness-to-work evaluation. He replied that he did not but that generally, it would be the type of discussion that would take place when the employer does not have enough medical evidence.

[453] Mr. Vézina was aware that Sun Life had approved the grievor's disability insurance claim; however, he could not remember when he learned of that fact.

4. Mr. Asare

[454] Mr. Asare is the grievor's father. He recalled that in April 2011, he telephoned Ms. McFarlane. He had been advised that someone was trying to contact him. He had spoken to his wife, obtained a number, and made a three-way call. He knew that Ms. McFarlane was Mr. Ruseski's administrative assistant. Ms. McFarlane told him that Mr. Ruseski wanted to send a package to the grievor. Mr. Asare wanted to know what it contained.

[455] He said that the grievor was sick and that she had been told by a counsellor or doctor to have no contact with Mr. Ruseski. It was their (his and his wife's) responsibility to make sure that that did not happen. He was asked whether he communicated that information to Ms. McFarlane.

[456] There was an objection based on the rule in *Browne v. Dunn*, (1893) 6 R. 67, H.L., to the effect that although counsel for Ms. Asare had asked the question of Ms. McFarlane, he did not advise her that he would call contradictory evidence to that effect. After hearing the parties, I ruled that a labour adjudicator has the latitude to admit evidence whether admissible in a court of law or not, and I allowed the question.

[457] Mr. Asare stated that his wife asked about the package's contents. Ms. McFarlane refused to tell her. His wife told Ms. McFarlane that she was not supposed to send anything to the grievor, that Mr. Ruseski was not supposed to contact the grievor, and that she would return the package.

Cross-examination

[458] Mr. Asare acknowledged that he had a close relationship with the grievor and that she lived at home at the time of the telephone discussion. He was proud that she was working towards her PhD and that she had contributed to the field of econometrics. He was asked whether he would agree that completing a PhD is a lot of work. He replied that she would have to answer that question. He stated that he knows that she works hard.

[459] During the discussion with Ms. McFarlane, he acknowledged that he and his wife had advised her that they would not accept a letter unless she told them of its contents. When the courier knocked on the door, they refused to take the envelope, did not open it, and refused to sign for it.

[460] He was concerned because the grievor was sick and her counsellor had advised her not to have any contact with Mr. Ruseski.

[461] Mr. Asare was asked whether there was any restriction on him reading the letter. He replied that he and his wife had nothing to do with it and that they were following the doctor's orders to not have any communication with Mr. Ruseski.

[462] Mr. Asare was asked whether he provided any other way the employer could communicate with the grievor. He stated that he was more concerned with her well-being.

[463] He was asked whether he had made any effort to understand the issue with Mr. Ruseski. Mr. Asare answered that he had not because the grievor was not supposed to have any contact with him. He confirmed that he would not accept anything that came from Mr. Ruseski's office. He stated that if the correspondence had been from Human Resources, he and his wife would have accepted it; however, they did not see anything from Human Resources.

[464] He was asked about what the grievor told him while she was on leave about why the employer asked whether she was working at the university. He explained that the university emailed the grievor and enclosed a letter from the employer asking for information. She authorized him to act on her behalf. He went to see the Chair of the Economics Department. He explained what was going on. The university wanted his consent to provide the information. He declined because the questions had come from Mr. Ruseski. Had they come from another branch, such as Human Resources, he would not have declined. There was to be no contact with Mr. Ruseski.

[465] He was asked whether the grievor had ever told him that she had received an email asking the same questions. He replied that she had not.

[466] He was asked whether she had ever told him that she was on unauthorized leave. He answered that she had not. He was asked whether Sun Life had ever told her that she was on unauthorized leave. He answered that it had not.

IV. Summary of the arguments

A. For the respondent

[467] The respondent did not pursue the argument that the grievance is out of time.

[468] The respondent bore the onus on the abandonment issue. The bargaining agent bore the onus on the human rights issue. There was some discussion over a five-year period on how to resolve this matter. The parties asked the Board to reserve on the remedy. On consent, they agreed to a sealing order with respect to the medical information relating to Ms. Asare.

[469] This is an important case relating to workplace management and the obligations on an employer to an employee on leave.

[470] Ms. Asare refused or neglected to fulfil her obligations as an employee for over a year and therefore abandoned her position.

1. <u>The test for abandonment</u>

[471] In *Hayter v. Deputy Head (Department of National Defence)*, 2015 PSLREB 15 at paras. 45 to 47, the Board set out as follows the criteria an employer must meet to terminate employment by reason of abandonment:

> *[45] Section 12(1)(e) the* FAA*, in my view, provides authority to the Deputy Head to exercise his or her discretion to terminate for non-disciplinary reasons including abandonment. The decision of the Deputy Head is to be reviewed by an adjudicator on the standard of reasonableness (*Laye *and* Lindsay*). In other words, the employer must satisfy me that it acted fairly and in good faith.*
>
> *[46] I accept the conclusion that in presenting their evidence, the employer did not have to establish that the grievor intended to abandoned her position (*Lindsay*).*
>
> *[47] However, the employer is required to establish that (1) grievor was absent from work for a significant period of time; (2) the leave was without authorization; (3) there were no valid reasons under circumstances within the employee's control; and (4) there was no notice to the employer (*Laye*).*

[472] There is no dispute that the grievor was gone for a significant time. She left work on August 12, 2011. Her employment was terminated on November 13, 2012, after a year and three months had passed.

[473] Had the grievor's leave been authorized? Mr. Ruseski's evidence was that her leave was treated as authorized until April 20, 2012, when he advised Compensation and Benefits that she was considered on unauthorized leave without pay from

August 9, 2011. She had not provided the originals of the medical certificates; nor had she provided leave forms, and she had not replied to the January 25, 2012, letter requesting a meeting to discuss the information that the University of Ottawa had provided to him.

[474] The fact that her leave was not authorized was communicated to her in a letter dated April 26, 2012. Although there is evidence that she did not receive the letter and that its delivery was refused, there is evidence that on July 3, 2012, Sun Life advised that her leave had not been authorized. On July 17 and 23, 2012, respectively, she informed Dr. Kilby and the bargaining agent that she was on unauthorized absence.

[475] The issue is not whether she was able to attend work, but since she had left work, she was obligated to substantiate to the employer's satisfaction that her medical condition excused her failure to attend work.

[476] In the analogous cases of *Halfacree v. Deputy Head (Department of Agriculture and Agri-Food)*, 2012 PSLRB 130, and *Halfacree v. Canada (Attorney General)*, 2014 FC 360, Mr. Halfacree, who was an employee with a history of poor attendance, was absent on long-term leave in excess of two years. His employment was terminated for insubordination essentially for his refusal to respond to the employer's request that he explain his absence from work over that time. He had provided his employer with standard-form notes from his physician stating that he was not fit to return to work.

[477] Mr. Halfacree was a racetrack official at the Woodbine Racetrack in Toronto, Ontario. During his absence, he worked part-time as a tractor-trailer driver. The question in his case was whether he had been insubordinate, not whether he was able to work during the time he was on leave. The question was whether he had obligations to the employer. In that case, the employer did not argue that he could have come to work; nor is the employer doing so in this case.

[478] In 2012 PSLRB 130, the Adjudicator stated as follows at paragraphs 207, 208, and 210:

> *[207] In this case, the answer to the first question turns on the answer to several more. First, was the employer entitled to ask the grievor for more medical information than was provided over the two years? If so, did the grievor's failure to*

> *provide such information amount to insubordination? And, if so, was the insubordination justified or at least mitigated in some way?*
>
> *[208] Turning to the first of those questions, one part of the employment relationship is an employee's obligation to show up for work. When an employee fails to show up for work, he or she owes the employer an explanation for that absence.…*
>
> …
>
> *The evidence necessary to satisfy that obligation may be slight, when the absence is of limited duration. The employer might be satisfied with a verbal excuse or with a short doctor's note. But, as the absences grow in number and duration, the evidence necessary to satisfy that obligation — and the employer — grows more substantial.*
>
> …
>
> *[210] The grievor not only ignored the employer's request for over two years, he also continued to submit the very same medical certificates (many of which were not even complete), which the employer had already said were not acceptable. On the face of it, I am satisfied that such conduct was insubordinate, if not indeed contemptuous of management.*

[479] An employee has certain obligations. If he or she elects not to comply with them, in this case failing to keep the employer notified of the circumstances surrounding the grievor's absence from work, it is sufficient to justify a finding of abandonment.

[480] It is noted that the information the employer had about the employee's condition in *Halfacree* differs greatly from this case, but this fact does not detract from the principle.

[481] In *Saskatchewan (Labour Relations and Workplace Safety) v. Saskatchewan Government and General Employees' Union*, 2015 CanLII 23030 (SK LA) at paras. 55 to 57, Arbitrator Ish summarized the general principles that apply in this case as follows:

> *[55] Medical information is an area of arbitral jurisprudence that has attracted significant attention. The core or underlying principles are relatively straightforward but their application must, of course, involve the particular facts and circumstances of every individual case.*
>
> *[56] The most fundamental need of an Employer is to maintain its operations and services without interruption; to*

this end it is necessary to have its workforce in regular attendance. Correspondingly, the most fundamental obligation of an employee is the requirement to be at work. The stark and obvious observation must be tempered by rights bargained in a collective agreement that recognize absences for illness and disability are justified, albeit not without limitation, and may give rise to the entitlement of sick leave benefits that are also bargained rights. In addition, the courts have recognized and imposed a duty to accommodate employee illness and disability (again not without limitations) and legislation has increasingly recognized privacy rights. All of these developments have informed and to a great extent complicated, arbitral jurisprudence in this area. A recent Saskatchewan arbitration decision observed:

> The important determinations we are asked to make involve a careful balancing of interests. Arbitrators have attempted to balance the interests of an employee's right to privacy with respect to medical information against an Employer's legitimate business interests, including prevention of abuse of sick leave benefits. This is an area of arbitral law that has received considerable attention and has evolved considerably in recent years largely as a result of Canadian society's heightened awareness of privacy rights of individuals. This awareness has manifested itself in court cases, legislation and arbitral jurisprudence. In addition, while trustees of sensitive information commit to confidentiality and spend significant resources to protect confidential information, modern technology has allowed many very public breaches that have compromised the privacy of individuals. Thus, there is a concern about the very information itself being collected.
>
> … arbitrators have consistently found that the amount of medical information an employer may request for an extended leave or where accommodation issues are raised is different from short periods of absence due to illness and injury. Generally an employer's right to information increases the longer the leave (see for example the Sibley decision, supra). It is against the backdrop of numerous years of consideration of these important issues by various tribunals, in addition to the specific provisions of the collective agreement, that we approach out [sic] task in this case. (Cypress, supra, at paras. 83-84) [Cypress Health Region v. Seiu-West, 2014 CanLII 49992 (SK LA)]

[57] The onus is on an employee to establish entitlement to paid sick leave benefits, "typically this requires an employee

> *establish that their absence is legitimate, that is, they are genuinely unable to report for work due to illness or injury. The employer is entitled to sufficient 'proof' of the illness or injury".(*Five Hills Regional Health Authority and S.E.I.U., Local. 299*, 2009 CarswellSask 943 (Denysiuk), referred to in* Cypress, supra.*) Arbitrator Denysiuk, in* Five Hills*, also observed as follows:*
>
> > There may be individual cases where more information is required from an employee in order to assess the sick leave request. This is particularly so when there are issues about the employee's fitness return to work and/or need for accommodation. There may be circumstances wherein assessing a claim for sick leave or in an investigation of alleged abuse of sick leave, an employee may be required to disclose greater information than simply an inability to work. An employee might even be obliged to disclose a diagnosis. However, this would be an exception to the general rule which is to minimize intrusion. (Para 149)

[482] In the circumstances of that case, the grievor's prolonged absence without sufficient justification constituted just cause for her dismissal on the grounds that she had abandoned her position.

[483] As an employee, Ms. Asare was under a positive obligation when using sick leave to make the employer and her physicians aware of activities that might have appeared inconsistent with leave for medical reasons and had to obtain approval from all of them. Having gone on sick leave while at the same time registering at the university in the doctorate program and undertaking the teaching assistant role, the grievor was required to obtain her employer's approval as well as that of her physicians.

[484] In *Royal Columbian Hospital v. Hospital Employees' Union*, [2001] B.C.C.A.A.A. No. 39 (QL) at para. 89, the grievor was terminated from her employment as an admitting clerk at a hospital for abusing her sick leave privileges by claiming sick pay from her employer while working in an identical job at another hospital. Arbitrator Gordon stated as follows:

> ***89*** *The union bears the onus of establishing that the employee was too sick to work on the day(s) he or she claimed sick leave benefits: Rosewood Manor. Certification of illness by a doctor may not be sufficient reason for an employee to absent herself from work. An employee claiming sick leave benefits is under a duty to disclose to the doctor activities that are inconsistent with either an inability to work or recovery:*

> *Re: Kenrock Tools Corp. -and- United Steelworkers (1990), 17 L.A.C. (4th) 416 (Picher). Where such activities are not disclosed to the physician, the medical certificate will not excuse the employee's absence from work: Ford Motor Co. of Canada Ltd. –and- United Automobile Workers, Local 1520 (1975), 8 L.A.C. (2d) 149 (Palmer). Employees "reasonably should know" that sick leave is intended for the purpose of allowing them an opportunity to regain their health and they are under a related duty of care and disclosure to their employer. Consequently, contemplated activities which may be unusual in the circumstances must be approved by both the employee's doctor and the employer. This concept was reviewed by Arbitrator Jackson in Rosewood Manor wherein the following comments of Arbitrator Picher in Re: Kenroc Tools Corp., supra, were cited with approval:*
>
> > *For the purposes of this grievance it is not necessary to determine whether Mr. Laframboise falsified his illness and engaged in a deliberate fraud of his employer. Even if one accepts his own evidence that he did suffer from the physical ailment for which he sought treatment, the evidence nevertheless discloses a violation of his duty to the company so fundamental as to constitute a waiver of any right to claim sick-leave indemnity. … As a person receiving indemnity benefits at the company's expense, the grievor was under a minimal obligation to follow a faithful programme of treatment and convalescence, and to clear in advance with both his physician and his employer any contemplated activities which might be unusual in the circumstances. This Mr. Laframboise failed to do so [sic] and in so doing departed from the intention of the sick-leave indemnity plan and the related duty of care and disclosure which he owes to the company.*
>
> …

[485] In *Alberta (Infrastructure and Transportation) v. Alberta Union of Provincial Employees*, [2007] A.G.A.A. No. 73 (QL), an employee working for the Alberta government called in sick for her day job while working part-time in another job. Her employment was terminated on the basis that she had misused her leave entitlements, which had fractured her trust relationship with her employer.

[486] The Arbitrator accepted the argument that she had suffered anxiety and stress in her day job but not in the part-time job. He stated as follows at paragraphs 50 to 52:

> ***50*** *… This board is satisfied that while the grievor was not as candid, or as forthcoming, as she should have been in dealing*

> *with the employer from whom she was claiming paid illness benefits, the evidence preponderantly points in the direction of her having suffered a level of stress and anxiety sufficient to have required medical involvement and some illness time away from her duties at least from time to time as addressed by the supporting documentation and testimony… She should have made her superiors aware far earlier of her approach, her position being that she was still able to work at her other "easier job" on some evenings of the sick days. The employer should have been alerted from [sic] outset in order to consider conducting its own outside medical evaluation in the circumstances … a natural workplace obligation existed for the greivor [sic] to have long since adequately disclosed the situation to her employer, which she plainly had failed to do, leaving it to eventually assume the worst when discovered. One recalls arbitrator Michel Picher's view in Kenroc Tools that some situations simply require an employee to clear certain activities with his or her physician and the employer in advance, which one expects would include at least an informed level of discussion over continuing on with her second job on paid illness days. This obligation is irrespective of the fact that her part-time situation was causing her no stress or anxiety.…*
>
> ***51*** *Certainly, on all the circumstances presented, the case can be distinguished from that situation where a healthy employee chose to book off his or her hours with one employer while working later or earlier the same day with another employer, done for his or her own purposes without any real or sufficient connection with any health related issue. Here, we are left with the grievor not having been suitably forthcoming in a timely manner to disclose and discuss her continuing outside work attendances, raising suspicions, concerning which she was able to garner medical support for the last year. The grievor left herself open to a disciplinary response, but not capable of justifying her discharge.…*
>
> ***52*** *In our view the discharge penalty must be set aside. In the circumstances presented, we have concluded that the grievor's conduct, related as it is to her failing to disclose in a timely manner what should have been discussed, could not have supported more than a three month suspension, all things considered. That being the case, we reinstate the grievor without loss of seniority and with said suspension to be recorded on her file.…*

[487] *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, [2014] B.C.C.A.A.A. No. 175 (QL), is a case in which a registered nurse grieved a 15-day suspension for allegedly abusing sick leave and for dishonesty. The employer provided evidence showing that during four sick days, the grievor had actually been in

Las Vegas. The grievance was dismissed as the employer had provided sufficient evidence to satisfy its onus. The Arbitrator stated at paragraph 36 as follows:

> ***36*** *Thus, the authorities establish that where, as here, an employer imposes discipline for alleged abuse of sick leave, the employer's onus of proof may be satisfied at arbitration with circumstantial evidence, and more particularly, evidence of the employee's actions prior to, during and after taking sick leave. In order to satisfy its onus in a case such as the present case, an employer need not prove that the employee engaged in deliberate fraud of her employer. It is sufficient if the evidence discloses a breach of the employee's duty to obtain prior clearance from her physician and her employer to engage in an away-from-home vacation or trip during the course of a sick leave. Why? Because arbitrators have determined that taking such a trip without prior clearance while off work on sick leave is conduct inconsistent with the intended purpose of the contractual sick leave provisions, and in itself constitutes just cause for some form of discipline. If the union wishes to prove that it was medically permissible for the employee to take the away-from-home trip or vacation during his sick leave, the onus rests with the union to establish that fact.*

[488] The circumstances in this case plainly required Ms. Asare to make a disclosure. Mr. Vézina's notes reflect that the employer asked about her work and education. He testified that if she was on sick leave while going to university, then that would have suggested a problem.

[489] From the employer's perspective, it had the right to obtain additional medical certification. The medical notes that were submitted did not establish the grievor's entitlement to sick leave. From the jurisprudence cited, while a short-term absence might be justified by a medical note, the longer the absence, the greater the obligation to substantiate it, especially in circumstances of conflicting information about the employee's health.

[490] It is all there in this case. Initially, the employer accepted the medical notes at face value. Different doctors were involved. The absence stretched to four months. At that point, the medical notes indicated an indefinite return-to-work date. In August, Mr. Ruseski had told the grievor that she was not granted a year's educational leave and that the previous arrangement would not continue. She responded that he was making her choose between education and work. He said that that was her choice. In January 2012, when he learned that she had enrolled at the University of Ottawa,

he concluded that she had made her choice.

[491] The evidence shows that the employer proceeded in a reasonable manner and that it did not act capriciously. Mr. Ruseski wrote to Ms. Asare to advise her of the information he had learned from the University of Ottawa and asked her to attend a meeting to explain the situation. He had no information that she would not accept communications from him.

[492] Mr. Hards relayed to Mr. Vézina other concerns the employer had with respect to Ms. Asare's absence from work, which possibly triggered the prospect that she could undergo a fitness-to-work evaluation at Health Canada. When Mr. Ruseski was informed that she would not communicate with him, his response was not to have her meet with him but with Health Canada.

[493] No evidence was conveyed that Ms. Asare could not open and read a letter from Mr. Ruseski. Certainly, the message from Mr. Vézina was not made in a clear way or in writing.

[494] Ms. Asare repudiated her employment. She did not clear in advance her educational studies and her teaching assistant job. There is no evidence that she had discussed the fact that she was pursuing her educational studies and working as a teaching assistant with any of the physicians she saw at the University of Ottawa Health Services clinic who signed her sick leave notes before meeting with Dr. Kilby.

[495] The evidence indicates that Dr. Kilby had a limited awareness of the fact that she was pursuing her PhD. He testified that he was not able to express an opinion on her ability to both attend work and pursue her PhD. He could not recall whether he had known that she was a teaching assistant.

[496] After January 2012, she did not meet with the employer to explain the situation. She refused correspondence from it and in fact took active steps to prevent it from obtaining information. She delegated to her father the responsibility to notify the University of Ottawa not to disclose to the employer any information about her educational program or the fact that she was employed as a teaching assistant. This was not medical information; it should have been provided to the employer.

[497] She instructed her bargaining agent and her parents not to engage in communication with the employer. She did not engage an intermediary to attempt to

resolve the situation, despite her doctors' advice.

[498] From her discussion with Mr. Ruseski on August 11, 2011, she would have realized that the employer would have had concerns had it discovered that she was enrolled in the PhD program and that she was working as a teaching assistant.

[499] She knew that she was on unauthorized leave. Both the bargaining agent and Dr. Kilby advised her to resolve the situation.

[500] The following supports the abandonment conclusion:

- on August 11, 2011, the discussion in which Ms. Asare stated that the employer was forcing her to choose between her career and her PhD;
- on August 11, 2011, the discussion in which the employer ended the informal arrangement;
- on August 12, 2011, the day after the conversation, she provided a sick note for one month, and during that month, she signed up for classes in the PhD program and accepted the teaching assistant offer on September 13, even though she had not secured a medical note for beyond October 12;
- at that time, there was no objective information that she would be off work for a period of greater than 30 days; subsequent notes were made, each for about a month, but there was no certainty of a long-term absence for her;
- when the first semester ended, she again enrolled in two more courses for the winter term, despite providing sick notes on a month-to-month basis, and she applied for a teaching assistant position, which triggered a call to the employer;
- two courses per week, which frequently are held during working hours, and a 10-hour-per-week part-time job as a teaching assistant;
- the PhD requires a six-year commitment;
- Ms. Asare was not available to attend hearings scheduled for this

adjudication due to her academic obligations;

- she refused correspondence from the employer; and
- she did not act when she learned that she was on unauthorized leave.

[501] In *Lindsay v. Canada Border Services Agency*, 2009 PSLRB 62, the grievor's employment was terminated for non-disciplinary reasons on the basis that she had been absent from work without authorization for a period of several months and had provided no indication of her intent to return to work. The Adjudicator stated as follows at paragraphs 92 and 93:

> *[92] The grievor did not present any evidence to show that she could not return to work. Her only explanation was that she did not receive Mr. Sheridan's letter of November 7, 2001, until December 12, 2001. I am not convinced that this is true, but even if it is, the employer still had the right to terminate the grievor's employment, as it did. The grievor had already been advised in late August and in September 2001 that her employment could be terminated. It is reasonable to think that the grievor should have checked her mail in November and December 2001, knowing that she was on unauthorized leave. Furthermore, she did not try to contact the employer on December 12 or 13, 2001, after she allegedly received the employer's letter of November 7, 2001.*
>
> *[93] An employer is fully entitled to expect an employee to show up for work. That is an intrinsic part of the employment relationship and contract. The employee needs advance authorization to be absent from work. Such authorization is given according to the rules set out in the collective agreement. The only exceptions to that basic logic would be situations in which an employee cannot, for compelling reasons, contact the employer to obtain leave authorization. That is not the case here. Consequently, the employer had the right to terminate the grievor's employment for an administrative reason, namely that the employee was not available for work.*

[502] Did the circumstances relieve or excuse Ms. Asare from the obligation to contact the employer to obtain leave authorization in the circumstances of this case? The principal defence was that Dr. Kilby had instructed her not to communicate with management.

[503] It was understood from the grievor's evidence that that was the doctor's advice. Having heard from Dr. Kilby, it is inconsistent with that evidence, as his advice

was that the appropriate way to manage the situation was to deal with Human Resources and not line management. Dr. Kilby's advice was not specific to this workplace. Ms. Asare did not contact Human Resources in accordance with his advice. Every one of her medical certificates was mailed to management, her supervisor, or Mr. Ruseski's assistant, Ms. McFarlane. Given that she was emailing medical notes to management, it was logical for it to respond when seeking clarification of her situation. Had it been different, she should have expressed that.

[504] Dr. Kilby did not intend that she refuse any and all information. When asked about the August 3, 2012, letter to her requesting her consent to speak with him, he stated that he thought that it was improper. However, when asked about Health Canada's request, he thought that such a request was proper and that it should not be ignored.

[505] On July 17, 2011, she told him that she had been advised that she was deemed on unauthorized leave. He told her that it was serious and urged her to take action through the bargaining agent or a lawyer to resolve the matter.

[506] Ms. Asare did not act on the advice. Subsequently, the employer sent her two more letters, which she ignored. As in *Halfacree*, at para. 216, if the workplace situation prevented contact, she could have used the bargaining agent as a conduit. In the circumstances, one cannot conclude that there were compelling reasons to disregard the request for information.

[507] Counsel for the grievor will argue that the disability insurance claim to Sun Life was accepted. Sun Life is not delegated to make decisions about granting leave. There is no arbitral authority that would recognize Sun Life's role. To the extent that Ms. Asare thought that the approval of her disability insurance claim would regularize her status, the employer sent her two more letters. She made no inquiry as to whether the outstanding issue had been resolved.

[508] After two years on disability insurance, an employee must be able to take any position. This at least raises the question of whether she could have been assigned to work in an accommodated position. The employer never received comprehensive medical information or a request to accommodate.

[509] Certification of illness by a doctor may not be a sufficient reason for an employee to absent himself or herself from work. An employee claiming sick leave benefits is under a duty to disclose to his or her doctor activities inconsistent with either an inability to work or a recovery. If those activities are not disclosed, the medical certificate will not excuse the employee's absence from work. There is no evidence that Ms. Asare disclosed to Dr. Kilby in more than a limited way the fact she was pursuing her PhD program and working as a teaching assistant. His evidence was insufficient to justify her leave from August 11 to 16, 2012.

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

[510] This case is about abandonment. This is not a discipline case. There is a distinction in the tests to apply.

[511] As noted in *Laye v. Deputy Head (Department of Agriculture and Agri-Food)*, 2013 PSLRB 27, abandonment is akin to an employer deciding that an employee has resigned from employment. It is not a situation of an employee being suspended.

[512] In *Laye*, the Board noted that not only should the employer's decision that an employee has abandoned his or her position be reviewed on a reasonableness standard but also the employer is obligated to act fairly and in good faith when it terminates an employee for non-disciplinary reasons. See *Laye*, at para. 153. The employer did not act fairly or in good faith.

[513] Not one case was submitted in which an employee was deemed to have abandoned his or her position when he or she was absent on approved disability leave.

[514] The employer suggested that Sun Life is a private company, at arm's length from the employer. Long-term disability is a term and condition of employment. The employer was aware that Ms. Asare was pursuing a disability insurance claim. Mr. Ruseski participated in that process and was copied on the correspondence. The respondent's subsequent action to deem that Ms. Asare abandoned her position established bad faith on its part.

[515] The respondent's view of sick leave is draconian. It presumes that when on sick leave, an employee is at home or in the hospital. That view undermines the seriousness of the mental illness the grievor was suffering from.

[516] The weight of the evidence demonstrates that the grievor's illness prevented her from working in that workplace and in that environment. The essence of the medical tests supported her being off work for an extended period. Those are valid reasons.

[517] The employer authorized her absence on sick leave until April 26, 2012. It is abundantly reasonable for an individual who pursues a disability insurance claim through Sun Life that is approved to conclude that no further information would be required and there would be no need to communicate with the employer.

[518] In *Canada (Attorney General) v. Grover*, 2007 FC 28 at paras. 64 to 68, the Federal Court set out as follows the principle of balancing the interests of employees' privacy rights and employers' rights to manage a workplace:

> *[64] The adjudicator's analysis and her definition of the appropriate legal standard, springs directly from the applicable labour law jurisprudence. The foundational principle is that employees have a strong right to privacy with respect to their bodily integrity and a medical practitioner; therefore, a trespass is committed if an employee is examined against his or her will. Consequently, the employer cannot order an employee to submit to a medical examination by a doctor chosen by the employer unless there is some express contractual obligation or statutory authority. (*Thompson and Oakville (Town) *1963), 41 D.L.R. (2d) 294 (Ont.H.C.) at p. 302)*
>
> *[65] Notwithstanding the above, it is also well established that employers have an important obligation to ensure a safe workplace. This means employers have the right to know more about an employee's medical information if there are reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace.*
>
> *[66] It does not follow that an employer can automatically demand that an employee undergo a medical examination. Rather, to balance the employee's right to privacy and bodily integrity, the employer must explore other options to obtain the necessary information. If the employer is dissatisfied with these other options, including and in particular a medical certificate tendered by the employee, it has the duty to clearly explain to the employee or state the reasons why the information is insufficient. Again, this respects the employee's rights to privacy and allows him or her to assess the employer's objections and produce other information if needed. It is only after all of these steps have been canvassed that an employer can in certain instances insist that an*

> *employee must attend a doctor chosen by the employer. (*Air Canada and Canadian Airline Employees Association *(1982), 8 L.A.C. (3d) 82 (Simmons) at pp.13-14;* Riverdale Hospital and Canadian Union of Public Employees, Local 79 *(1985), 19 L.A.C. (3d) 396 (Burkett) at pp. 406-407;* Nelsons Laundries Ltd. and Retail Wholesale Union, Local 580 *(1997), 64 L.A.C. (4th) (Somjen) at pp. 125-127)*
>
> *[67] The Ontario Divisional Court recently affirmed the arbitral jurisprudence in this regard. In* Ontario Nurses' Association v. St. Joseph's Health Centre *(2005), 76 O.R. (3d) 22 (Ont.Div.Ct.), the Court ruled as follows:*
>
> > *[19] We were referred to a number of arbitral cases canvassing the issue of what information an employer can require of an employee returning from a medical leave. Not surprisingly, in view of the privacy interests involved, limits of reasonableness have been developed by arbitrators.*
> >
> > *[20] The weight of the arbitral cases is that employers are entitled to seek medical information to ensure that a returning employee is able to return to work safely and poses no hazard to others. The employee's initial obligation is to present some brief information from the doctor declaring the employee is fit to return. If the employer has reasonable grounds on which to believe that the employee's medical condition presents a danger to herself or others, the employer may ask for additional information to allay the specific fears which exist, explaining the reasons to the employee. The request must be related to the reasons for absence; no broad inquiry as to health is allowed. In my view, these are sound principles.*
>
> *[68] It is also important to emphasize again that the employer's interest must relate to safety. Concerns about the validity of an employee's sick leave cannot justify a demand for a medical examination. Indeed, there is a "fundamental difference" between requiring a medical examination for fitness to work versus testing the validity of an illness. (*Riverdale Hospital*, above at pp. 405-406)*

[519] In *Machacynski v. Treasury Board (Canada Border Services Agency)*, 2012 PSLRB 40, the Board referenced the following excerpts from Brown and Beatty, *Canadian Labour Arbitration* from the grievor's summary of arguments (at para. 33):

…

> …As a general rule, arbitrators have said that an employer can only demand medical verification of an illness or

> incapacity of a kind, in a form and at a time that is consistent with the terms of the agreement, and where there is a reasonable basis for so requiring… [para 8:3320]
>
> …Consistent with the normal rules of procedure and proof, the onus is on the employer to establish that whatever evidence the employee has provided is unsatisfactory.
>
> Even when an employer has a legitimate basis to insist that employees provide satisfactory medical certification for their absences and/or their fitness to return to work, its right is not absolute or unfettered. Both the circumstances in which and the manner by which the right is exercised must conform to the terms of the collective agreement and a general standard of reasonableness…Whatever the deficiency, there is a consensus that it is improper for employers to reject a medical certificate without explaining to the employee the basis for its doubts and specifying exactly what information is missing. [para 7:6142]
>
> …As well, there is a general consensus that while an employer has a legitimate basis on which to demand a medical certificate from the employee's own physician when a claim for a health benefit is made, it cannot insist that the employee submit to an examination by its own doctor, or by one not of his or her own choosing… [para 8:3320]
>
> …

[520] In that case, the adjudicator upheld the grievance and concluded that the employer had reacted to the grievor's medical diagnosis in an unreasonable and rash manner.

[521] In *Major v. Deputy Head (Department of Fisheries and Oceans)*, 2017 PSLREB 27, the Board found when an underlying decision behind a declaration of abandonment was not legitimate, the abandonment decision was not allowed. In that case, the employer incorrectly believed that it could reassign an employee to a different position in a different geographic area without obtaining her consent.

[522] In this case, Mr. Ruseski's letters to Ms. Asare exhibit a certain unfairness and personal motivation. The respondent called no witnesses from Labour Relations, Human Resources, or Compensation and Benefits. The absence of those branches in the communications with the grievor is an important fact. While Mr. Ruseski might have involved other branches to varying degrees, he wrote all the letters. He did not involve Mr. Hards or the bargaining agent. He did not bother to copy the bargaining agent on the letters, other than the one that deemed that Ms. Asare had abandoned her

position.

[523] Ms. Asare testified about her employment background. Her performance appraisal dated May 31, 2011, indicates that she achieved her objectives and that she was a good employee.

[524] The case cannot be separated from the underlying cause of her absence, which flows from the harassment complaint that was rejected 10 days after it was made. The employer's response led to her going on sick leave after the August 11, 2011, meeting.

[525] A reasonable person reviewing Mr. Ruseski's August 11, 2011, letter would conclude that it was disciplinary in nature. The letter and the response to the harassment complaint led to the medical reaction.

[526] Disability is the reason she went off work. An employee made a plea for help. She asked for personal leave, which was rejected. She asked for a different supervisor; she was rejected. She asked for educational leave; it was refused. Ultimately, she went on sick leave.

[527] The respondent implied that she orchestrated the sick leave so that she could pursue her PhD. This is absurd. The August 11, 2011, letter acknowledges a concern about her health. Mr. Ruseski acknowledged that she might have been suffering from a disability and advised her to seek help. The August 16, 2011, letter reflects that she asked to be reassigned to another supervisor. Mr. Ruseski stated that that would be premature. A combination of letters pushed her into sick leave.

[528] The medical certificates were not challenged when they were submitted. They were accepted. There was confusion over the leave forms; however, there was a reasonable interaction until the end of 2011. She made efforts to find a family doctor and did so in November 2011.

[529] At the meeting with Dr. Kilby on November 2, 2011, she indicated to him that she was a full-time student pursuing her PhD in economics and a full-time employee with Indian and Northern Affairs and that she had not been at work since August 12, 2011. He advised her that she had to get out of that work environment and that she was not in a position to return to the workplace until she received a psychiatric assessment.

[530] Ms. Asare had advised Dr. Fisher that she had worked as a research assistant and that she had had no difficulties in that context.

[531] Her counsellor had advised her to pursue her education.

[532] With respect to an employee's duty to communicate activities inconsistent with sick leave, the evidence does not establish that the grievor's activities were so inconsistent. Being a teaching assistant is completely different from working in a toxic work environment. She saw it as therapeutic. It was part of her PhD program, and she was not paid for the work but rather received a credit towards her tuition. She had done it both before and after she went on sick leave. She had every intention of pursuing full-time employment and her education.

[533] As time progressed, she pursued a disability insurance claim. She completed the related form on March 20, 2012.

[534] On April 22, 2012, she wrote to Compensation and Benefits, requesting that the employer complete its statement with respect to the disability insurance forms. This was an instance of an employee communicating with her employer and disclosing that she was pursuing a disability insurance claim; it was not an instance of an employee intending to resign her position.

[535] There may be issues around how Ms. Asare should have handled the letter sent in January 2012 with respect to the call the employer received from the University of Ottawa.

[536] Both Ms. Asare and Dr. Kilby testified that she had been advised not to communicate with her supervisor. Her evidence was that she understood that Dr. Kilby's advice meant that she should not communicate with Mr. Ruseski. However, she communicated with Human Resources on April 22, 2012, and with the bargaining agent. She contacted Mr. Vézina to advise him that she did not want management to contact her while she was on sick leave and that she wanted that information conveyed to the employer. Those were not the actions of someone abandoning her employment. She suffered from depression that prevented her from reporting to work, which was a valid reason for not communicating with her employer, by any objective standard.

[537] Not only did she contact Mr. Vézina in February 2012, but also, she followed up with him. She took the positive step to ensure that management received her message as conveyed by the bargaining agent.

[538] In her email to Mr. Vézina of November 29, 2012, enclosing her draft complaint, she requested that he file a grievance against Mr. Ruseski for stating that she was on an unauthorized absence. That was not the action of an employee abandoning employment. In the draft complaint, she stated that she had been unable to return to work due to illness.

[539] On July 31, 2012, she was advised by letter that Sun Life had approved her benefits claim based on the medical advice submitted. The letter was copied to the employer. While she might have understood that the employer had revoked her leave, the approval of her benefits claim would have led a reasonable person to believe that there was no need for further communication with the employer until she was ready to return to work.

[540] On February 8, 2013, she wrote to Mr. Vézina, indicating that correspondence could be sent to her home address.

[541] On April 10, 2013, subsequent to the termination, the employer acknowledged the grievor's January 23, 2013, letter that included a medical certificate dated January 14, 2013, and signed by Dr. Kilby that stated that she was able to return to work on February 1, 2013.

[542] Certainly, the employer had been aware that Ms. Asare was pursuing disability insurance benefits.

1. <u>Discrimination claim</u>

[543] The employer's statement on the disability insurance claim asked if the employee could to return to work on a reduced-hours basis. The answer box chosen was "No". The employer stated on the form that it is small and that it is frequently called upon to undertake urgent and ad-hoc requests or to participate in meetings called on short notice. The grievor had a specialized background that was not suitable for work in other parts of the branch or sector.

[544] She did not receive or review the specific letters sent to her until March 2013, after the termination of her employment.

[545] She sought medical advice. She was advised not to communicate with her supervisors.

[546] The employer's response to the information that the University of Ottawa provided was unfair and disproportionate in the context of the case. When Mr. Ruseski discovered the information, he engaged in a letter-writing campaign and did not involve Labour Relations or Human Resources. He wrote things like, "Come to my office", and "I want to speak to your doctor." There is an element of bullying or ongoing harassment in the letters. He wrote to the University of Ottawa without securing Ms. Asare's consent.

[547] The employer might have had questions about Ms. Asare's educational activities. It was also aware of the medical certificates. What would have prevented it from backing off and addressing these issues when she returned from leave?

[548] This investigation went above and beyond what is reasonable by the University of Ottawa being written to directly. It was unfair. While it is appreciated that an employer may be entitled to information, the tone of the letters indicated that it was going down the road of accusing her of fraud.

[549] She never received a letter from Health Canada asking her to consent to a medical examination.

[550] Mr. Ruseski had a number of different options. Rather than pursuing his letter-writing campaign, he ought to have involved Human Resources. Once he learned that the disability insurance claim was allowed, he should have backed off. His conduct was shameful and disrespectful to a person on sick leave.

[551] In his letter to Health Canada on April 26, 2012, requesting a fitness-to-work evaluation for Ms. Asare, Mr. Ruseski noted that on February 21, 2012, her bargaining agent representative contacted Mr. Hards of Labour Relations to advise that she had informed him that her doctor had indicated that there should not be any contact with the Director.

[552] Ms. McFarlane phoned Ms. Asare's residence to advise her that correspondence was being sent to her and that she should receive it on Monday, April 30, 2012. In response to a question from Ms. Asare's parents, Ms. McFarlane stated that she did not know what was in the envelope. Mr. Ruseski made no attempt to contact the bargaining agent.

[553] Ms. Asare did not abandon her employment. She was suffering from a disability that was verified by Dr. Kilby. His qualifications as outlined on his CV speak for themselves. He was well placed to make a diagnosis of depression. The other expert reports corroborating that evidence were uncontested. The evidence is that she was sick and that she was focused on her recovery.

[554] The employer, aware of her illness, demanded that she provide a valid explanation for her conduct, which was entirely unreasonable. That demand was not made in good faith. The employer made an unreasonable conclusion and a harsh and unjust reaction to a telephone call from the University of Ottawa. It believed wrongly that the grievor was engaged in fraudulent activity.

[555] The grievance against her termination for abandonment should be upheld. There is a *prima facie* case of discrimination. The employer ignored the medical evidence that it possessed. It refused to accommodate her in August 2011, when she sought different types of accommodation. By the time she was ready to return to work, her employment had been terminated. The grievor asked that the Board find that the termination was unjustified and discriminatory.

[556] A number of the authorities that the employer cited involved disciplinary action. *Halfacree* involved very different facts. The same unfit-for-work notes were submitted over and over again. The analysis does not apply to abandonments.

[557] In *Alberta (Infrastructure and Transportation)*, a grievor was not suitably forthcoming in a timely manner to disclose her continuing outside work, which raised suspicions and left her open to a disciplinary response. However, discharge was too severe.

[558] *Kenroc Tools* concerned a five-week suspension, not a termination.

C. <u>The respondent's reply argument</u>

[559] With respect to the second issue in the case, the duty to accommodate, the bargaining agent argued that the employer failed to accommodate the grievor in August 2011, when she asked for a change in supervisors.

[560] At that time, there was no reference whatsoever to Ms. Asare being ill. The grievance relates to the abandonment of her position, not to an incident involving her supervisor 1.5 years earlier.

[561] It was also alleged that there was a failure to accommodate the grievor, as evidenced by the comments in the employer's statement with respect to her disability insurance benefits application. The form stated to the effect that reduced hours were not available. There was no evidence that reduced hours were available. Ms. Asare never asked to come back to work during that time frame.

[562] An employee has an obligation to cooperate in an accommodation process. In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 994, the Supreme Court of Canada stated that the search for accommodation is a multiparty inquiry. Along with the employer and the union, there is also a duty on the complainant to help secure appropriate accommodation.

[563] In *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4 at para. 99, the Board stated as follows:

> ***99*** *The Supreme Court of Canada noted in* Central Okanagan School District No. 23 *that employees seeking accommodation have a duty to cooperate with their employers by providing information as to the nature and extent of their accommodation needs, which will enable the employers to determine the necessary accommodations. The employer asked the grievor to clarify his needs, and he provided none, other than that he needed the leave for general family reasons, which can hardly be considered cooperating with the employer in its search for a suitable accommodation. The grievor provided no clarification of his needs when asked, and it is unfathomable that the employer should be considered to have acted unreasonably because, as the grievor's representative argued, "It did not ask the right questions." If the grievor was not willing to be open and forthright in identifying his needs, then the employer cannot be held responsible.*

[564] No request for accommodation was made, and the respondent cannot be held responsible for acting in a discriminatory manner.

[565] Although a number of the cases referred to involved disciplinary responses, the principles are from general labour law cases, in which employees were on leave.

[566] Discipline was not a realistic response in this case. Ms. Asare was not in the workplace. It required a different approach.

[567] The respondent had no information on Ms. Asare's condition. It would be speculative at this point to suggest what its actions might have been had it had this information.

[568] The employer had received five copies of medical certificates before it learned that the grievor was enrolled at the university and was employed as a teaching assistant. Until then, there was no reason to challenge the notes. However, that information gave rise to legitimate concerns. The employer adopted a reasonable approach to find out more information in light of the conflicting information it suddenly possessed. All it wanted was for Ms. Asare to come in and explain what was going on.

[569] It was argued that there was no need for Ms. Asare to provide any further information because Sun Life had approved her claim. If the employer had that information in hand and had no other information, it might be different; however, the employer still had the other information provided by the University of Ottawa and had treated the grievor's absence as unauthorized.

[570] Its decision was not capricious. The employer tried twice more to contact Ms. Asare. The tone of the letters was very standard. They were drafted in conjunction with Labour Relations.

[571] The authority to communicate with employees is delegated to line management. It is not up to Ms. Asare or Dr. Kilby to dictate how management should organize its affairs.

[572] With respect to the position that she did not respond because she had a mental illness, Dr. Fisher's report was referred to as evidence. However, Dr. Fisher did not testify, and so the report should be given little weight. Similarly, Ms. Asare testified

about what her counsellor had advised her to do. Her counsellor did not testify, so the Board cannot put much weight on the evidence.

[573] It was suggested that Mr. Ruseski acted inappropriately by writing to the University of Ottawa. The university triggered legitimate concerns with respect to her medical condition. Only when he was unable to obtain clarification did Mr. Ruseski make his abandonment decision.

[574] It was suggested that the respondent should have waited until Ms. Asare returned to work before pursuing a clarification of her condition. The information that the University of Ottawa provided raised legitimate concerns about her sick leave. The employer was entitled to know more. There was no evidence that she was ever coming back.

[575] With respect to the discussion between Mr. Vézina and Mr. Hards on February 21, 2012, during which Mr. Vézina informed Mr. Hards that Ms. Asare had informed him that her doctor had indicated there should not be any contact with the Director, there is no reference to this limitation in any of the medical certificates.

D. The grievor's reply

[576] The decision to terminate the grievor was discriminatory. The duty to accommodate was never triggered.

V. Analysis

1. Was the respondent's decision deeming that Ms. Asare abandoned her position reasonable?

[577] In *Laye*, I concluded that even though the deputy head's express authority to terminate employment by reason of abandonment was repealed by the *Public Service Reform Act* (S.C. 1992, c. 54), the provisions of the same statute expressly empowering the deputy head to terminate employment for non-disciplinary reasons include in that broad authority the power to terminate employment by reason of abandonment.

[578] Section 12(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11) empowers the deputy head to terminate employment or to demote to a position at a lower maximum rate of pay persons employed in the public service for reasons other than breaches of discipline or misconduct.

[579] Based on the jurisprudence, I found in *Laye* that even in the absence of an express definition of abandonment in the legislation, the employer's guidelines, or the collective agreement, an employee may still be deemed to have abandoned his or her position in circumstances in which he or she has been absent from work for a significant period of time without authorization and without valid reasons, under circumstances within his or her control, and without notice to the employer, unless the employee shows that he or she was unable to notify the employer because of exceptional circumstances.

[580] I also concluded based on a review of the jurisprudence that the employer's decision to deem an employee to have abandoned his or her position should be reviewed on a standard of reasonableness. The employer's decision is reasonable if, when viewing the factual situation at hand, it decides that the employee's conduct, viewed objectively, supports a conclusion of abandonment.

[581] I also concluded on the basis of arbitral jurisprudence that there is an obligation on the employer to act fairly and in good faith when terminating an employee for non-disciplinary reasons and that when appropriate, the principles of notice, waiver, and condonation may apply.

A. Absence for a significant period of time

[582] Applying these principles to the facts in this case, was the grievor absent from work for a significant period? She left work on August 12, 2011. Her employment was terminated on November 13, 2012, a period of one year and three months.

[583] In *Hayter*, at para. 65, Adjudicator Filliter stated that no definite line can be drawn between periods that will support a declaration of abandonment and that each case must be evaluated on its own merits, within its own context. Standing on its own as a factor to be considered in support of a declaration of abandonment, a period of absence from work of one year and three months appears to me to be a significant period of absence.

B. Without authorization

[584] However, it is only the period of time that the grievor was on unauthorized leave that is material for my analysis of this issue. The grievor's leave was treated as authorized from August 12, 2011, until April 20, 2012, when Mr. Ruseski advised

Compensation and Benefits that she was considered on unauthorized leave without pay. On April 26, 2012, Mr. Ruseski wrote a letter to Ms. Asare advising her that she was considered on unauthorized leave. It was sent to her by email and by courier. It was returned as "refused to be accepted". Ms. Asare did not respond to the request. Moreover, Mr. Ruseski instructed Compensation and Benefits that this unauthorized leave without pay was to be made retroactive to August 9, 2011. The reason he gave for that consideration was that she had not provided the originals of the medical certificates, had not provided leave forms, and had not replied to his January 25, 2012, letter, which requested a meeting to discuss the information that the University of Ottawa had provided to him.

[585] I cannot accept the respondent's position that the grievor was on unauthorized leave from August 2011. Until April 2012, the respondent had not taken issue with the way in which the grievor was providing it with medical certificates, nor had it prior to this date demanded the originals of the medical certificates or leave forms.

[586] On July 3, 2012, Sun Life advised the grievor that the employer considered her on unauthorized leave. As well, in Dr. Kilby's notes of the grievor's visit on July 17, 2012, there is a notation stating that the employer said that she was on unauthorized leave.

[587] The bargaining agent took the position that it is abundantly reasonable for an employee whose disability insurance claim through Sun Life is approved to conclude that no further information would be required and that there would be no need to communicate with the employer. I disagree. There is a contractual obligation between an employer and an employee that results in obligations on the part of the employee when he or she is made aware that he or she is on unauthorized leave.

[588] Given the above, I am left with determining what period of time the grievor was on unauthorized leave. What I am left with is that Mr. Ruseski placed Ms. Asare on unauthorized leave as of April 26, 2012, and the grievor knew this at the latest by July 3, 2012.

[589] The grievor was terminated on November 16, 2012, which, at best for the respondent, is less than 7 months after being declared on unauthorized leave. While I am now dealing with a considerably shorter period of time, it may have still been a sufficient amount of time to justify termination for abandonment of position.

However, given my findings on the next aspect of the test for abandonment, it is unnecessary for me to make that determination. I note that even if I were satisfied that the grievor had been on unauthorized leave since August 2011, as per my findings below, her absence since that time was for valid medical reasons.

C. Without valid reasons

[590] The bargaining agent argued that the weight of the medical evidence demonstrated that her illness prevented her from working in that workplace and in that environment. The essence of the medical tests supported her being off work for an extended period. Those are valid reasons for her absence that were not within her control.

[591] A review of the evidence indicates that in his August 11, 2011, letter to Ms. Asare, Mr. Ruseski acknowledged a concern about her behaviour, and he advised her that she may wish to seek assistance. As of August 16, 2011, Ms. Asare had only 29.125 hours of sick leave with pay remaining. In the employer's statement with respect to disability insurance claim Mr. Ruseski made the following observation:

> *Since late April, 2011, the immediate supervisor began noting that the employee's behaviour became increasingly erratic and her performance deteriorated. More specifically, she was unable to concentrate, confused, anxious, withdrawn and disruptive.*

[592] The report of Dr. Fisher, the psychologist, dated October 4, 2011, was introduced into evidence not for the truth of its contents with respect to the harassment allegations but with respect to the state of Ms. Asare's mind at the time. The report concluded that Ms. Asare suffered from a valid disorder.

[593] Dr. Fisher recommended that the grievor be referred to a psychiatrist, that she remain on short-term disability until she had consulted that specialist, that a return-to-work schedule should be implemented on a gradual basis, and that a liaison be delegated to communicate information pertinent to Ms. Asare's workload rather than it coming directly from her manager.

[594] The grievor saw Dr. Kilby in December 2011. He ultimately became her regular physician. Dr. Kilby testified that she was suffering from a disability. The other expert reports of the psychologist and ultimately the psychiatrist, Dr. Legeix, corroborated

that opinion.

[595] In December 2011, Dr. Kilby described the grievor's symptoms as poor concentration, anxiety, insomnia, appetite decrease, and isolation. He opined that the condition was due to illness caused by employment, noting that she felt that she was a victim of harassment at work and that she had been traumatized by the experience and left shaken and depressed. His diagnosis was listed as major depression, anxiety, and work-related stress. In February 2012, he extended the medical leave to an indefinite duration.

[596] Dr. Kilby confirmed that a number of Dr. Fisher's recommendations were followed. A referral was made to a psychiatrist. The grievor remained on short-term disability until she had consulted this specialist. The recommendation that a return-to-work schedule be implemented on a gradual basis could not be done at that time. With respect to a liaison being delegated to communicate information pertinent to Ms. Asare, he recommended that the liaison should not be her manager.

[597] On July 5, 2012, he prescribed medication for Ms. Asare's condition.

[598] On July 9, 2012, Dr. Kilby completed his report for Sun Life, in support of the grievor's disability insurance application. On July 31, 2012, Sun Life approved Ms. Asare's LTD claim effective December 14, 2011.

[599] On November 2, 2012, Dr. Kilby noted that Ms. Asare was beginning to respond to medication and that she was feeling better.

[600] In November and December 2012, the grievor consulted a psychiatrist, Dr. Legeix.

[601] On January 14, 2013, after meeting Ms. Asare, Dr. Kilby signed a medical certificate indicating a return to work for February 1, 2013, for her based on his assessment.

[602] On February 8, 2013, Dr. Kilby received the psychiatrist's report. Dr. Legeix confirmed the diagnosis of anxiety and depression and concluded that stressors at work were a contributing factor to her disability. As of November and December 2012, Dr. Legeix assessed her as being well enough to carry out all the functions of daily living but recommended that she remain on medication and that she continue

psychotherapy.

[603] The respondent argued that the issue was not whether the grievor was able to attend work but since she had left work, she was under an obligation to substantiate to the employer's satisfaction that her medical condition excused her failure to attend work. I agree that this is an issue in the case, but in my respectful view, it is an issue separate and distinct from that of whether there were valid reasons for her absence that were beyond her control.

[604] The respondent further argued that illness has not been demonstrated and that a doctor's certificate of illness may not be sufficient reason for an employee to absent himself or herself from work as an employee claiming sick leave benefits is under a duty to disclose to the doctor activities that are inconsistent with either an inability to work or recovery. If that is not done, the medical certificate will not excuse the employee's absence from work. It was argued that there was no evidence that the grievor had disclosed to Dr. Kilby in more than a limited way the fact she was pursuing her PhD and working as a teaching assistant.

[605] In his visit with her on November 2, 2011, Dr. Kilby noted that Ms. Asare was a full-time student pursuing a PhD in economics and a full-time employee at Indian and Northern Affairs on sick leave. When asked whether he was aware that while she was pursuing her PhD, she was engaged by the university as a teaching assistant, he said that he might have been aware of it. He did not recall advising her in this respect, but he stated that if she did work as a teaching assistant, it might have been therapeutic for her to work in that environment. The record indicates that she worked as a teaching assistant at the university during the fall of 2011 and that she did not work there in any capacity during 2012.

[606] Ms. Asare testified that her counsellor advised her to become involved in activities that contributed to her well-being. She told her counsellor about working as a teaching assistant. The counsellor thought it would be a therapeutic contribution to her recovery as the atmosphere was different from her regular workplace.

[607] I have concluded that the weight of the evidence demonstrates that the grievor's illness prevented her from working in the respondent's workplace and in that environment during the period of her certified illness. The three medical opinions support that conclusion. In my view, on balance, given the nature of her disability and

its linkage to the respondent's workplace, I am not persuaded that it was inconsistent with her inability to work there, to pursue her studies, and to work as a teaching assistant during the fall of 2011.

[608] Therefore, I find that there were valid reasons for her absence from the respondent's workplace from August 12, 2011, up to and beyond the date of her termination on November 16, 2012, that were not within her control.

[609] Therefore, I conclude that the respondent's decision deeming that Ms. Asare abandoned her position was unreasonable.

2. Did the respondent discriminate against the grievor on the basis of her disability by terminating her employment?

[610] The grievor alleged that her termination was discriminatory in violation of the *CHRA* and article 16 of the collective agreement.

[611] According to s. 226(2)(a) of the *Act*, 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.

[612] Section 7 of the *CHRA* provides that it is a discriminatory practice to refuse to continue to employ any individual on a prohibited ground of discrimination.

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

[614] 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 was one of the factors in the employer's decision (see *Holden v. Canadian National Railway Company* (1990), 14 C.H.R.R. D/12 (F.C.A.) at para. 7). The standard of proof in discrimination cases is the civil standard of the balance of

probabilities (see *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FC 789).

[615] The issue of whether the employer discriminated against Ms. Asare on the basis of her disability in terminating her employment as alleged in the grievance is inextricably linked to the previous issue that I have analyzed.

[616] The employer terminated Ms. Asare's employment for non-disciplinary reasons.

[617] I have no difficulty finding on the evidence presented before me that a *prima facie* case of discrimination has been established. To demonstrate *prima facie* discrimination, Ms. Asare had to show that she had a characteristic protected from discrimination under the *CHRA*, that she experienced an adverse impact with respect to her employment, and that the protected characteristic was a factor in that adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33).

[618] Firstly, Ms. Asare had a characteristic protected from discrimination under the *CHRA*. One of the prohibited grounds listed in s. 3 of the *CHRA* is disability. Under s. 25, disability is defined as meaning "… any previous or existing mental or physical disability …". The medical evidence before me was overwhelming that Ms. Asare suffered from a disability. Secondly, she experienced an adverse impact with respect to her employment -- she was terminated.

[619] The evidence further establishes that her disability was a factor in her termination. In this regard, although more could be highlighted, it will suffice to refer to several key facts to support this finding. First, the respondent was informed on February 22, 2012, by Dr. Kilby that the grievor's medical leave had been extended for an indefinite period. Second, Ms. Asare applied for Sun Life LTD on March 20, 2012. Sometime thereafter, Mr. Ruseski, reluctantly and with qualifications, completed the employer's portion of the LTD claim form. On July 31, 2012, Sun Life advised Ms. Asare that her LTD benefits application had been approved effective December 14, 2011; this letter was copied to the respondent's Compensation and Benefits personnel. Thus, as at the date of her termination, the respondent knew, or is deemed to have known, that Ms. Asare was on LTD, and it knew that she was on certified medical leave. Lastly, I refer to two letters from Mr. Ruseski to Ms. Asare. In the August 3, 2012, letter, Mr. Ruseski writes to the grievor, seeking her consent to contact Dr. Kilby.

In the termination letter dated November 16, 2012, Mr. Ruseski references, *inter alia*, the August 3rd letter, and states: "The purpose of the letters were to give you a chance to explain your absence from work; to seek your consent for a Fitness to Work Evaluation (FTWE) with Health Canada and to seek your consent to contact your doctor." Mr. Ruseski links her termination for abandonment with her failure to comply with his requests for further medical information. I have no hesitation in finding that Ms. Asare's disability was a factor in Mr. Ruseski's decision to terminate the grievor's employment.

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

[621] The respondent has not met its evidentiary onus of providing a reasonable non-discriminatory explanation for its decision to terminate Ms. Asare. This is not surprising given my conclusion on the previous issue, namely, that the termination for abandonment was unreasonable.

[622] This only leaves a statutory *bona fide occupational requirement* (*BFOR*) defence to the *prima facie* discrimination. Subsection 15(2) of the *CHRA* sets out a statutory defence to what would otherwise be a discriminatory practice. The applicable portions of s. 15 of the *CHRA* read as follows:

> *Exceptions*
>
> ***15.*** *(1) It is not a discriminatory practice if*
>
> *(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a* bona fide occupational requirement*; (…)*
>
> *Accommodation of needs*
>
> ***15.*** *(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a* bona fide occupational requirement*…it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have*

> *to accommodate those needs, considering health, safety and cost.*

[623] The respondent argued that employees have an obligation to cooperate in the accommodation process. It relied on *Renaud*, in which the Supreme Court of Canada stated that the search for accommodation is a multiparty inquiry and that along with the employer and the bargaining agent, there is also a duty on the complainant to help secure appropriate accommodation. Relying on *Nash*, the respondent submitted that no request for accommodation was made; thus, it cannot be held responsible for acting in a discriminatory manner.

[624] On February 22, 2012, Dr. Kilby completed a medical certificate that was provided to the employer and that certified that Ms. Asare would be absent for medical reasons from August 12, 2011, for an indefinite period. He noted that at that time, he was not able to see a timely end to the period of disability.

[625] On July 9, 2012, he wrote to Sun Life, noting that at that time, the grievor was suffering from severe depression. At that time, he believed that her disability would continue for at least another six months.

[626] During her visit on November 2, 2012, he observed that she was beginning to respond to medication and that she was feeling better.

[627] He met with her on January 14, 2013, when he signed a medical certificate indicating that she was ready to return to work as of February 1, 2013.

[628] Based on the evidence before me, I conclude on the facts of this case that the circumstances did not give rise to a duty to accommodate before Ms. Asare's employment was terminated on November 16, 2012, as she was not cleared to return to work until February 1, 2013. Had she returned to work on or about February 1, 2013, depending on the recommendations of her doctor, accommodations may have been necessary. If so, there would have been a multiparty obligation, including an obligation on the grievor, to cooperate in the accommodation process. I note that while there are references at various points in both the documentary and *viva voce* evidence to accommodation, for the material time before me, namely August 12, 2011, to November 16, 2012, the grievor was clearly not in a return to work situation. In any event, the respondent has not demonstrated that it was impossible to accommodate the grievor during the material time to the point of undue hardship.

The grievor had been on sick leave without pay until placed on unauthorized leave by Mr. Ruseski on April 26, 2012. No accommodation was offered to the grievor during this time period. Accordingly, the respondent has not established a statutory *BFOR* defence to justify the discrimination.

[629] Therefore, I conclude that the respondent's decision to terminate the grievor's employment on November 16, 2012, constituted a discriminatory practice contrary to s. 7 of the *CHRA*.

3. Did the grievor fail in her obligation to disclose to the respondent in a timely way the fact that she was pursuing her PhD and working as a teaching assistant while on approved sick leave?

[630] Based on the jurisprudence, it is clear that one part of the employment relationship is an employee's obligation to show up for work. When an employee fails to, he or she owes the employer an explanation for that absence. Furthermore, as absences grow in number and duration, the evidence necessary to satisfy that obligation becomes more substantial (see *Halfacree*).

[631] As stated as follows in *Saskatchewan (Labour Relations and Workplace Safety)*, at paras. 56 and 57:

> *[56] The most fundamental need of an Employer is to maintain its operations and services without interruption; to this end it is necessary to have its workforce in regular attendance. Correspondingly, the most fundamental obligation of an employee is the requirement to be at work.…*
>
> > The important determinations we are asked to make involve a careful balancing of interests. Arbitrators have attempted to balance the interests of an employee's right to privacy with respect to medical information against an Employer's legitimate business interests, including prevention of abuse of sick leave benefits…
> >
> > … Generally, an employer's right to information increases the longer the leave.…
>
> *[57] The onus is on an employee to establish entitlement to paid sick leave benefits, "typically this requires an employee establish that their absence is legitimate, that is, they are genuinely unable to report for work due to illness or injury.…" ….*
>
> > There may be individual cases where more information is required from an employee in order to assess the sick leave request. This is particularly so when there are

> issues about the employee's fitness to return to work and/or need for accommodation. There may be circumstances wherein assessing a claim for sick leave or in an investigation of alleged abuse of sick leave, an employee may be required to disclose greater information than simply an inability to work. An employee might even be obliged to disclose a diagnosis. However, this would be an exception to the general rule which is to minimize intrusion.…

[632] The respondent argued that Ms. Asare was under a positive obligation when using sick leave to make it aware of activities that might appear inconsistent with leave for medical reasons.

[633] On the facts, the respondent argued that initially, it accepted the medical notes at face value. The absence stretched to four months, and then the medical notes indicated an indefinite time before a return to work would take place. In January 2012, the employer learned from the University of Ottawa that the grievor was enrolled as a PhD student and that she was engaged as a teaching assistant. It wrote to Ms. Asare to request that she attend a meeting to explain the situation. She did not meet with the employer to explain the situation. She refused further correspondence from the employer and asked her father to notify the University of Ottawa not to disclose to the employer any information. Subsequent correspondence requesting that she agree to a Health Canada fitness-to-work evaluation and that she consent to the employer contacting Dr. Kilby went unclaimed and unanswered.

[634] The bargaining agent submitted that both Ms. Asare and Dr. Kilby testified that she had been advised not to communicate with her supervisor, which she understood to include Mr. Ruseski. On the facts before me, I find this submission somewhat disingenuous. Ms. Asare had not contacted Mr. Vézina, or anyone from the bargaining agent, about her situation at any time before finding out from the University of Ottawa that her employer was making inquiries about her activities at the university. Up until that point, she had not informed her employer that her supervisors were not to contact her. It was only after the University of Ottawa informed her that her employer was making these inquiries that she drastically changed the communication channels.

[635] The bargaining agent argued that she communicated with Human Resources and with her bargaining agent to advise management that she did not wish to be contacted while she was on sick leave. On July 31, 2012, she was advised that Sun Life

had approved her LTD benefits claim based on the medical advice submitted. The letter was copied to her employer. Based on the fact that the letter was copied to the employer, she believed there was no need for further communication with it until she was ready to return to work.

[636] In *Alberta (Infrastructure and Transportation)*, at para. 51, Arbitrator Jolliffe stated as follows with respect to the facts in that case:

> ***51*** *Certainly, on all the circumstances presented, the case can be distinguished from that situation where a healthy employee chose to book off his or her hours with one employer while working later or earlier the same day with another employer, done for his or her own purposes without any real or sufficient connection with any health related issue. Here, we are left with the grievor not having been suitably forthcoming in a timely manner to disclose and discuss her continuing outside work attendances, raising suspicions, concerning which she was able to garner medical support for the last year. The grievor left herself open to a disciplinary response, but not capable of justifying her discharge.*

[637] In my view, the grievor did not fulfil her obligation to fully explain her absence on the facts of this case. She should have disclosed to her employer in a timely way the fact that she was pursuing her education at the University of Ottawa and was engaged as a teaching assistant. I note that she had every intention of continuing as a teaching assistant for the following winter term in 2012 until she became aware that her employer found out about her activities at the University of Ottawa. While I understand her reluctance to engage with her line superiors based on the advice of Dr. Fisher and Dr. Kilby, she did not follow Dr. Fisher's or Dr. Kilby's advice to establish a liaison with the employer, either with Human Resources or Compensation and Benefits or through her bargaining agent. Even her counsel in his arguments before me conceded that there may have been issues around how Ms. Asare should have handled the letter sent in January 2012 with respect to the call Mr. Ruseski received from the University of Ottawa.

[638] Although it is no excuse for not disclosing these facts to her employer in September 2011, she learned in January 2012 that the employer had become aware of these facts purely by happenstance. Rather than fulfilling her obligation to fully explain the facts, she instructed the University of Ottawa not to provide any further information to the employer. She took no steps to appoint a liaison or to arrange

through her bargaining agent to provide the necessary explanation to the employer. In July 2012, she learned from Sun Life that she had been placed on unauthorized leave. She raised it with Dr. Kilby, who advised her to resolve the situation with counsel or her bargaining agent. She took no steps to do so and fulfil her obligations to the employer. I cannot help but conclude that in the circumstances of this case, she contributed in a significant way to her employment difficulties.

[639] In conclusion, I have found that there were valid reasons not within her control for her absence during the period from August 12, 2011, to November 13, 2012, and that in the circumstances of this case, the respondent's decision to deem Ms. Asare to have abandoned her position was not reasonable. I have also concluded that the employer discriminated against her on the grounds of disability. Finally, I have concluded that the grievor failed to fulfil her obligation to fully explain her absence to the employer on the facts of this case.

[640] The parties have requested that I not deal with the remedial issues arising in this case and that I remit those issues to them to attempt to resolve. I will remain seized for 60 days following the issuance of this award. If the parties are unable to resolve the remedial issues, they may bring the matter back before me within the stipulated time.

[641] I note in closing that under s. 228(2) of the *Act*, I must make the order(s) that I consider appropriate in the circumstances. Should the issue of remedies come back to me, my conclusion with respect to the grievor's failure to fulfill her obligation to fully explain her absence will have a direct bearing on any remedies that I award arising from both the findings of unreasonable termination and discriminatory practice.

VI. Decision

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

(The Order appears on the next page)

VII. Order

[643] The grievance is allowed. I will remain seized for a period of 60 days if the parties are unable to resolve the remedial issues.

July 5, 2018.

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