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Citation: 2018 FPSLREB 76

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

KEITH HERBERT

Grievor

and

DEPUTY HEAD
(Parole Board of Canada)

Respondent

Indexed as
Herbert v. Deputy Head (Parole Board of Canada)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Craig Stehr and Sean McGee, counsel

For the Respondent: Michel Girard, counsel

File:

Heard at Ottawa, Ontario,
January 4 to 8 and 17, August 8 to 10, and November 1 and 2, 2016.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

1 Keith Herbert ("the grievor") was employed by the Parole Board of Canada ("PBC" or "the employer") as a strategic planning analyst ("SPA"). By letter dated April 23, 2015, he was terminated from his position effective May 22, 2015.

2 On April 24, 2015, the grievor grieved the employer's decision to terminate his employment and alleged that it had discriminated against him with respect to his disability in an ongoing manner, violating both the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*") and the collective agreement entered into between the Treasury Board ("TB") and the Public Service Alliance of Canada ("the Alliance") for the Program and Administrative Services Group that was signed on March 1, 2011, and that expired on June 20, 2014 ("the collective agreement"). As relief, his request included the following:

- that he be reinstated immediately;
- that he be accommodated in accordance with the *CHRA* and the TB's *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service* ("the DTA policy");
- that he be compensated for all losses, including pay and benefits and any additional expenses that resulted from the termination;
- that he be compensated $20 000 for pain, suffering, and psychological and physical damages, due to the employer's neglect, and that he receive an additional $20 000 for the reckless and wilful discrimination he has suffered;
- that the employer be responsible for any tax implications resulting from any award made pursuant to the grievance; and
- that he be made whole.

3 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 PSLREB and the titles of the *PSLREBA* 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*").

4 Before his termination, the grievor had filed seven other grievances, all of which were referred to the Board or its predecessors. After the evidence portion of the hearing had completed and at the outset of the arguments, he withdrew the following four grievances: file 566-02-8688, dated August 2, 2012; file 566-02-8689, dated October 12, 2012; file 566-02-9976, dated December 20, 2013; and file 566-02-11310, dated December 19, 2014. In addition to the grievance against his termination (files 566-02-11308 and 11309), those withdrawals left the following three grievances outstanding, the details of which shall be set out at the appropriate point in this decision:

1. file 566-02-8829, dated February 14, 2013;

2. file 566-02-8830, dated August 2, 2012; and

3. file 566-02-10258, dated August 22, 2014.

5 The parties requested and I agreed that the hearing be bifurcated and that the remedy be dealt with after I had determined if there was liability.

II. Summary of the evidence

6 The grievor holds a bachelor of arts degree in psychology from Carleton University. He started his federal public service career in April of 1993 with the Correctional Service of Canada ("CSC") as a correctional officer, classified at the CX-1 level at Kingston Penitentiary, where in August of 1994, he became a CX-2. From May of 1998 until March of 2004, he was a parole officer there. In April of 2004, he moved to Ottawa, Ontario, where he remained a parole officer until September of 2007. From December of 2005 until March of 2006, he was a grievance analyst for the CSC

at its national headquarters. Between September and April of 2008, he was a project officer there.

7 The grievor testified that during his tenure at the CSC, he was involved in an incident which caused him to be on leave from work. He said that he was off work for about one year and that before returning, he was required to undergo a fitness-to-work evaluation ("FTWE") and was placed on a priority staffing list.

8 I was not provided any documentary evidence with respect to the priority staffing list.

9 On August 8, 2007, the grievor applied in a selection process for a policy analyst position at the AS-05 group and level at the National Parole Board ("NPB"). The advertisement for this position said that one position was to be filled.

10 On April 4, 2008, the grievor was offered a full-time indeterminate SPA position at the AS-05 group and level in the Corporate and Strategic Planning ("CSP") group, which was part of the NPB's Policy, Planning and Operations ("PPO") branch. On April 9, 2008, he accepted the offer, effective April 21, 2008.

11 After the grievor joined the NPB, organizational changes occurred, and the NPB's name changed to the PBC.

12 The grievor testified that he never applied for the SPA position, only to the policy analyst position. He stated that he took the SPA position under duress, stating that the hiring manager at the time told him that two policy analyst positions had been awarded to two women and that he could lose his priority if he did not take the SPA position as it was available, and he was qualified.

13 The grievor stated that he was told that the work descriptions for the two positions were the same; however, he agreed that he never asked to see them because, he said, he did not want to impugn an unknown woman's honesty.

14 In his evidence-in-chief, when he was asked if he had ever expressed that he could carry out the duties of the SPA position, he did not answer. In cross-examination, when he was asked if he thought he was not qualified for the SPA

position, again, he did not answer. When he was asked if he thought that looking at the work description for the SPA position would have been wise, again, he did not answer, suggesting that doing so would be to suggest that the unknown woman had lied.

15 There is no evidence that at the time he was offered and then appointed to the SPA position, the grievor accepted the position under duress; nor was there any evidence that he filed a grievance or complaint under the *Public Service Employment Act* (R.S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*").

16 The CSP group did strategic planning for the PBC's operations, including the following:

- performance measurement;
- program alignment;
- management accountability;
- plans and priorities; and
- coordination with central agencies, including the Treasury Board Secretariat and the Privy Council Office.

17 When he first started working at the PBC in April of 2008, the grievor reported to Shelley Trevathan.

18 At the time of the hearing, Terrence Ryan was the manager for the CSP group, classified at the AS-07 group and level. He had been in that position since October of 2009. At the time of the hearing, two AS-05s reported to him; in 2009, only the grievor had reported to him.

19 Mr. Ryan testified that the grievor's role was to gather information, provide analysis and advice, and develop options and recommendations using a logical and systematic approach and in an articulate manner such that his work could be sent to superiors with little, if any, amending. He said that the grievor was to work independently, with limited supervision and mentoring.

20 The grievor's first performance appraisal or Performance Evaluation Report ("PER") was for April 21, 2008, to March 31, 2009 ("the 2008-2009 PER"). Ms. Trevathan had carried it out. She rated his overall performance as unsatisfactory, which he disagreed with.

21 Ms. Trevathan did not testify. I was not provided with any evidence that a grievance was filed with respect to the 2008-2009 PER.

22 Mr. Ryan carried out the grievor's second PER, for April 1, 2009, to March 31, 2010 ("the 2009-2010 PER"). He said that a significant amount of the grievor's work was putting together a document called the PPO newsletter. It was to provide information to the PBC and other criminal-justice-related organizations. According to Mr. Ryan, it was an important vehicle that allowed the grievor to gather information, assimilate and analyze it, and then articulate it in writing.

23 Mr. Ryan said that the PPO newsletter was a challenge for the grievor and that it took him an excessive amount of time to gather information and prepare the document in an appropriate format. He said that the grievor's performance at that time was not at the AS-05 level. Despite the issues, Mr. Ryan said that he rated the grievor's overall performance as satisfactory. When asked why he did so, Mr. Ryan said that he wanted to build a good relationship with the grievor; he had not had the opportunity to see the grievor for the full year, and it was done in the spirit of good will. The following comments were set out in the 2009-2010 PER and testified to by Mr. Ryan:

. . .

> ***Knowledge*** *. . . In the area of ability to synthesize and analyze information Keith must continue to develop and improve as this is critical to the nature of work in this division. Improvement must be made so that he will be able to fully function and perform tasks to satisfactory completion at an AS-05 required level. It is important for Keith to further his knowledge of the Board and corporate strategy management processes in support of government and operational requirements. . . .*
>
> . . .
>
> ***Judgement*** *. . . Keith needs to continue to strive to improve on his analytical skills as the identification, analysis and*

option development of relevant information is a major part of the work required of a Planning Analyst. He also needs to assume a greater level of independence and resolve issues/problems with less support.

. . .

Communications *. . . In writing, Keith has worked hard and shown some improvement in tailoring information presented to the intended audience. Keith needs to continue the momentum he has created to ensure that he progresses further in this area.*

. . .

24 The grievor wrote on the 2009-2010 PER that he did not agree with all the comments in it; however, he said that he signed it to acknowledge receipt and in an effort to be more conciliatory.

25 Mr. Ryan testified that during this time frame (2009-2010), he mentored the grievor on almost a daily basis, some days for up to an hour. When asked if he was aware of any health issues the grievor might have had at that time, he said that he was not aware of any.

26 The grievor's third PER was for April 1, 2010, to March 31, 2011 ("the 2010-2011 PER"), and was carried out by Mr. Ryan. He rated the grievor's overall performance as unsatisfactory, with which the grievor disagreed.

27 Mr. Ryan testified that many of the issues identified in earlier PERs persisted. With respect to producing the PPO newsletter, Mr. Ryan stated that it should have accounted for approximately 20 percent of the grievor's time, yet it took up approximately 80 percent of this time. Mr. Ryan said that formatting problems continued despite the grievor having a template, being sent on training, and being supplied with two monitors.

28 Mr. Ryan testified that he continued to mentor the grievor. He said that from someone at the grievor's level, he expected a lot more independence and a lot less supervision. He said that the grievor continued to have difficulty finding information to complete his tasks. He also identified that the grievor had a habit of going over the past, which is fine to a certain extent, but that his work did not move forward. He said that the grievor continued to have difficulty in his written expression.

29 He characterized the grievor's work as throwing everything into a document, doing a lot of copying and pasting without context, and not tailoring the information in the document to the intended audience. Mr. Ryan also identified an inability on the grievor's part with respect to multitasking and stated that it was difficult to get the grievor to work on more than one task at a time. He said that multitasking was essential in the AS-05 job.

30 Mr. Ryan stated that for the 2010-2011 PER, the grievor did not work at an

AS-05 level. When asked to summarize the grievor's work performance, Mr. Ryan said that he was personable, meant well, wanted to do well, and found the work challenging. At the same time, he said that the grievor had the following work challenges: time management, delivering work on time, focusing on a task, analyzing information, and delivering the expected result. When asked what percentage of the grievor's work was at the AS-05 level, he would not provide an answer but instead stated that the work was not at an AS-05 level, which was why he was given an unsatisfactory rating.

31 Mr. Ryan said that he discussed the 2010-2011 PER with the grievor and asked him for concrete examples of why he disagreed with the unsatisfactory rating. He said that the grievor could not provide any. He said that the grievor told him that he felt that he was not well-suited to the SPA position and that his talents could be better used elsewhere. When asked whether he was aware that the grievor had any health issues at that time, he said that he was not aware of any.

32 From July 4, 2011, until January 20, 2012, the grievor was assigned to work on a project outside his SPA duties, and he was supervised by Sheila Ouellette.

33 In 2010 and at the time of the hearing, Ms. Ouellette was the manager of performance measurement at the PBC. At the time of the hearing, she had been with the PBC or its predecessor for 38.5 years. Her duties involved analyzing and reporting on the PBC's two programs, which were Conditional Releases, and Clemency and Records Suspension ("Records Suspension"), formerly known as Pardons. She confirmed that she had known the grievor since he started at the PBC. In the organizational structure, Mr. Ryan reported to her.

34 Mr. Ryan testified that the grievor was given the special project with Ms. Ouellette to develop his competencies. He said that that decision was based on discussions he had with the grievor and Ms. Ouellette. The project dealt with inmates unlawfully at large.

35 Ms. Ouellette testified about the grievor's issues during that project, which were also set out in the PER for fiscal year 2011-2012 ("the 2011-2012 PER"). She said that he had so many problems doing the work that they would have needed someone to work with him full-time and that she did not have that kind of resource. She reported that

the grievor had difficulty copying and pasting materials, working with the word processing system, and accepting criticism of his work.

36 Mr. Ryan said that he participated in assessing the grievor's work for the 2011-2012 PER, in which he received another unsatisfactory rating. In going through it, Mr. Ryan again identified recurring difficulties in the grievor's performance. He described them as an inability to gather and organize information into a product. He said that despite giving the grievor extensive mentoring, guidance, and assistance, he could not complete his assigned work.

37 On February 7, 2012, the grievor was given a letter from Mr. Ryan about his work behaviour and hours. Mr. Ryan indicated that what led to the letter was that he had received complaints from the grievor's colleagues about his behaviour, such as swearing out loud in his workspace, spending inappropriate amounts of time chatting with colleagues, and not working. While the letter did mention that the employer had a duty to accommodate, Mr. Ryan stated that as of that time, he was unaware of any medical condition of the grievor that would have necessitated an accommodation.

38 In July of 2012, Richard Clair was the PBC's executive director general. All 5 regional NPB offices and most of the national office reported to him, either directly or indirectly, accounting for roughly 400 of the 450 total employees. He confirmed that he knew the grievor but that he had not worked with him.

39 As a result of the grievor's unsatisfactory performance, a determination was made to place him in an assignment at a lower group and level (PM-03) in the Records Suspension group as a Records Suspension Officer ("RSO") under Brian Bender's supervision. Mr. Ryan communicated that decision to the grievor in a meeting on July 12, 2012. The assignment was for four months, from July 30 to November 30, 2012, with the potential for a four-month extension if his performance was satisfactory. The grievor would continue to be paid at the AS-05 group and level. The terms and conditions of the assignment were set out in a letter dated July 13, 2012 (with an attached assignment agreement), signed by Mr. Clair.

40 Mr. Ryan testified that he had no role in supervising the grievor while he was on assignment in Records Suspension group.

41 In July of 2012 and at the time of the hearing, Mr. Bender was the manager of the Records Suspension group, classified at the PM-06 group and level.

42 The PBC receives applications for record suspensions (formerly termed "pardons") that the Records Suspension group processes. A clerk enters the tombstone data received with the applications into the designated computer system, after which they are sent to an RSO, who screens and validates the information. If it is invalid, it is returned to the applicant. Otherwise, the application continues through the process. If the application is about a summary conviction offence, then an RSO, classified PM-03, investigates and verifies the information, writes a case summary, and makes a recommendation to a PBC Board Member. If the application is about an indictable offence, it is processed the same way, except by a more senior RSO, classified PM-04.

43 The relevant portions of the RSO work description state as follows:

1. Under the heading "Client Service Results", the RSO is to analyze, assess, and review applications for pardons; develop recommendations for Board Members related to pardon requests and revocations; provide advice and guidance on the Pardon Program and processes to applicants or their representatives, the management and staff of the PBC, and criminal justice system participants and partners.

2. Under the heading "Key Activities", the RSO is to do the following:

   - analyze and interpret pardon requests along with detailed and complex criminal records and related documentation to assess completeness and eligibility after determining whether crimes committed were summary offences, summary offences as identified in Schedule 1 of the *Criminal Records Act* (R.S.C., 1985, c. C-47), indictable offences, personal injury offences, indictable offences listed in Schedule I of the *Criminal Records Act*, or a hybrid offence;

   - coordinate and prioritize all operational files to ensure that service is delivered according to established time frames as required by the *User Fees Act* (S.C. 2004, c. 6);

   - provide advice, case-specific information, and interpretations of policies and procedures relating to the Pardons Program to

interested parties;

- select, extract, review, and validate sensitive information on pardon applications related to several types of summary offences using different internal and external databases;
- research legal and academic courses;
- prepare synopses and recommendations for Board members;
- research, validate, and analyze criminal record documentation, making inquiries with criminal justice system participants and partners; search departmental dedicated databases and secure criminal justice databases with respect to requests for pardons of summary offences; and evaluate and grant urgency on applications that meet the criteria;
- review cases and determine whether PBC revocation criteria and the provisions on revocation or cessation within the legislation are met, and make recommendations to Board members for decisions;
- conduct in-person interviews with applicants to assist them with their applications and to respond to questions;
- develop, and recommend and implement, new or amended processing and logistical support procedures and systems to meet evolving operational practices, services, or requirements and to deal with receiving and handling continuously fluctuating volumes of pardon applications and enquiries; and
- make recommendations on updates to training modules and deliver training to Board members, criminal justice system partners, and new employees.

3. Under the heading “Skills”, the RSO is to have knowledge of the following to be able to carry out the key activities of the job:

- several pieces of legislation;
- research, investigation and inquiry, and interviewing methods, techniques, and practices;
- time management methods, techniques, and practices;
- programme management methods, techniques, and practices;
- facilitation methods, techniques, and practices;
- the mandate, responsibilities, and processes of the Records Suspension Division and the PBC's mission mandate and core values;
- protocols and abbreviations relative to the use of stand-alone terminals;
- the roles and responsibilities of criminal justice system partners and participants and of different levels of government departments; and
- consultative and networking methods, techniques, and practices.

4. Under that same heading, the RSO is to have the following skills to be able to carry out the key activities of the job: interviewing, mentoring and coaching, and communicating, specifically writing and speaking.

5. Under the heading "Responsibilities - Human Resources", the RSO is responsible for training, mentoring, and providing coaching to new employees, Board members, and criminal justice system partners.

44 On August 2, 2012, the grievor filed a grievance (Board file no. 566-02-8830, departmental grievance no. 49061), which stated as follows:

. . .

I grieve the contents of the assignment agreement dated

> *2012/07/12, and the assignment related to the letter, which commenced July 30 2012 until November 30, 2012. This is a disciplinary action disguised as an administrative decision, which is punitive and in violation of Article 17 of the PA Collective Agreement. This is also a violation of the Treasury Board Guidelines for Performance Management and the Public Service Employment Act for Deployment.*
>
> . . .
>
> *Corrective action requested*
>
> *- The assignment letter be rescinded and removed from my file.*
>
> *- That I be reinstated to my substantive position immediately.*
>
> *- That the Treasury Board Guidelines for Performance Management be respected and implemented immediately. In that the Treasury Board Guidelines for Performance Management were not respected following the unsatisfactory Performance Appraisal Report for 2010-2011, that no appraisal completed subsequent to that report be considered valid until the manager and Human Resources division has complied with all the required steps as stipulated in the Guidelines.*
>
> *- That my personnel file be purged of any documentation referring to this matter.*
>
> . . .
>
> *Date on which each act, omission or other matter giving rise to the event occurred*
>
> *2012-07-12*
>
> . . .

45 Entered into evidence was a copy of the Treasury Board of Canada Secretariat's *Guide on Non-Disciplinary Actions and Issues* dated September 2011 ("the TBS guide"). Part 1 discusses how managers are to address unsatisfactory performance. Section 6 of Part 1 is entitled "Performance Management - Role of the Manager" and states as follows:

> *In carrying out their responsibilities for performance management, managers have a duty to:*

- *act in good faith;*
- *manage clearly and consistently;*
- *seek advice;*
- *provide opportunities to correct performance;*
- *seek alternative solutions;*
- *respect both employee rights and management rights; and*
- *be transparent.*

Identifying the performance requirements of a position is the first step in determining whether an employee is performing poorly. The work description, although not he only source, is a key document in identifying the performance requirements of a position because it specifies the functions and duties expected of the employee.

It is a manager's right and obligation to set performance standards, goals and objectives for the employee. Not everything is in the work description.

Performance requirements must reflect the SMART characteristics of effective objectives. That is, they must be:

- ***S**pecific (a clear statement of what is expected);*
- ***M**easurable in terms of quality, quantity, cost and time;*
- ***A**ttainable (must be achievable, realistic and challenging);*
- ***R**elevant (must relate to the legitimate requirements of the job as outlined in the work description); and*
- ***T**rackable (there must be a time limit on the expectations).*

A manager identifies the performance requirements of a position at the start of the review period. The required learning activities are then identified, and an individual learning plan can be completed.

Once the performance requirements of the position are identified, a comparison with the work produced or the

> *service rendered by an employee will show whether the performance is satisfactory.*
>
> *Employees should be provided with regular performance feedback. This process should culminate in an end-of-year, formal performance appraisal session. However, managers do not need to wait a year to complete a performance review. Periodic performance reviews can and should be done when necessary.*
>
> *When a manager realizes that an employee has a performance problem, he or she should:*
>
> - *explore with the employee the reasons for the performance deficiencies;*
> - *ask the employee how he or she can be helped to improve;*
> - *provide the employee with any necessary support; and*
> - *develop an action plan.*
>
> . . .

46 Section 7 of Part 1 of the TBS guide is entitled "The Four-Step Approach to Dealing With Unsatisfactory Performance" and sets out in detail over six pages the four-step approach, which is as follows:

> 1. preparing to talk to the employee;
> 2. meeting with the employee;
> 3. developing an action plan; and
> 4. following up.

47 Counsel for the grievor cross-examined Mr. Ryan on a manager's role in relation to the TBS Guide and the grievor's performance and his assignment to Records Suspension. Mr. Ryan confirmed that he did not put an action plan into place as specified in Part 7 of the TBS Guide per se but that work expectations were certainly communicated to the grievor, and he had informal discussions with the grievor with respect to an action plan.

48 In his evidence-in-chief, the grievor was asked for his view with respect to the assignment to Records Suspension. He said that he viewed it as a demotion because it had taken him a long time to reach the AS-05 level. When asked if he had communicated this to anyone, he said that he had, and repeatedly. He said that he told everyone about it at the July 12, 2012, meeting, when he was advised of the assignment.

49 Dr. Amy Moustgaard is a clinical psychologist licensed to practice in the Province of Ontario. She received a bachelor's degree with honours in psychology from the University of Ottawa in 1999, a masters of arts in clinical psychology from Lakehead University (in Thunder Bay, Ontario) in 2001, and her PhD in clinical psychology, also from Lakehead, in 2004. After that, she began her professional career in Thunder Bay, where she provided psychological services in both private practice and a hospital.

50 In 2006, she moved to Ottawa, and in May of that year, she began providing clinical psychology services in a hospital setting at the Royal Ottawa Mental Health Centre ("ROH"). She was continuing to provide those services as of the hearing. Commencing in June of 2007, she continued her private clinical psychology practice in Ottawa, which she was also continuing as of her testimony. From September of 2006 until August of 2011, she was a clinical professor at the University of Ottawa, supervising graduate students.

51 On August 14, 2012, Dr. Moustgaard signed a letter ("the August 14 letter"), which the grievor delivered to the PBC. It indicated as follows about him:

- he had been a patient of hers between January 13 and March 10, 2007;
- he had recently contacted her for help with respect to managing a relapse of mood-related symptoms;
- he had recently visited her, at which time she had assessed him as presenting with a high number of symptoms associated with a major depressive disorder that she identified as recurrent and that was consistent with a severe level of clinical pathology; and

- he was (as of the date of the letter) experiencing emotional, cognitive, and physical symptoms of depression.

52 The August 14 letter also stated the following:

- the grievor's emotional symptoms of depression were identified as sadness, irritability, and loss of pleasure;
- his cognitive symptoms of depression were identified as difficulty with concentration and decision making and a decreased sense of self-worth;
- his physical symptoms of depression were identified as decreased energy and altered sleep;
- his symptoms were undoubtedly impacting his ability to engage in his work-related responsibilities;
- it would be in his best interests to have some accommodations put in place that might be best directed through a Health Canada ("HC") evaluation;
- he was not taking psychotropic medications;
- he was encouraged to engage in work that was familiar to him;
- cognitive acuity could be intrinsic to depression; as such, his rate of work productivity might be slowed;
- he might require concrete direction for any expectations on work-related tasks, to limit demands on creative reasoning and to account for his fear of failure;
- he appeared motivated to recover; and
- there was no indication that he should not work, provided the identified accommodations were actioned.

53 Mr. Ryan confirmed that he received a copy of the August 14 letter. He stated that it led the employer to request that the grievor undergo an FTWE. A letter dated August 23, 2012 ("the August 23 letter"), requesting that FTWE was prepared by Mr. Ryan, Mr. Bender, and Human Resources ("HR") and was sent to HC's Specialized Health Services Directorate, NCR Occupational Health Clinic ("HSHC"). The letter set out the following:

- a copy of the work description of the grievor's substantive (AS-05) SPA position;
- a copy of the work description of his temporary RSO position (PM-03) in Records Suspension;
- the August 14 letter;
- since April of 2008, he had received three unsatisfactory PERs out of four;
- the reasons for the unsatisfactory performance ratings; and
- he had exhibited some behavioural issues with colleagues, supervisors, managers, and other staff, and it set out those behaviours.

54 The August 23 letter asked that HSHC reply to the following:

- whether the grievor was fit to work;
- whether he was fit to work in the PM-03 position;
- whether he was fit to work in the AS-05 position;
- the extent of his medical condition, either long term, short term, or indefinite;
- a reasonable return-to-work date;
- the limitations for the PM-03 and AS-05 positions that would prevent him from fulfilling his duties, such as working a productive 37.5-hour

week;

- whether he was fit to work and capable of regularly performing the tasks of his substantive (AS-05) position or an alternative (PM-03) position and if not, the specific restrictions prevent him from meeting performance expectations;

- whether there were any specific strategies that management could use to help the grievor cope with his work situation (dealing with stress, conflict, and hostile clients) when he returned to work;

- whether his condition impacted his ability to rebuild working relationships with co-workers, partners, and stakeholders;

- if he was not fit to return to work, when to expect that he would be; and

- any additional comments and insights.

55 The grievor was provided with a copy of that letter. As part of the FTWE process, he signed a consent for the release of medical information dated August 23, 2012.

56 On August 23, 2012, the grievor emailed Mr. Bender, asking him if there were

". . . any plans to fulfill [*sic*] the accommodation requirements as recommended in the letter [the August 14 letter]." Mr. Bender forwarded the email to Mr. Clair, who responded to the grievor, stating as follows:

. . .

> *. . . As part of your current assignment as a Record Suspension Officer, a performance agreement was put in place and a coach is currently assisting you in your work. At this point in time, I feel that this assignment constitutes your best chance of succeeding.*
>
> *The documentation for a fitness to work evaluation is now complete and will be sent to Health Canada early next week. . . .*

. . .

57 In August of 2012 (the specific date is not clear), the grievor was away from work on sick leave. From the evidence, it appeared that he was away until sometime in either October or November of 2012 and that he returned to work on a graduated basis, reaching full-time hours in February of 2013.

58 On October 10, 2012, Mr. Bender emailed the grievor, confirming their discussion of the week before, and stated that the action plan developed for the grievor when he arrived in Records Suspension would be set aside pending his return to work full-time or after the employer had received the FTWE from HC. At this point, the grievor was assigned only to screening, which involved looking at information and validating it. Mr. Bender stated that it took the grievor a lot of time to do this work.

59 Dr. Sofia Lazaridis received her doctor of medicine, master of surgery (M.D.C.M.) degree from McGill University in Montreal, Quebec, in 1994. She completed her family medicine residency at McGill between July of 1994 and June of 1996 and completed her fellowship in health care for the elderly there between August of 1996 and March of 1998. She commenced employment as an occupational health medical officer with HSHC in the National Capital Region in March of 2001 and was still in that position when she testified.

60 On October 24, 2012, Dr. Lazaridis met with the grievor. Her notes were entered into evidence. She testified that her diagnosis, based on the symptoms he presented and his medical history, was anxiety, depression, and post-traumatic stress disorder ("PTSD"). She identified that he had problems concentrating, insomnia, irritability, a personality disorder, and dependent and avoidant traits. She stated that he was fit to work but not in his SPA (AS-05) position.

61 Dr. Moustgaard next saw the grievor on October 22, 2012, for a cognitive therapy session. She described that cognitive therapy was a way to help him learn how his interpretations of situations affected his emotions. She stated that he advised her at that time that he had returned to work and that he believed that he was doing well but that he wanted to return to his substantive position.

62 On October 25, 2012, Dr. Lazaridis wrote to the following people:

- Dr. Moustgaard, seeking additional updated information;
- Dr. André Dessaulles, a clinical psychologist who had been involved in an FTWE involving the grievor in December of 2006 and July of 2007, seeking his assessment of the grievor; and
- Dr. S.S. Kasbia, the grievor's family doctor.

63 Dr. Moustgaard next saw the grievor on November 14, 2012. She testified that her assessment of him at that time was as follows:

- he was anxious, which was primarily related to both his belief that he had been demoted to a PM-03 position and his performance in that position;
- his anxiety disorder was not otherwise specified, meaning that he presented with a disorder that was so multifaceted that it was difficult to assess exactly what it was;
- he had issues with executive functioning (planning, organizing, and regulating behaviour, including how his behaviour might impact others);
- he was worrying excessively about situations;
- his worrying was difficult to control;
- he was experiencing a physiological reaction to the worry in the form of panic attacks; and
- he was apprehensive about the health assessment.

64 On November 15, 2012, Dr. Moustgaard wrote to Dr. Lazaridis, stating as follows:

. . .

> *With respect to clinical status and present working diagnoses, Mr. Herbert has been unable to achieve significant gains since my communication with your office in*

August of 2012. While he has returned to work since then, his level of anxiety and ruminative worry about his role at work and job security appears to have lessened only slightly. . . Unfortunately, given the uncertainty with regard to his work role/status, cognitive interventions relating to worry (and associated behaviours) has been difficult.

. . .

Mr. Herbert has provided me with a Work Description of his substantive position of "Strategic Planning Analyst" at the classification of AS-05. From what I can see within the description, there are work demands for policy analysis, strategic advice, audit and investigation reviews, and strategic plan design, analysis, implementation, and evaluation. Mr. Herbert related that his strength and competency lie in analysis of documentation and in written communication (e.g., articulating findings and making related recommendations). Tasks that involve multifaceted characteristics (e.g., planning, coordination, implementation of strategic or operational plans) are said to be overly difficult for him to complete.

By clinical observation, Mr. Herbert's cognitive difficulties include difficulty with decision-making, difficulty with attention, and limited tolerance for acquisition of new information. There is a significant overlay of these symptoms between both Depression and Anxiety-related issues. Specifically, Mr. Herbert reports being continuously fearful of "making a mistake" and that this could reflect poorly on another work appraisal. As a result, he is overly cautious in his approach with work-related tasks. I suspect that there may also be a developmental contribution of issues relating to attention and associated executive regulation (by reports of school performance), though no formal testing or assessment has taken place.

At this point, it is evident that work is a protective factor for Mr. Herbert in that he enjoys being a contributory and productive employee with the Parole Board of Canada. That being said, <u>workplace accommodations</u> that may help to manage symptoms should be considered. Without being closely involved with the resources and options available within the work environment, I can only make recommendations that are logical from a theoretical perspective. I understand that Mr. Herbert is meeting with Dr. Dessaulles later this week, who may be better able to integrate recommendations into practice. I recommend that:

- *Mr. Herbert's work responsibilities remain in a familiar work content area. Learning a new skill or software program at this time is proving to be somewhat difficult for him, for cognitive and emotional reasons noted above. Mr. Herbert related, however that he is starting to make slow gains in proficiency with the "coaching" by a colleague. He enjoys strategic policy analysis work and describes this being an area of strength. Work involving reading comprehension and analysis skills as well as writing would be recommended.*

- *It is recommended that Mr. Herbert work in an environment that fosters growth and minimizes perceived risk of being "punished" for errors. Perhaps regular meetings with his supervisor and liasing with a mentor familiar with the work environment will allow for early recognition of challenges where guidance can take place.*

- *Mr. Herbert's may require 'personal days' when he is experiencing an exacerbation in symptoms. He may be required to take vacation time as "sick time" on short-notice.*

. . .

[*Sic* throughout]

[Emphasis in the original]

65 Dr. Moustgaard testified that when she saw the grievor on November 14, 2012, his symptoms had lessened slightly but had not really improved. She said that she was not sure how much she could help him from a cognitive point of view. She said that workplace stress impacted his anxiety; she attributed his stress to being in the PM-03 role, and the uncertainty of being in that role affected his mood and anxiety. She said that it was easy to make recommendations from her "chair"; however, it is difficult to do that in the workplace.

66 On November 21, 2012, Dr. Kasbia wrote to Dr. Lazaridis and provided her with his report. The relevant portions state as follows:

. . .

. . . This gentleman was first seen on January 24th, 2012.

> *He complained of stress at work for the previous eighteen months, and as a result felt anxious, had lethargy, and difficulty sleeping. He had been on effexor four years ago, but had stopped on his own accord. He decided to restart it prior to seeing myself. . . He was subsequently seen on February 7th, 2012 with no change in his work situation. Subsequently, he came in on 3rd July, 5th July. When he was seen on 27th August, he was still complaining of stress at work, causing sleep problems, as well as difficulty concentrating. A note to be off work from 28th August until 14th October was given. On follow up in September 27th he advised myself that he was seeing a psychologist on a regular basis and that he was on no medication. He was to restart work on a gradual basis of two hours per day for two weeks and then increase to four hours per day. When seen on 29th October, it was decided to increase his work hours to five per day, as his energy levels were improved, as well as his concentration.*
>
> *Mr. Herbert is not happy with his new position as he feels that data entry is not for him, and that he was much happier with more job satisfaction in his prior position. I have seen Mr. Herbert several times in the past few months, and it is my opinion, that he is not suffering from any depressive illness. However upon reading the reports that you have provided from Mr, Herbert's supervisors I feel that he may in fact have an Attention deficit disorder. When questioned about possible symptoms as a child he did volunteer the fact he did have attention problems at the time. . . .*
>
> . . .
>
> [*Sic* throughout]

67 Dr. Dessaulles saw the grievor on November 16 and December 10, 2012. In his cover letter to Dr. Lazaridis, Dr. Dessaulles stated that on the basis of his interview and assessment of the grievor, his opinion was that the grievor did not appear to be fit to work, and Dr. Dessaulles recommended that the grievor go on medical leave for six months. He said that the grievor had redeveloped a depressive disorder, and his opinion was that the grievor could not get better while remaining at work. He went on to state that there was a significant long-term issue with the grievor's capacity to deal with stress, and while he had shown some good post-traumatic growth following the workplace trauma experience, he still had complex PTSD and was vulnerable to developing a number of deficits in functioning. The relevant portions of Dr. Dessaulles's

December 10, 2012, report state as follows:

. . .

. . . He was previously seen by this assessor in 2006 and 2007 when he was employed with Correctional Services Canada as a Parole Officer and was diagnosed with Major Depression and Post-traumatic Stress Disorder.

. . .

Mr. Herbert confirmed that he was once again diagnosed with a depressive episode . . . When asked about any problems with attention, concentration and memory, he confirmed that these had been a problem and he noted that he would awaken at night and worry about the trouble he was in at work.

. . .

Conclusions and Recommendations

. . . Mr. Herbert is not fit to work and he will unfortunately require another period of medical leave to restore his health. . . . there is evidence that he has deteriorated from the level of functioning that allowed him to return to work in 2007. There are a number of significant deficits in functioning which include a mood disorder, persistent anxiety, fatigue, broad and sharply limiting deficits in cognitive functioning, problematic patterns of interpersonal behaviour, and a very limited capacity to deal with stress. While there are signs that he has been able to achieve some good post-traumatic growth . . . , he appears to have a continuing and significant vulnerability to stress which makes him more sensitive to interpersonal triggers and greatly increases the probability of recurrent depressive episodes. Mr. Herbert should be viewed as having complex PTSD on the basis of [deleted] *and this condition will continue to limit his functioning until he receives additional specialized treatment.*

. . .

Given the complexities of his situation, it would probably be best for Mr. Herbert to begin a new period of medical leave on the basis of the recurrence of a depressive disorder. If he remains at work, he will potentially face serious consequences as his performance will continue to be an issue. His employer may also not be able to properly accommodate his disability given its current level of severity.

> *A 6-month period of medical leave should be sufficient to treat the depressive disorder and to begin addressing the longer-term impacts of PTSD on his functioning.*
>
> . . .
>
> *Mr. Herbert has not been sent for a sleep study as yet and this may be quite useful if only to rule-out [sic] the presence of a sleep disorder. There is a growing body of evidence which suggest that sleep disorders precede the development of PTSD and may prolong key deficits in functioning such as a lowered resistance to stress, irritability, and cognitive limitations.*
>
> . . .
>
> *Mr. Herbert's health practitioners will be in the best position to signal his eventual readiness to begin a gradual return to work process. A return to the position at the PM-03 level would appear to be quite counterproductive and moving directly into the position of Policy Analyst may be somewhat premature. . . Mr. Herbert's recovery may well be delayed if he is forced to return to the PM-03 position as he would anticipate the return with more anxiety. When he does return to work, he will benefit from regular coaching to identify and resolve any problematic interpersonal patterns or job-specific issues and this will help him gain some much-needed confidence.*
>
> *The prognosis for Mr. Herbert is somewhat more guarded than 5 years ago because of the recurrence of the depressive disorder. . . The recurrence of a depressive disorder signals his continuing psychological vulnerability and it remains to be seen how much progress he will be able to make in treatment. . . .*
>
> . . .

68 I was never made aware of the workplace trauma that occurred when the grievor was employed by the CSC.

69 Dr. Dessaulles's correspondence to Dr. Lazaridis did not appear to have been copied to the grievor. However, on December 10, 2012, Dr. Dessaulles did write to him, advising him that he had forwarded his report to Dr. Lazaridis, and he provided the grievor with his conclusions and recommendations.

70 On February 5, 2013, Mr. Bender wrote to HSHC, sending an update and some additional information. His letter indicated that the grievor had been on sick leave for two months after starting with the Records Suspension group and that he had returned to work on a graduated schedule in November of 2012. He did not reach full-time hours until February 1, 2013. Mr. Bender made the following observations:

- before going on sick leave, the grievor had had great difficulty concentrating and retaining information;
- over two weeks in late January of 2013, the grievor seemed to better understand and retain information received from his coach during training; and
- the grievor kept mentioning that he did not understand why he was working in the Records Suspension group.

71 On February 6, 2013, the grievor emailed Mr. Bender again about the August 14 letter and accommodation measures it set out, suggesting that they had not been implemented. He asked that they be implemented and requested an answer in five business days.

72 Mr. Bender responded on February 8, 2013, and referred to Mr. Clair's email of August 24, 2012. He stated that it addressed the issue when the grievor had written about it originally and advised the grievor that management was implementing the measures set out in the August 14 letter and that both a performance agreement and coach were in place.

73 Dr. Lazaridis did not speak with Drs. Kasbia or Moustgaard.

74 Dr. Lazaridis provided her FTWE by letter dated February 12, 2013 ("the February 2013 FTWE"), which stated the following:

- the grievor was seen by a consultant specialist (Dr. Dessaulles) on November 16, 2012;
- reports were received from his health care providers (who were not identified) on November 22 and 23, 2012;
- his manager provided up-to-date information on February 5, 2013;
- his medical conditions were identified as chronic;
- he was being followed and was obtaining treatment;
- his medical conditions were not yet being fully treated;
- additional treatment measures and investigations were recommended;
- based on the February 5 letter, it was considered reasonable for the grievor to remain at work, and the following recommendations, if operationally feasible, might have assisted him for the next six months:
    - limiting his duties that required multitasking, such as planning, coordinating, and implementing strategic or operational plans,
    - limiting his duties that required sustained attention, acquiring new information, and decision making,
    - performing duties with which he was familiar,
    - being coached by someone familiar with the duties, and
    - attending regular guidance meetings with his supervisor to help identify the more challenging duties as soon as they were assigned; and
- a period of medical leave could have been indicated if ongoing significant performance or attendance difficulties arose despite the recommendations.

75 None of Dr. Moustgaard's November 15, 2012, letter, Dr. Kasbia's November 21, 2012, letter, or Dessaulles' December 10, 2012, letter (all to Dr. Lazaridis) was provided to the employer.

76 Both Mr. Ryan and Mr. Bender received a copy of the February 2013 FTWE.

77 Mr. Ryan was asked specifically about the recommendations in the February 2013 FTWE, in which Dr. Lazaridis had suggested limiting certain tasks for the grievor (multitasking, planning, coordinating, and implementing strategic and operational plans, as well as sustained attention, acquiring new information, and decision making), which Mr. Ryan identified as essential to the duties of the grievor's SPA position. Mr. Ryan said that the grievor would not be able to perform those duties without doing those tasks. He stated that acquiring new information and decision making were key to the SPA job functions.

78 With respect to the suggestion in the February 2013 FTWE to tasks that were identified as familiar, Mr. Ryan said that the term "familiar tasks" was ambiguous, as it lacked context, which was required in a work environment. Did it mean tasks that had been simply familiar in the past or that also had been done in a satisfactory manner?

79 Mr. Bender stated that when the grievor returned to full-time hours after his gradual return to work in early February 2013, but before the February 2013 FTWE was received, he was supposed to carry out the full complement of his RSO duties. Mr. Bender said that when the employer had tried earlier to get the grievor to perform investigation work, he had become anxious and nervous and had had trouble concentrating.

80 On February 14, 2013, the grievor filed the grievance that became Board file no. 566-02-8829 (departmental grievance no. 50267), which stated as follows:

. . .

Grievance details: . . .

I grieve the fact that my employer has denied me

> *Accommodation measures in the workplace in contravention of the Treasury Board Policy on the "Duty to Accommodate Persons with Disabilities in the Public Service", thus causing me serious financial, physical and psychological injury.*
>
> *I grieve that because of my disability my employer has discriminated against me in an ongoing manner and has violated the Canadian Human Rights Act, as well as Article 19 and all other related Articles of my Collective Agreement.*
>
> . . .
>
> *Date on which each act, omission or other matter giving rise to the grievance occurred*
>
> *February 8, 2013* [in handwriting]
>
> . . .
>
> *Corrective action requested*
>
> *1) That management implement accommodation measures immediately, in keeping with my diagnosed medical condition.*
>
> *2) That I be compensated for all losses including pay and benefits, and any additional expenses that may result from this situation.*
>
> *3) That I be compensated by the employer in the amount of $20,000 for pain and suffering, and the psychological and physical injury that I suffered and will continue to suffer due to my employer's willful neglect.*
>
> *4) That I be compensated by the employer in the amount of $20,000 for the reckless and willful discrimination I have suffered.*
>
> . . .
>
> [*Sic* throughout]

81 On February 15, 2013, Mr. Clair emailed the grievor, advising that he would be in touch with him in the next few weeks to indicate the measures that would be taken to better address the grievor's situation and needs. He said that the grievor's RSO assignment would continue. However, in line with the February 2013 FTWE, he would be asked only to screen incoming applications, would be given access to a coach, and would meet with Mr. Bender once a week.

82 Mr. Bender testified that after the February 2013 FTWE, the grievor's workload was limited, and his duties were limited to screening. He said that the work largely involved verifying initial information and determining if it was to be retained for a further investigation or returned to the applicants.

83 Mr. Bender said that in nine years of training employees to do the RSO job, he noted that it took approximately one month to train them, from start to finish. He said that it took the grievor a long time to be able to do the job. He had coaches, and it appeared to Mr. Bender that showing the grievor how to do this job took a lot of their time and energy. He said the following:

- the coaches reported to him that they would often have to reinstruct him as he would forget how to do the work;
- one coach was very discouraged;
- one coach cried in his office;
- one coach was very frustrated;
- all the coaches asked to be relieved of having to coach the grievor;
- the grievor argued with the coaches and asked the same questions over and over again; and
- the coaches knew that the job could be learned within a month, and they could not understand why the grievor, an AS-05, could not learn it.

84 When asked why he changed the grievor's coaches, Mr. Bender stated that it was because they had asked him to be removed from that task.

85 Mr. Bender stated that he did not review the February 2013 FTWE. When cross-examined on the points set out in it, he confirmed that the RSO job required multitasking, planning, coordinating, keeping sustained attention, acquiring new information, and decision making.

86 On March 1, 2013, Dr. Moustgaard saw the grievor. She testified that at that time, he was highly ruminative, thinking about things over and over; was hyper-focused on work-related issues; had started taking antidepressant medication; and appeared more anxious and distressed. She said that she tried to focus him on helping himself and that she suggested to him that he might need time off work.

87 On March 12, 2013, the grievor met with Mr. Clair, after which Mr. Clair emailed him, stating as follows:

. . .

> *. . . As I discussed with you, your assignment as a Record Suspension Officer (RSO) with the Clemency and Record Suspension Division will be extended for an additional three months, from April 1, 2013 to June 28, 2013. During that period and following the recommendations outlined in the letter from Health Canada, you will be given a limited number of files to process; you will be expected to fulfill all the functions of a Record Suspension Officer; you will continue to report to Mr Brian Bender, who you will meet weekly; your established objectives will be used to assess your work and a coach will be assigned to you. Each month, you will be assessed against the established objectives (work plan).*

. . .

[*Sic* throughout]

88 On March 18, 2013, Mr. Ryan wrote to HSHC with questions on the February 13 FTWE. He sought clarification; specifically, he asked the following:

. . .

> *1) Please indicate to which position each recommendation applies (referring to the Strategic Planning Analyst and the Record Suspension Officer work descriptions included with the request for medical assessment dated August 23rd, 2012).*
>
> *2) Please define and provide context around the word 'familiar' in this case and explain what parameters should be used by the employer when assessing what is entailed by 'familiar' duties.*
>
> *3) The letter specifies these recommendations may assist Mr. Herbert for the next six months and outlines Health*

> *Canada would be willing to reassess Mr. Herbert in six months. As the letter mentions that the employee's medical conditions are chronic in nature what is the implication of the six month timeframe?*
>
> *4) In addition, the letter states the following:*
>
> - A period of medical leave may be indicated should there be on going [*sic*] significant performance or attendance difficulties despite the above measures.
>
> *Please define and provide context around the word 'significant' in this case and explain what parameters should be used by the employer when assessing what is entailed by 'significant performance difficulties'.*

. . .

89 On April 26, 2013, Mr. Ryan wrote to HSHC as a follow up to the March 18, 2013, letter. He again had questions on the February 2013 FTWE. He sought clarification on the information and recommendations; specifically, he asked the following:

. . .

> *1) Given the request for medical assessment was sent to Health Canada in August 2012 and the results were received in February 2013, when have these medical conditions started? (i.e. was there a trigger?)*
>
> *2) The letter refers to specific recommendation which may assist Mr. Herbert for the next six months and outlines Health Canada would be willing to reassess Mr. Herbert in six months. As the letter mentions that the employee's medical conditions are <u>chronic</u> in nature:*
>
> - *what is the implication of the six month timeframe <u>as these conditions are chronic</u>?*
>
> - *<u>are the employee's performance issues related to these medical conditions</u>?*

. . .

[Emphasis in the original]

90 Copies of both the March 18 and April 26, 2013, letters were sent to the grievor.

91 On May 13, 2013, Dr. Lazaridis responded to Mr. Ryan's letters of March 18 and April 26, 2013, stating as follows:

. . .

> *Letter of March 18, 2013:*
> 1. *The recommendations provided are based on Mr. Herbert's medical condition, and do not apply to a particular work position. He has expressed a wish to remain in his substantive AS-05 position, should it be operationally feasible, but the decision as to work position is left to the employer.*
>
> 2. *'Familiar duties' refer to duties which Mr. Herbert has performed in the past. This is contrary to new, unfamiliar duties.*
>
> 3. *Mr. Herbert's medical conditions are chronic, however, as noted in my letter, they 'are not yet fully treated and additional treatment measures and investigations are recommended at this time'. Six months will hopefully allow Mr. Herbert and his health care providers to pursue some or all of these recommendations. Depending on availability of resources and on Mr. Herbert's response to treatment, he may have an improvement in his medical condition in the next six months.*
>
> 4. *'Significant' may be interpreted as being unable to satisfactorily perform the majority of his duties. The decision as to what is satisfactory with respect to performance of duties is left to the employer as this has to do with determining the degree of accommodation that is operationally possible.*
>
> *Letter of April 26, 2013:*
> 1. *This question falls outside . . . the fitness to work evaluation.*
>
> 2. *i. Please see response to #3 above.*
>
> *ii. Mr. Herbert's medical conditions likely contribute to* [the] *performance concerns described in your letters. It is difficult to say to what extent this is the case. At this time, since his medical conditions require additional treatment, it is hoped that any performance concerns related to his medical conditions will improve with treatment.*

. . .

92 Mr. Ryan confirmed that he received Dr. Lazaridis's May 13, 2013, letter but that her clarification of familiar duties was not helpful; it was still ambiguous. He said that he understood that "familiar" meant something that the grievor knew. The point of his clarification request was to help the employer better understand what it had to do to help the grievor.

93 Mr. Clair confirmed that to the best of his recollection, he had seen Dr. Lazaridis's May 13, 2013, letter. He also confirmed that he did not discuss with the grievor this letter or alternative accommodation measures. He said that he did not discuss accommodation with the grievor's bargaining agent; however, he also stated that the bargaining agent did not approach him.

94 In her testimony, Dr. Lazaridis was asked what she meant with respect to her May 13, 2013, responses to Mr. Ryan's questions. She said that based on the information she received, her assessment, and the information provided by the employer, it was safe to keep the grievor in the workplace; however, there was a chance his medical condition could deteriorate, so he might require a period of leave.

95 Dr. Dessaulles's opinion, which was that the grievor was not fit to work for six months, was put to Dr. Lazaridis. She said that she had taken into account information from all sources and that her February 13 FTWE was based on all the information, taking into account where it came from.

96 Dr. Lazaridis said that she had indicated a follow-up in six months because that time would have been sufficient to allow implementing treatment recommendations and to see if there had been any change in the grievor's health status.

97 When asked to expand on her comments about the grievor's conditions being chronic, Dr. Lazaridis said that it meant that they were lasting and long-standing. She said that when she made those comments, she was referring to his depression, anxiety, and PTSD. She said that although they were chronic, periods of improvement and relapse were possible.

98 The grievor's PER for April 1, 2012, to March 31, 2013 ("the 2012-2013

PER"), had no overall rating, which was set out in the review where it stated that ". . . health issues may have had an impact on the performance observed during the period under review. Had an overall rating been given, it would have been 'unsatisfactory'." For April 1 to July 29, 2012, the grievor was assessed on his SPA duties, while from July 30 to the end of the assessment period, he was assessed on his RSO duties.

99 For April 1 to July 29, 2012 (the grievor's time in the SPA position), the following comments were set out in the 2012-2013 PER:

. . .

> *. . . difficulties persisted with regard to content development (i.e., organization, logical thinking, proper analysis, and formatting). Direction and guidance was [sic] communicated multiple times to Keith and on numerous occasions feedback was given in an attempt to assist Keith in fulfilling the expected results/deliverables. To illustrate difficulties, the environmental scan exercise was terminated (after 4 months) due to dealing with the same issues without noticeable returns. Throughout all these activities the ability to apply analytical and logical thinking and to gather and analyze information has proven to be a challenge for Keith.*
>
> . . .
>
> *Keith continues to have issues with formatting and working with Word and Excel documents which made his work more challenging.*
>
> . . .
>
> *Keith has been provided with opportunities to examine a number of issues that require judgement. . . Keith needs to strive to improve his judgement and problem resolution skills as* identification, analysis and option development based on relevant information *is a major part of the work required of a Strategic Planning Analyst.*
>
> . . .
>
> *. . . Keith has worked hard but needs to focus his attention on tailoring information presented to the intended audience. He needs to work on his ability to summarize information into the salient points necessary. . . .*
>
> . . .

100 For July 30, 2012, to March 31, 2013 (the grievor's time in the RSO position), the following comments were set out in the 2012-2013 PER:

. . .

> *. . . Keith was at times not following the steps when completing screening/investigation according to established procedures.*
>
> *He did not make use of available resources or follow the appropriate steps that are required when carrying out his screening/investigation . . . .*
>
> . . .
>
> *Keith made errors in screening applications on numerous occasions . . . .*
>
> . . .
>
> *Keith continued to have issues with formatting and working with Word . . . .*
>
> . . .
>
> *After almost a year working at the Clemency and Record Suspension Division, Keith was asking the same sorts of questions time and time again, showing difficulties in remembering and acquiring the basic knowledge and confidence needed to perform his work within the division. Direction and guidance was communicated multiple times to Keith and on numerous occasions feedback was given in an attempt to assist Keith in fulfilling the expected results/deliverables.*
>
> *Keith is quite anxious and continuously worried about making mistakes. Keith had to work with 5 different coaches during his assignment with the division. . . .*
>
> . . .
>
> *Keith doesn't weigh alternative courses of action and makes decisions that do not reflect factual information or are based on rational and logical assumptions. . . .*
>
> . . .
>
> *Keith finds it difficult to handle several projects simultaneously . . . He hasn't been able to shift priorities quickly, adjust to change and respond successfully. He must*

work towards improving upon this.

. . .

101 Dr. Moustgaard next saw the grievor on May 23, 2013. She described him as angry and agitated, and she felt that he was at risk of saying something at work that could get him fired. She said that these conditions were related to his major depressive disorder. She said that she was concerned that he could become physically aggressive and that he should not be at work due to his severe levels of anger and anxiety. On May 30, 2013, she wrote a note for him recommending that he be away from work for one month beginning on Monday, June 3, 2013.

102 Dr. Moustgaard testified that she did not see the grievor again until September 26, 2014 (some 16 months later).

103 The grievor's assignment in the Records Suspension group ended in June of 2013. Mr. Clair stated that he was asked to assign the grievor elsewhere as he was not doing the work and was burning out the employees assigned to coach him.

104 In July of 2013, the grievor was assigned to work on another special project, once again under Ms. Ouellette's supervision. She said that at that time, she was advised that an accommodation agreement was needed. She said that she designed the performance portion of the accommodation agreement, in consultation with the grievor.

105 The accommodation agreement was entered into with the employer on July 3, 2013, and was for six months. The grievor's task was to conduct a compliance review of sample full-parole decisions made between June 1, 2012, and May 31, 2013. A four-page performance agreement template set out the specific actions required of him, the criteria that would be used to measure his progress, the training and other support to be made available to him to help him meet the performance objectives, the due dates, and the written follow-ups. The template indicated that he would be provided with the material and necessary links to enable him to carry out the project tasks and that he would be provided coaching from a supervisor and a daily meeting with Ms. Ouellette, with a written follow-up.

106 The accommodation agreement also set out HC's recommendations, as follows:

. . .

- *Limit duties requiring multitasking, such as planning, coordinating and implementing strategic or operational plans;*
- *Limit duties requiring sustained attention, acquisition of new information and decision making;*
- *Duties familiar to the employee;*
- *Coaching by someone familiar with the work duties;*
- *Regular guidance meeting with the Supervisor (i.e. to identify the more challenging duties as soon as they are assigned).*

. . .

[The original text is also in italics]

107 Ms. Ouellette testified that the grievor did not have to multitask and that he worked at his own pace. She said that she provided him with one-on-one coaching and that she held daily meetings, which lasted between 30 and 45 minutes. Entered into evidence was a sample of the grievor's work during this period, which was reviewed with Ms. Ouellette. She said that she reviewed his work not to assess if it had been done satisfactorily or to rate him but to help him to improve his skills. She stated that his work did not correspond to an actual position at the PBC; it was an assignment created to accommodate him, and it did not have to be done. When asked if the duties were similar to those of an auditor or investigator position at the PBC, she stated that only the portion of them that required reading documents was similar.

108 Ms. Ouellette stated that the accommodation agreement was extended.

109 On January 30, 2014, Ms. Ouellette wrote to HSHC and requested an update on the February 13 FTWE. Dr. Lazaridis in turn wrote to Dr. Kasbia on March 20, 2014, and requested an update from him, specifically the "Clinical course since February 2013; Present diagnoses and clinical status; [and] Present recommendations for management and for the workplace".

110 Ms. Ouellette was asked to write a memo for HC, which was entered into evidence and is dated February 20, 2014; it stated as follows:

. . .

> *Mr. Herbert is a very social individual and wants everyone to like him. Sometimes in his exuberance he says things which are not really appropriate for an office setting.*
>
> *Mr. Herbert is very comfortable with performing the tasks he has been performing for the past six months. He has been conducting reviews of decisions for a number of months now and does not feel the need to add any other challenges.*
>
> *As I meet with Mr. Herbert every morning I have had an opportunity to observe his behaviour and I have noticed that he has difficulty in focussing on a topic for any length of time and that he changes topic, sometimes mid-sentence, without giving the listener the appropriate frame of reference.*
>
> *I have also noticed that Mr. Herbert, on occasion, takes actions or makes decisions without thinking of the consequences not only for himself but for others. He has a tendency to jump to conclusions and obsess about an issue for an abnormal length of time.*
>
> . . .
>
> [*Sic* throughout]

111 On May 14, 2014, Dr. Kasbia responded to Dr. Lazaridis, forwarding to her three reports from the Sleep Clinic at the ROH. The first was from Dr. Alan Douglass and was dated July 12, 2013; it was an initial assessment, and it indicated the following:

- the grievor's affect was rather intense overall;
- he complained that his bosses were giving him a workload that he could not handle;
- he indicated that he had moderate daytime sleepiness and that he slept at 5:00 p.m. for two to four hours; he admitted to falling asleep watching movies, watching television, in meetings at work, and while doing paperwork or being on a computer; and

- he admitted to having insomnia in the middle of the night and to having seasonal insomnia, in the spring.

112 The initial diagnosis from the Sleep Disorders Clinic was obstructive sleep apnea and insomnia, possibly with a psychiatric causation. Dr. Douglass recommended a nocturnal polysomnogram.

113 The grievor had his first polysomnogram done on August 29, 2013, the results of which indicated that he slept only 30% of the time and that he had 3 episodes of severe insomnia averaging 80 minutes in length. In interpreting the polysomnogram, Dr. Douglass stated that it confirmed the diagnosis of obstructive sleep apnea. He felt that the sleep-disordered breathing was of a degree that should be treated with a trial of a nasal Continuous Positive Airway Pressure (nCPAP) machine.

114 The grievor had a second polysomnogram done on December 5, 2013, with the nCPAP machine. This session disclosed that he slept prone for much of the night and that he had much less insomnia. The sleep architecture showed normal transitions from NREM (non-rapid eye movement) to REM (rapid eye movement) sleep with the nCPAP machine.

115 A follow-up note from Dr. Douglass indicated that the grievor, who had been given an nCPAP machine on a trial basis, was having some difficulty due to nasal obstruction.

116 Dr. Lazaridis referred the grievor to Dr. Kenneth Suddaby.

117 Dr. Suddaby received his medical training at the University of Manitoba. He graduated in 1989. He completed a specialty in psychiatry in 1994 and a fellowship in family/system psychiatry in 1997, both from the University of Rochester. He became a Fellow of the Royal College of Physicians and Surgeons of Canada, FRCPC, in psychiatry in 1994.

118 Dr. Suddaby testified that he has a general psychiatric practice that involves families and systems, which includes the workplace. With respect to workplace systems, he stated that he is a third-party evaluator and that he has evaluated employees on their behalf, on behalf of management, and on behalf of unions. His work

involves all facets of mental health in the workplace.

119 Dr. Suddaby saw the grievor on May 1, 2014, and wrote a 13-page report to Dr. Lazaridis that same day.

120 In his report, Dr. Suddaby stated that the grievor presented in a somewhat disjointed style, for which he frequently needed redirection to get back on topic and that he had an overly intellectualized response style and often offered opinions or self-diagnoses in his responses to questions instead of answering their particular details. He said that at times the grievor's responses were disjointed and difficult to understand or, were discounted. When he asked the grievor why he needed the accommodations that had been put in place in July of 2013, the grievor reported that he needed to work with familiar material because of "cognitive impairment secondary to Major Depressive Disorder" and that he had a "strong fear of failure". Dr. Suddaby noted that it was not clear as to how the grievor felt that this related to a need for accommodation.

121 Dr. Suddaby's report indicated that the grievor presented with a somewhat paranoid personality style and had a very narcissistic approach to his comments. It went on to state that he seemed to have a somewhat paranoid orientation and a feeling that others had done him wrong. It also stated that, the grievor appeared somewhat tangential in his interpersonal style, tending to blame others for difficulties and minimizing or denying his personal accountability in workplace interactions.

122 With respect to the grievor's work environment, Dr. Suddaby's report said that the grievor seemed to see others as less competent than himself; he seemed to take little accountability for his actions and performance in the work environment; he seemed to blame the employer for hiring him to a position that he was not competent for, and blamed it for removing him from those duties when he did not perform them well. It also indicated that when the grievor talked about performance concerns raised about him at work, he sometimes acknowledged that he was not good at a particular position but then went on to offer that he had been unfairly performance managed.

123 Dr. Suddaby's report stated that the grievor had a propensity to medicalize his performance problems, even when he might not be symptomatic and that it would

not serve the grievor or the employer if, from time-to-time, non-medical performance issues are medicalized. It stated that within his narcissism, he presented with a tendency to self-diagnose and blame interpersonal or performance difficulties on medical problems or on others.

124 Dr. Suddaby's diagnosis of the grievor was major depression, recurrent, mild to moderate, without psychosis, and in remission; obstructive sleep apnea, with possible resultant cognitive impairment; and possible mixed personality traits with paranoid and avoidant characteristics. He stated that no psychiatric illness was interfering with the grievor's work. His opinion was that the grievor's mood disorder was in remission and was not causing any cognitive or functional impairment. However, he stated that the sleep apnea was a different issue. He also referred to the grievor's problems with cognition and concentration. He suggested that this indicated that if the sleep apnea problem were dealt with and the cognition issues remained, perhaps a neuropsychological/psychological assessment could be carried out, which he described as specialized psychological objective tests that look at different brain functions.

125 Dr. Suddaby talked about the grievor's emotional and interpersonal skill-set deficits, stating that they were not medical but characterological issues. Everyone has them, and they allow us to function with others in our environments. As an example, he suggested someone who cannot read peoples' emotions, which can lead to inappropriate actions and reactions. In his report Dr. Suddaby concurred with a notation of Dr. Dessaulles that in personality testing the grievor's characterological make-up might cause him interpersonal difficulties in the work environment. The report indicated that the interpersonal skill-set deficits, were likely chronic and contributed to interpersonal difficulties and perhaps performance difficulties in the work environment. It stated that his skill-set deficits are considered non-medical in nature, and the employer should respond to them in the normal administrative fashion.

126 When asked about the grievor's skill-set deficits, Dr. Suddaby stated that they involved the grievor answering questions tangentially, his inability to stay on topic, and his need to be brought back on topic via directions. He stated that the grievor saw himself as being hurt by others but that he failed to see his involvement in situations. He stated that the grievor had a tendency to blame everyone else and that he had a pattern of not taking responsibility. He had an over-inflated sense of self and his abilities. Dr. Suddaby said that these things cause interpersonal difficulties in the workplace and that they are not psychiatric depression.

127 Dr. Suddaby also stated that the grievor used dramatic language when answering questions that was not appropriate, such as being an "indentured servant of your supervisor", "beat as much out of me", and "back to the joint".

128 Dr. Lazaridis confirmed that she received and reviewed Dr. Suddaby's report; however, she did not speak with him.

129 Dr. Lazaridis saw the grievor on June 4, 2014. She wrote a one-page report to the employer the next day ("the June 2014 FTWE"), the relevant portions of which read as follows:

. . .

> *The chronic medical conditions referred to in my previous letters of February 13, 2013, and May 13, 2013 are considered stable at the present time. There is an additional medical condition identified which may account for some of the difficulties described in documentation you forwarded to our office. Therapeutic modalities have been reviewed with Mr. Herbert and copies of our specialist report have been provided to Mr. Herbert and to his treating physician. Mr. Herbert requires ongoing treatment and follow-up of this medical condition. At this time, Mr. Herbert is not considered medically able to resume the full duties of the substantive AS-05 position for medical reasons and therefore workplace recommendations remain as per my previous letters. Depending on Mr. Herbert's initiation and response to proposed therapeutic initiatives he may be able to assume further duties of his AS-05 position in the future. Should he respond favourably to treatment measures, his health care provider could advise you directly with respect to the possibility of lifting restrictions. Alternatively, we would be*

> *willing to reassess Mr. Herbert in six months' time, at your request, to revisit the above recommendations.*
>
> *With respect to other concerns identified in the documentation forwarded to our office on February 20, 2014, please note that these concerns are considered to be non-medical in nature and can be responded to in the normal administrative fashion.*
>
> . . .

130 On June 26, 2014, the employer wrote to Dr. Lazaridis seeking clarification of the June 2014 FTWE, stating as follows:

> . . .
>
> 1. *Is there a reasonable probability to see Mr. Herbert perform his functions in his substantive AS-05 position in a foreseeable future? And if so, in your opinion, when will this be possible?*
>
> 2. *Mr. Herbert has expressed an interest in another AS-05 position within the Parole Board of Canada, as a Policy Advisor in the Appeals Division. Based on the functional limitations that you established, would he, in your opinion, be able to perform these functions? We are concerned by the fact that this is an unfamiliar position for him that requires multitasking. Note that Mr. Herbert would have to compete for this position.*
>
> *Attached you will find the job descriptions of both AS-05 positions, to help you better understand their respective job requirements.*
>
> . . .

131 Dr. Lazaridis responded on July 8, 2014, as follows:

> . . .
>
> 1. *. . . As noted in the letter, Mr. Herbert may be able to assume further duties of the AS-05 position, depending on his response to proposed therapeutic initiatives.*
>
> . . .
>
> 2. *. . . We cannot provide more definitive information in this regard, as it is beyond the scope of the fitness to work evaluation to provide an opinion on career planning. There*

> *are no medical contraindications to applying and competing for this position.*
>
> . . .

132 In her evidence before me, Dr. Lazaridis stated that the therapeutic initiatives she referred to were using the nCPAP for his sleep apnea and awaiting a consult with an ear, nose, and throat specialist, again with respect to difficulties relating to his sleep apnea.

133 Dr. Lazaridis did not see the grievor after June 4, 2014.

134 She stated that none of the reports she received from Drs. Dessaulles, Moustgaard, Kasbia, Douglass, or Suddaby was shared with the employer.

135 She stated that her sessions with the grievor would have been between one to two hours long.

136 On August 22, 2014, the grievor filed the grievance that became Board file no. 566-02-10258 (departmental grievance no. 53264). It stated as follows:

> *Grievance details: . . .*
>
> *This grievance is being submitted in response to the grievance response authored by Harvey Cenaiko dated July 16, 2014. In his response he states that "my decision is to reinsert what was taken out of your performance appraisal at the second level grievance hearing."*
>
> *With this response Mr. Cenaiko has violated the following articles of the collective agreement:*
>
> *Article 18: No person shall seek by intimidation, by threat of dismissal or by any other kind of threat to cause a grievor to abandon a grievance or refrain from exercising the right to present a grievance, as provided in this collective agreement.*
>
> *Article 19: There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*
>
> *Article 56: The Employer's representative(s) who assess(es) an employee's performance must have observed or been aware of the employees performance for at least one-half (1/2) of the period for which the employee's performance is*

> *evaluated. . . .*
>
> . . .
>
> *Date on which each act, omission or other matter giving rise to the grievance occurred*
>
> *July 21, 2014*
>
> . . .
>
> [*Sic* throughout]

137 As set out earlier, Dr. Moustgaard did not see the grievor again until September 26, 2014. Her notes that were entered as evidence indicate that at that time, she said that he told her that he had been diagnosed with sleep apnea. She said that they discussed that and how better sleep helped him to have better moods. Her notes also reflect that he advised her that he was back in his substantive position and that he was keeping up with it and had received a positive performance appraisal. He told her that he was engaged with family and extra-curricular activities, and she described his mood as stable. She said that he also advised her that he was taking an over-the-counter holistic medication to help with his mood. She confirmed this in her evidence at the hearing.

138 Dr. Moustgaard's notes of their September 26, 2014, meeting also reflect that the grievor told her that Dr. Suddaby had assessed him in the spring as being able to work without restrictions. In her testimony, Dr. Moustgaard said that she and the grievor discussed Dr. Suddaby's assessment and that her view was that it seemed reasonable that the grievor did not need any accommodations. She stated that he had conveyed to her that he was in his substantive position and that his view was that he was doing well and that he was keeping up with the work demands. She said that he appeared stable and in a good mood. She said that she did not know if he was being accommodated.

139 I was not provided with any evidence that Dr. Moustgaard saw Dr. Suddaby's assessment.

140 Dr. Moustgaard testified that she did not see the grievor again until March 6, 2015.

141 Ms. Ouellette assessed the grievor's performance for July 3, 2013, to March 31, 2014. She stated that his work for her included some but not all the duties of the auditor/investigator position. In her testimony, she clarified that the only function of that position that he carried out was reading documents.

142 Auditor/investigator positions at the PBC are classified at the AS-05 group and level.

143 In cross-examination, when it was put to Ms. Ouellette that the grievor did not complete the work he did for her because he was terminated from his position, she said that that was conjecture because no determination had been made that he had had the skill set to move forward.

144 Ms. Ouellette confirmed the following:

- the accommodation agreement continued until the grievor was terminated from his employment;
- he had shared with her that he wanted to work as a policy analyst and that he thought it was something that suited his skills;
- he worked collaboratively with her and was very engaged; and
- she was not made aware of the details of his disability; however, she confirmed that he told her that he suffered from chronic manic depression [bi-polar disorder] and sleep apnea, which caused him cognitive issues.

145 Ms. Ouellette conducted the grievor's PER for the fiscal year of April 1, 2014, to March 31, 2015 ("the 2014-2015 PER"). She said that he met expectations with respect to the work he carried out in the role assigned to him as part of the accommodation process. She confirmed that at no time did she suggest to him that he had to perform at a level higher than set out in the accommodation agreement or that he was at risk of losing his job.

146 Ms. Ouellette stated that she was not involved in the process of

terminating the grievor's employment, was not consulted about it, and did not contribute to the content of the termination letter. She said that no one spoke to her about terminating his employment, told her that the employer was considering the termination, or asked about the ratings she had given him on his last two PERs. She said that she learned of his termination just hours before it happened.

147 At the time of the hearing, Cathy Gaudet was the PBC's director of finance and planning and chief financial officer. She had been in those positions since January of 2012. Before that, she had been the director of finance at the Supreme Court of Canada. She began her federal public service career in 1993.

148 Ms. Gaudet testified that in April of 2014, a re-organization took place at the PBC due to a renewal initiative. CSP group merged with the Financial Planning Division. This meant that the grievor's substantive position (as an SPA) came under her area of responsibility. She said that before early 2015, her interactions with him had been minimal.

149 On January 5, 2015, Ms. Gaudet emailed the grievor, asking to meet with him to discuss his potential return to his SPA position (effective February 2, 2015). She had limited knowledge of the work he was doing for Ms. Ouellette, stating that she knew it was not an actual position and that the work was not required. She said that she initiated the meeting at that time as the accommodation agreement was to end as of the end of January 2015.

150 On January 7, 2015, the meeting took place involving the grievor; his bargaining agent representative, Angela Habraken; Ms. Gaudet; and an HR representative, Josée Gratton. Ms. Gaudet stated that the purpose was to start the process to obtain the grievor's collaboration for an independent medical examination ("IME"). She said that she wanted an IME done because the grievor was having difficulties multitasking and that the familiar duties were not helping enough to return him to his job. She characterized the process as finding out how to help him obtain and retain information to better help him return to his job. She said that he could not stay in the position doing the work he had been doing for Ms. Ouellette because it was not an actual position and because the work he was doing was not needed.

151 Ms. Gaudet stated that the PBC was subject to the Deficit Reduction Action Plan ("DRAP"), just like every other government department. She stated that it had to cut expenses, just like every other department, and that money was tight. She said that it was felt that the PBC could not sustain an AS-05 salary in a position that did not exist, doing work that it did not need done.

152 During the course of the January 7, 2015, meeting, the grievor asked if the employer was seeking a neuropsychological assessment of him, which Ms. Gaudet stated was possible. She said that he enquired as to what would happen if he did not consent to one. She stated that that bridge would be crossed when necessary. She stated that he referred to the number of assessments already done by HC and his psychologist and that he did not see the need for another one.

153 In cross-examination, Ms. Gaudet stated that the employer believed that without a specialized assessment of the grievor, it could not pursue accommodating him. She confirmed that this belief was based on the fact that the employer did not have enough information for a proper accommodation exercise. She agreed that a new medical assessment would help the employer learn more about his mental health issues. She also agreed that the assessment was necessary to compare results specifically with respect to his cognitive profile, to assess his strengths and weaknesses and his learning and cognitive styles. She stated that the employer needed a specialist and that it had concerns that there were limitations to the grievor's occupational functions.

154 Still in cross-examination, Ms. Gaudet agreed that the employer wanted a specialist to help it determine whether in both the short-term and the long-term the grievor could work in his substantive or another AS-05 position or whether it was more realistic to look at some type of demotion.

155 On January 14, 2015, a second meeting was held with the grievor and Mses. Habraken, Gaudet, and Gratton. Again, the IME and possible neuropsychological assessment were discussed. Ms. Gaudet stated that the grievor said he did not need a neuropsychological assessment and that she reiterated that that was not necessarily the route that would be taken. She said that the result of the meeting was inconclusive

but that the grievor did not reject the idea.

156 Ms. Gaudet said that after that meeting, the grievor and Ms. Gratton met again, on Friday, January 30, 2015. Ms. Gratton summarized that meeting in an email to Ms. Gaudet on February 2, 2015, stating the following about the grievor:

- he was given a consent form, draft referral letter, and list of potential doctors;
- he was visibly upset;
- he was adamant in stating that he had no cognitive issues or learning difficulties, and he was insulted that the employer asked him to go through a neuropsychological assessment;
- Ms. Gratton told him that he would undergo a medical assessment and not a neuropsychological assessment;
- Ms. Gratton told him that the employer was not forcing him to consent to the evaluation;
- Ms. Gratton gave him a very high-level explanation as to why the employer wanted him evaluated, which was that it needed more tangible information to properly accommodate him;
- Ms. Gratton told him that his assignment with Ms. Ouellette would not be extended past March 15, 2015;
- he felt that the employer had sufficient information from his treating physician and HC;
- he felt that his strengths were writing, analyzing, and making recommendations and that he would be well suited for the AS-05 policy analyst position;
- Ms. Gratton told him that those duties, which he felt were his strengths, were a large part of the SPA position;

- he swore a lot at the meeting;
- he was tired of being labelled with a disability and suggested that everybody looked at him like it was written on his forehead;
- he looked at the list of physicians and said that he did not want to be assessed by Dr. Suddaby, as that doctor had already assessed him and that he did not like Dr. Suddaby, and he alleged that Dr. Suddaby had told lies about him in his evaluation; and
- he kept the documents and said that he would consult his bargaining agent and that he would get back to Ms. Gratton.

157 On February 2, 2015, the grievor emailed Ms. Gratton and copied his bargaining agent. She forwarded the email to Ms. Gaudet. The email stated as follows:

. . .

> *Do you now recall that you had in fact confirmed via email that the assessment is a Neuro-Psych assessment? . . . .*
>
> *As I said during our last meeting, you can call the assessment "a can of paint" but no matter what you call it it is still a Neuro-Psych assessment.*
>
> *To further support my assertion, I refer you to the first two objectives enunciated in your explanatory letter:*
>
> *1) Mr. Herbert's personal, neurological, psychological and occupational strengths*
>
> *2) Mr. Herbert's personal, neurological, psychological and occupational limitations*
>
> *I now have had the opportunity to read the pre-amble / explanatory letter and the actual consent form for the Independent Medical Evaluation. I believe that you will recall that my union representative raised the point that I would like to have the names of five consultant specialists from which I can choose provided to me before I consent to the assessment. Should you and Jacques and Eric continue to insist that I consent to such an assessment, please provide me with these names in your next iteration of this letter.*

. . .

> *You mention in the explanatory (raison d'etre) letter that four of my last six performance appraisals have been unsatisfactory. This is not accurate in that I have submitted a grievance related to the appraisal completed by Brian Bender, and that matter has not been adjudicated on in front of the PSLRB. . . .*
>
> *The consent form mentions: "I declare that my consent has been given voluntarily and without coercion." Please remove that statement in that it is not true for the reasons that I have repeatedly articulated during the meetings of January 7th, January 14th and January 29th. From this point forward do not attempt to put words in my mouth. It insults my intelligence.*
>
> . . .
>
> *Final point for this morning: There are a number of errors in the referral documents and how my employer (represented by you, Jacques and Eric McMullen) are trying to initiate the process that need to be corrected before I will consent to any further assessments. I would encourage you to read the relevant policy documents and guidelines and correct those errors. Please correct those errors and once they have been corrected you can then contact me and my bargaining agent to set up another meeting between yourself, Angela Habraken, me and Jacques Lemire. I will then reiterate the reasons why I am very ambivalent about such an assessment but I (should the explanatory letter and consent form pass muster) will then give consideration to consenting to the assessment.*
>
> . . .

158 On February 5, 2015, Ms. Gaudet replied to that email, stating as follows: "The statements you have made in your e-mail [*sic*] to Josée Gratton dated February 2, 2015, below, lead us to believe that you are refusing to consent to a 3rd party Independent Medical Evaluation."

159 On Friday February 6, 2015, at 7:07 a.m., the grievor emailed Ms. Gaudet (with copies to his bargaining agent representatives and Ms. Gratton), stating as follows:

> . . .
>
> *I am not refusing to consent to a third party Independent Medical Evaluation.*

> *I refer you to the last paragraph of the email below:*
>
> *Final point for this morning: There are a number of errors in the referral documents and how my employer (represented by you, Jacques and Eric McMullen) are trying to initiate the process that need to be corrected before I will consent to any further assessments. I would encourage you to read the relevant policy documents and guidelines and correct those errors. Please correct those errors and once they have been corrected you can then contact me and my bargaining agent to set up another meeting between yourself, Angela Habraken, me and Jacques Lemire. I will then reiterate the reasons why I am very ambivalent about such an assessment but I (should the explanatory letter and consent form pass muster) will then give consideration to consenting to the assessment.*
>
> . . .

160 Ms. Gaudet responded to that email on that same day at 8:58 a.m., stating that she had attached a revised version of the letter, which addressed the concerns he had raised with Ms. Gratton; added an additional doctor's name for his consideration; and provided two potential dates for him to meet with another doctor. She also attached a consent form and stated as follows: "You noted concerns with the final paragraph. However, as the decision to sign the consent form is yours, it is unchanged. If you wish to proceed with the assessment, please send me the signed consent form by end of day Monday." The relevant portion of the attached letter stated as follows:

> *Neuropsychologist/*
> *Treating physician*
>
> . . .
>
> *I would like to refer Mr. Herbert, an employee of the Parole Board of Canada, for an Independent Medical Evaluation (IME). This evaluation will complement the "Fitness to Work Evaluation" conducted by Health Canada in 2013 and follow-up assessment in 2014, in order to assist the Board in obtaining an objective medical assessment of Mr. Herbert's capacity to work and to determine the best options available to him in the workplace. For your consideration, you will find enclosed the 4 letters we have received from Health Canada to date.*
>
> *Mr. Herbert has been a full-time employee of the Public Service since 1993. He started at the Parole Board of*

Canada on April 21st 2008 as a Strategic Planning Analyst, at the AS-05 group and level, for the former Policy, Planning Operations Division. Prior to working for the Board, Mr. Herbert was an employee of Correctional Services Canada, occupying positions of Correctional Officer and Parole Officer.

Since Mr. Herbert's appointment, 3 of his 6 performance appraisals have been unsatisfactory. The exception was in 2009-10 and 2013-14 when he was assessed as satisfactory with the understanding that the assessment was not based on AS-05 competency levels.

Given the numerous performance issues, a number of assignment opportunities within the organization were made available to Mr. Herbert, in an attempt to optimize his competencies and to find work better suited to his abilities. In his latest work assignment, which began on July 4, 2013, Mr. Herbert has assumed some of the duties he has been tasked with which are closely related to the Auditor/Investigator positions. However, he has not been performing the full range of duties reflected in the assigned work description. Management's perception is that Mr. Herbert feels comfortable with the tasks he has been assigned with. Unfortunately, the position Mr. Herbert has been occupying while on assignment does not actually exist and can no longer be sustained as meaningful work.

. . .

. . . I would also appreciate you allowing Mr. Herbert the opportunity to review the report prior to it being shared with me/the Board, as I want to ensure that he is fully informed of the specific finished product.

With respect to workplace-related functioning and capacity, I would like the report to address the following:

1. *Mr. Herbert's functional and occupational strengths and limitations;*

2. *Mr. Herbert's learning and cognitive styles;*

3. *Strategies to maximize his learning and retention;*

4. *Strategies to minimize the impact of his limitations on occupational functioning;*

5. *Comments related to realistic career aspirations given his strengths and limitations;*

> 6. *Any other comments or recommendations not listed that are germane to Mr. Herbert's occupational functioning or career progression.*
>
> *In previous assessments completed by Health Canada, it has been indicated that Mr. Herbert has a lack of coping with unfamiliar duties. Therefore, we would also like that your report address the idea of "familiar duties" and provide clarification as to what that actually means for Hr. Herbert* [*sic*], *in terms of functional limitations, in his current position at the Parole Board of Canada.*
>
> *Please note that Mr. Herbert is aware of the reasons for this referral. . . .*
>
> . . .

161 On February 10, 2015, Ms. Habraken emailed Ms. Gaudet and Ms. Gratton after reviewing that draft letter. She stated that the grievor would sign the consent if the employer amended it by removing, "I declare that my consent has been given voluntarily and without coercion" and replacing it with, "I give my consent to the above." The relevant portions of the balance of the email stated as follows:

> . . .
>
> *(1) Would you please indicate the third year which Mr. Herbert had a satisfactory or better performance evaluation.*
>
> *(2) It is still unclear as to why objectives 2 and 3 are included in the letter. Is there a reason why PBC wishes to have cognitive functioning tests performed on Mr. Herbert? There does not appear to be any reason set out for such. Mr. Herbert has informed you that he does not fall within the parameters of someone who requires this type of testing. If there is such a reason, we request that you clearly articulate it. Otherwise we request that you remove these two objectives.*
>
> *(3) Considering the letter addresses Mr. Herbert's functioning in relation to his position, we would expect that a copy of his job description be attached to the letter.*
>
> *(4) The letter indicates that "Mr. Herbert has a lack of coping with unfamiliar duties." Mr. Herbert informs me that this is not a proper quotation of his doctor or of the most recent Health Canada report. Would you please endure* [*sic*]

> *that you quote one or the other report verbatim, so that it does not give the reader the wrong impression.*
>
> *. . . After a review of the Treasury Board policy suite . . . Mr. Herbert requests that a fitness to work evaluation process through Health Canada be followed. Therefore, once the physician has been selected by Mr. Herbert and his doctor, we ask that the request be made to this physician through Health Canada as per policy, such that Health Canada would be the requester and recipient of the medical information and would provide to PBC only the required functional occupational and accommodation information.*
>
> . . .

162 On Friday, February 13, 2015, Ms. Gaudet responded to that email, stating as follows:

- the wording with respect to the consent was amended by removing “and without coercion”;
- the missing year of performance assessment was addressed;
- the employer required information on “how to limit duties requiring sustained attention, acquisition of new information and decision making”, as stated by HC, to properly consider potential accommodation in the workplace; therefore, it believed that cognitive functioning tests would answer those questions;
- it amended the letter to match the wording from HC’s report with respect to familiar duties;
- the TB policy does not state that the employer must use only HC’s services; since it was unsatisfied with the information that it had on file, a third-party assessment was required to ensure that it would have sufficient detail to properly accommodate the grievor;
- the employer would not consider any further changes to the consent form or referral letter;
- if the grievor was prepared to proceed with the medical assessment,

he was to provide the signed consent form by the end of the day on February 16, 2015; and

- once the employer received the signed consent, it was to forward to him the physician's name, contact information, and appointment date.

163 On February 16, 2015, the grievor emailed Ms. Gratton about signing the consent and about his preference for a particular doctor to conduct the assessment. She referred him to Ms. Gaudet to arrange for him to sign the consent form.

164 While the grievor did sign the consent, he filed a grievance the next day, the relevant portions of which state as follows:

> *On January 7th 2015 Cathy Gaudet Chief Financial Officer and Josée Gratton HR advisor convened a meeting with me . . . During the course of the meeting, Ms. Gaudet asked me whether I would be willing to consent to another assessment, the objectives of which she read from a sheet of paper. When I told her that based on the objectives it sounded like they wanted me to consent to a "Neuro-Psych" assessment she and Ms. Gratton feigned not knowing exactly what sort of assessment it was that they were requesting that I participate in.*
>
> *During a subsequent meeting held on January 14th 2015, (after Ms. Gratton confirmed via email that in fact they were requesting that I participate in a Neuropsychological assessment) I indicated that I would consent to such an assessment but I was very ambivalent about doing so*
>
> . . .
>
> *Based on the numerous reasons that I clearly articulated during the course of the second and third meetings (the third one of January 30th with only Ms. Gratton in attendance), and based on the fact that the manager and HR advisor are still requiring me to participate in another assessment, I am submitting this grievance in that this is just the latest abuse of authority that I have been subjected to by the management of the Parole Board of Canada. The request that I once again participate in another assessment, when seven have already been completed in relation to my disability, is another example of the harassment and discrimination that the managers at the PBC have subjected me to, and is once again another contravention of Article 19.01 of my collective*

agreement.

. . .

Corrective action requested

1) That the managers at the Parole Board of Canada finally and permanently implement the accommodation measure recommended by my Health Care Professional, Dr. Amy Moustgaard, which is articulated in her diagnostic letter dated August 14, 2012. . .

2) That if my managers have difficulty understanding just what is meant by engaging me in "work that is familiar" to me, that they look at my résumé and marry this up with the tasks that I have been involved in for most of my career thus far.

3) That if they still have difficulty understanding what the clearly understood accommodation measure means, that they interview me . . . and ask me to explain what the accommodation measure means in my case.

4) That the managers at the Board stop exacerbating my disability by requesting that I consent to additional assessments when they already have all of the information that they need to understand and accommodate it, and have had this easily understood information at their disposal for the last two years and five months.

5) . . .

6) That I be made whole

. . .

165 The evidence disclosed that a grievance hearing was held on February 24, 2015, and that the PBC's chairperson, Harvey Cenaiko, wrote a response on March 4, 2015, the relevant portions of which state as follows:

. . .

I understand that clarifications are required in order to reasonably and appropriately accommodate your disability in the workplace. In order to do so, your collaboration was sought to participate in an Independent Medical Evaluation (IME) for the purpose of providing the Parole Board of Canada with the necessary information regarding your

> *functional and occupational strengths and limitations.*
>
> *You have expressed on numerous occasions that you are very ambivalent with consenting to another medical evaluation and consider this request as "*another example of the harassment and discrimination (…)" *you have been subjected to by managers at the Parole Board of Canada.*
>
> *Although I disagree with your statement that management has discriminated against you by seeking your collaboration to participate in an IME, I do not want to exacerbate your disability any further. We will therefore make a decision regarding the employer's ability to accommodate you at the Parole Board of Canada based on the information we have already received from your health care professional, Dr. Amy Moustgaard, and the previous evaluations conducted by Health Canada.*
>
> *Accordingly, your grievance is granted.*
>
> . . .

166 Dr. Moustgaard wrote a letter dated March 6, 2015, which stated as follows:

> *To Whom It May Concern,*
>
> *Mr. Herbert continues to be under my care from a Psychological therapy perspective. He has recently related to me that there has been a grievance decision rendered related to the Parole Board of Canada's request that he undergo a Neuropsychological Assessment. Being a Neuropsychologist myself, it is not clear to me why this form of assessment was raised as a requirement to determine his need for accommodation. Mr. Herbert suffers from Major Depressive Disorder, recurrent and Generalized Anxiety Disorder. During the eight years that I have known Mr. Herbert, subjective limitations in cognitive functioning (e.g., information processing speed, decision making, focused attention) present only during periods of acute depression and stress-related anxiety. During periods of stabilized mood, these issues are not present, however.*
>
> *Mr. Herbert has related to me that my original recommendation for accommodation (August 14, 2012) requires clarification. I am recommending that Mr. Herbert be engaged in work that is familiar to him and within his skill set and experience.*

> *So as not to exacerbate Mr. Herbert's disability, I would encourage you to ask him what the accommodation measure means in his case. This would be in accordance with the Duty to Accommodate Persons with Disabilities in the Federal Public Service. Mr. Herbert has strong insight into his skills and would be in a position to articulate this without difficulty.*
>
> . . .

167 On March 9, 2015, Ms. Habraken emailed Ms. Gratton, Ms. Gaudet, and others, stating as follows:

> *I am writing in relation to the employer's response to grievance #54424, which I received on Thursday. I believe that this letter requires further explanation.*
>
> *I expect that this decision means that PBC will review the medical documentation on file so far and make a determination based on that medical documentation as to how best Mr. Herbert may be accommodated. Mr. Herbert has repeatedly requested to be asked exactly what his Health Care Professional's recommended accommodation measure means in terms of his case. We are requesting that this be done as part of your review. It is an easy step to follow in accordance with the Treasury Board policy and the Duty to Accommodate. Following this review, if PBC determines that it requires further information, we expect that PBC will make a specific request as to the nature of the required information. Mr. Herbert will sign a consent form in order for the PBC to request a Fitness to Work Evaluation through Health Canada. We expect the PBC to adhere to the Treasury Board policy.*
>
> *If the decision means that the PBC will make a bona fide and concerted effort at accommodation in compliance with the applicable law and policies, the Union is satisfied with the decision. Mr. Herbert and the Union will then await PBC's evaluation of the medical information and discussion with Mr. Herbert, and determination of the proper accommodation for Mr. Herbert in accordance with his substantive occupational level.*
>
> *However if the purpose is to use this grievance response as a method to send Mr. Herbert home for failing to consent to a further medical/psychological assessment when the PBC has asked for one, then the Union states that this is entirely inappropriate. We expect that this is not the case.*

. . .

168 Ms. Gaudet testified that subsequent to the grievance decision and Dr. Moustgaard's March 6, 2015, letter, a meeting was held on March 18, 2015, with the grievor and Ms. Habraken to discuss options, which included finding a job congruent with the grievor's abilities; she stated that they could have included a demotion and potentially the termination of his employment. Ms. Gaudet asked the grievor to provide his CV, and she provided him with the job descriptions of the policy analyst and planning analyst positions. She asked him to provide them with his thoughts on what he felt would be congruent with Dr. Moustgaard's recommendations. On March 24, 2015, he emailed Ms. Gaudet (copying others) his response.

169 According to the grievor, he felt that he could fulfil most if not all the duties and responsibilities of an auditor/investigator and that his skill set would make him a good fit for a position within the Board Member Secretariat division. He also suggested that he believed that many of the key activities of both the policy analyst and planning analyst positions were congruent with his psychologist-recommended accommodation measures.

170 At the hearing, Ms. Gaudet was asked about the grievor's suggestions that he could carry out the auditor/investigator job, a job in the Board Member Secretariat, or a policy analyst or planning analyst job. Ms. Gaudet responded by stating as follows:

- with respect to the auditor/investigator job, there were no positions in that area;
- with respect to a job in the Board Member Secretariat, there were no positions in that area, and the grievor had no skills with respect to training and had difficulty with communications; and
- with respect to a job as a planning analyst or policy analyst, these positions would have been challenging for the grievor given the difficulties he had encountered in the work he had done since arriving at the PBC.

171 Ms. Gaudet stated that the grievor had had difficulties carrying out analyses and completing tasks. She did not feel that policy analyst or planning analyst duties would be considered familiar duties, given that he had had trouble carrying them out. She also pointed out that the duties he had listed as being able to carry out were only part of the duties of the planning analyst position. She stated that she had consulted with Mr. Ryan, who had told her that when the grievor had reported to him, he had had difficulties with writing briefing notes, being precise and logical, and using Microsoft Word.

172 On April 8, 2015, Ms. Gaudet responded to the grievor's March 24, 2015, email and asked him to provide examples to substantiate his abilities to complete the activities set out in the key activities section of the positions he felt were a good fit for him. She also asked him about a reference in his CV about his proficiency with Excel.

173 On April 13, 2015, the grievor replied to her Excel question, stating that his comment about his proficiency had been accurate when his CV was written but that he had not worked with Excel to any degree for four or more years. As such, the statement no longer applied.

174 On April 16, 2015, the grievor again replied in email, providing her with further information with respect to her request of April 8, 2015. Ms. Gaudet testified that she showed that email to Mr. Ryan. She stated that some of the grievor's examples of his abilities with respect to the key activities were not accurate. She stated that he had had difficulty drafting and amending briefing notes and that Mr. Ryan had confirmed to her that the environmental scan exercise had been unsuccessful and that it had been abandoned. She stated that the grievor's document had been difficult to follow.

175 Ms. Gaudet stated that the April 16, 2015, email did not provide any substantiation with respect to work the grievor had done for Ms. Ouellette in his assignment to the special project under her supervision in 2013. Ms. Gaudet stated that she had spoken to Ms. Ouellette and that her understanding was that the grievor had had some difficulty expressing himself in writing.

176 Ms. Gaudet stated that she did not review the grievor's 2014-2015 PER but that she did review his 2013-2014 PER. When asked if she had assessed the

grievor's competencies based on his work in 2015 before his termination, Ms. Gaudet answered in the negative, stating that the grievor had not provided that information to her.

177 In cross-examination and in response to questions put to her, Ms. Gaudet stated that she was not aware of the following:

- of any document that reflected that an analysis had been carried out and that a conclusion had been reached that determined that the grievor could not come up to speed working at the AS-05 group and level;
- of any discussion in which the medical information made it clear that the grievor could not come up to speed working at the AS-05 group and level;
- of any information from a medical perspective that the grievor could not come up to speed working at the AS-05 group and level;
- that demotions do not require consent in competency cases;
- if the grievor had been told that the employer was moving towards a termination but that he could be demoted instead; and
- if anyone had discussed medical retirement with the grievor.

178 In cross-examination, Ms. Gaudet also stated that she did not opine to anyone that between November of 2014 and April of 2015, the grievor was unable to demonstrate the duties of his position; nor did she tell anyone that he was unable to demonstrate that he could perform a policy analyst's duties.

179 Mr. Cenaiko was appointed to the NPB's chairperson and chief executive officer position in July of 2008. Before that, he was a member of the legislative assembly (MLA) in Alberta, and before that, he had been a police officer with the Calgary Police Service.

180 Mr. Cenaiko testified that the decision to terminate the grievor's

employment was his and that he signed the letter doing so dated April 23, 2015. He stated that before making that decision, he spoke with Mr. Ryan, Ms. Gaudet, and Ms. Ouellette. The relevant portions of the termination letter state as follows:

. . .

> *This is further to the on-going issues concerning the department's ability to address your functional limitations as indicated by Health Canada on February 12, 2013 and clarifications received on May 13, 2013 with no change or progression in the medical re-assessment of 2014. In addition, we have noted that since your appointment at the Parole Board of Canada, 3 out of 7 of your performance appraisals have been unsatisfactory. The exceptions were in 2009-10, 2012-13, 2013-14 and 2014-15 when you were assessed as satisfactory with the understanding that the assessment was not based on AS-05 competency levels.*
>
> *Based on the information gathered over the period of the last 6 years at PBC, and in spite of the measures taken by our organization in accordance with the Policy on Duty to Accommodate Persons with Disabilities in the Federal Public Service, we have not observed improvement in the work you have performed that would lead us to expect change in a foreseeable future. Therefore, I have reached the conclusion that you are not able to perform the key activities and duties of your substantive position as a Strategic Planning Analyst. This is supported by your assertion in the e-mail of March 24, 2015 that you would be able to partially perform 3 of the total 9 key activities. In addition, the previous secondment opportunities in the organization were not conclusive to find work better suited to your abilities elsewhere in the organization.*
>
> *In the various communication exchanges, you have not demonstrated any interest in considering a demotion during this process. Finally, I have considered the Policy Analyst position as an option. You have not sufficiently demonstrated that you can reasonably perform the duties of this position. In any case, there is no vacant position available.*
>
> *This matter has been on-going since 2009 and in all your communications with the organization, we cannot agree to any solution to resolve this matter. Therefore, under my authority pursuant to Section 12(1)(d) of the Financial Administration Act (FAA), I am obliged to terminate your employment for unsatisfactory performance. Your last day of employment in the Federal Public Service will be*

> *May 22, 2015. However your last day at the workplace will be officially today.*
>
> . . .

181 Mr. Cenaiko was asked about the three unsatisfactory PERs referenced in the termination letter and why they were important. He stated that they were about the grievor's AS-05 work and that the satisfactory PERs were for his work done at lower classifications, PM-01, PM-02, or CR-03.

182 Mr. Cenaiko was asked about the reference to there having been no change or progression in the grievor's medical assessment and why that was relevant. He stated that the grievor was not getting any better and that with no such change, it became difficult for the PBC to accommodate him. The employer could not hire someone else to do the part of the work that the grievor was supposed to do but could not.

183 When he was asked about the reference in the termination letter about the grievor not being interested in a demotion, Mr. Cenaiko stated that every public servant has to remember that taxpayers pay his or her salary and that he or she has to view working in a position in relation to his or her skills. According to Mr. Cenaiko, the grievor had refused to consider the option of a lower-level position at lower pay.

184 In cross-examination, Mr. Cenaiko was asked the following questions and responded as follows:

- if the work the grievor did when he was not in the SPA position had been evaluated, to determine its level — he stated that he did not know;
- if his evidence was that the grievor worked for Mr. Ryan after the accommodations were put into place — he stated that he did not know;
- who supervised the grievor and when — he stated that he could not say;
- what duties the grievor carried out for Ms. Ouellette — he stated that he could not say;

- if he had spoken to Ms. Ouellette about the grievor's performance — he said that he had not; and

- if he was going to terminate someone from a position, would he speak to that person's supervisor — he said, "Maybe someone did, I don't know."

185 Mr. Cenaiko also stated the following:

- he stated that he was aware that in the fall of 2014, it was necessary to send the grievor for an IME, and he agreed that more information had been needed with respect to the grievor's competencies and fitness to work;

- had the medical assessment said that the grievor was fit, he would have been assigned to a position determined by the employer based on the accommodations, if necessary;

- he stated that in the fall of 2014, had the grievor refused to undergo an IME, he would have been kept from the workplace until he complied; and

- he stated that between December of 2014 and April of 2015, when he decided to terminate the grievor's employment, two things happened: first, the grievor refused to participate in an IME; and second, Mr. Cenaiko was led to believe that the grievor was unable to perform the duties of his substantive position as an SPA.

186 When he was asked what had changed and had caused him to determine that the grievor was unable to perform the duties of his substantive position, Mr. Cenaiko was unable to answer. When he was asked when the grievor said that he would not entertain moving to a lower-level position, again, Mr. Cenaiko stated that he did not know.

187 When he was asked if he was aware that the grievor had been asked to set out the key activities he thought he was familiar with, Mr. Cenaiko replied in the

negative. When he was asked if he was aware that the grievor had been asked to provide examples of how he was familiar with the key activities at issue, Mr. Cenaiko again replied in the negative. When he was asked if he was aware that only one meeting had been held to discuss accommodating the grievor between the fall of 2014 and the termination of his employment, Mr. Cenaiko again replied in the negative. When he was asked what the employer did to put the grievor on a disability priority list, Mr. Cenaiko stated that he believed that a discussion had taken place. However, when pushed on the issue, he conceded that he was not sure and that he was not sure if the employer ever even offered it. But he did confirm that the grievor was not put on a disability priority list.

A. Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service

188 The DTA policy applies to the PBC. Its definition of a person with a disability includes anyone who has a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who considers himself or herself disadvantaged in employment by reason of that impairment or believes that an employer or potential employer likely would consider him or her disadvantaged in employment by reason of that impairment.

189 The DTA policy requires deputy heads and their delegates to do the following:

- after general barriers have been removed and general accommodation measures have been put in place, proceed with individual accommodation requests by a person with disabilities by
    - consulting with that person to identify the nature of the accommodation,
    - if necessary, consulting appropriate medical and rehabilitation advisors and others, with the person's consent, to determine the accommodation appropriate to that person, and

- accommodating the person; and

- consult and collaborate with bargaining agents or other employee representatives if the accommodation affects other employees or if the employee being accommodated requests that bargaining agents or other employee representatives be consulted.

190 The DTA policy requires employees to do the following:

- inform their supervisors of their employment-related needs;

- collaborate with the employer or its representatives in finding the most appropriate means to accommodate their employment-related needs; and

- notify the employer when an attendant or other services, technical aids, or equipment are no longer needed and return the equipment.

191 The DTA policy lists a non-exhaustive set of guidelines to help interpret and implement it. The relevant portions state as follows:

- the person to whom the request for accommodation has been directed should do the following:

  - determine the type of accommodation required, based on information provided by the employee,

  - if the employee does not know what type of accommodation is required, consult experts in the field to determine the appropriate accommodation, who could include the employee's physician, psychologist, or centres of expertise with the Public Service Commission or the accommodating department, and

  - provide the accommodation based on the request of the person being accommodated or, if necessary, on the advice of experts; and

- departments and agencies are expected to integrate into their budgets and financial planning exercises the resources necessary to accommodate their employees. When considering costs, it should be kept in mind that in many cases, they will be amortized over the employee's entire career.

192 The DTA policy provides examples of disabilities, which include learning, psychiatric, and developmental disabilities.

193 The DTA policy provides examples of types of accommodation, including flexible work arrangements including but not limited to telework, task modifications, or other alternative work arrangements.

B. The relevant provisions of the collective agreement

194 Clause 18.06 of the collective agreement states as follows:

> ***18.06*** *No person shall seek by intimidation, by threat of dismissal or by any other kind of threat to cause a grievor to abandon a grievance or refrain from exercising the right to present a grievance, as provided in this collective agreement.*

195 Clause 19.01 of the collective agreement states as follows:

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

196 Clause 56.01(b) of the collective agreement states as follows:

> ***56.01***
>
> *(b) The Employer's representative(s) who assess(es) an employee's performance must have observed or been aware of the employee's performance for at least one-half (1/2) of the period for which the employee's performance is evaluated.*

C. Harassment complaints

197 The evidence disclosed that on March 30, 2011, the grievor filed a harassment complaint against a co-worker. Copies of the complaint and investigation report were entered into evidence. The investigation report was dated May of 2012. Of the three allegations set out in the complaint, the investigation found that harassment had occurred with respect to one of them. I was provided with no information as to when the grievor received a copy of the investigation report; nor was I provided with any other information about the harassment complaint or the fallout from it.

198 The evidence disclosed that on December 14, 2011, the grievor filed a harassment complaint against a second co-worker, a copy of which was entered into evidence. I was not provided with any further information on what happened with it.

III. Summary of the arguments

199 Both parties submitted that the medical evidence adduced contained sensitive information and requested that it be redacted and not form part of the public record.

A. For the employer

1. Termination of employment and failure to accommodate

200 The main issue relates to the grievance against the termination of employment and the allegation that the employer failed to accommodate the grievor.

201 Three of the grievor's first four PERs were unsatisfactory. According to Mr. Ryan's testimony, the grievor did not fulfil all the duties of an SPA at the AS-05 group and level. He also testified to the difficulties the grievor had carrying out those functions.

202 During the 2011-2012 fiscal year, the grievor was given an assignment with respect to UALs, and he worked with Ms. Ouellette. She reported that he had difficulty carrying out the duties related to that task, and she ended the assignment. It was never completed.

203 After receiving his third unsatisfactory PER for fiscal year 2011-2012, a further assignment was arranged for the grievor to work as an RSO in Records Suspension at the PM-03 group and level while retaining the pay of his AS-05 group and level. Mr. Bender, who supervised the grievor, reported that he had difficulties grasping the work and that he burned out his coaches.

204 In July of 2013, the grievor was moved from the RSO position to a special project, supervised again by Ms. Ouellette. The work being done was not needed, and it was put together to accommodate his medical issues. While his work on the special projects was deemed satisfactory, it was not assessed against the level of work that would be done at the AS-05 group and level.

205 The employer submitted that an adjudicator's jurisdiction is limited by s.

230 of the *Act*. In this respect, it referred me to *Raymond v. Treasury Board*, 2010 PSLRB 23, *Reddy v. Office of the Superintendent of Financial Institutions*, 2012 PSLRB 94, *Forner v. Canada (Attorney General)*, 2016 FCA 136, *Kalonji v. Deputy Head (Immigration and Refugee Board of Canada)*, 2016 PSLREB 31, *Plamondon v. Deputy Head (Department of Foreign Affairs and International Trade)*, 2011 PSLRB 90, and *Mazerolle v. Deputy Head (Department of Citizenship and Immigration)*, 2012 PSLRB 6.

206 The following are the criteria set out in *Raymond*, which would make a decision unreasonable:

1. the deputy head or the supervisors who assessed the employee's performance were involved in a bad-faith exercise;

2. the employee was not subject to appropriate performance standards;

3. the employer did not clearly communicate the performance standards to the employee that he or she was required to meet; or

4. the employee did not receive the tools, training, and mentoring required to meet the performance standards in a reasonable period.

207 The employer submitted that there was no evidence of bad faith and that in fact, the evidence was to the contrary, in that it acted in the grievor's best interests. He was evaluated against the appropriate performance standards, for the SPA position, and the evidence disclosed that he did not meet the performance level expected of that position.

208 The employer submitted that the performance standards were clearly communicated to the grievor each year and during the course of the year, when he met with his supervisor, Mr. Ryan.

209 The employer's position is that the fact that the grievor performed satisfactorily when working for Ms. Ouellette is not relevant because it did not have to consider work that was not performed at his substantive level (see *Kalonji*).

210 The employer submitted that the grievor received the tools, training,

and mentoring required to succeed. While he might argue that the employer did not follow its policy or guidelines, this is not relevant because he knew what was expected of him and was given the tools, training and, mentoring to succeed. The employer is entitled to make a decision relating to the terms and conditions of employment that deviate from policy. In this respect, it referred me to *Kalonji*, *Appleby-Ostroff v. Canada (Attorney General)*, 2010 FC 479, and *Kubinski v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 87.

2. No disciplinary demotion: Board file no. 566-02-8829 (departmental grievance no. 50267)

211 The grievor challenged his assignment to Records Suspension in July of 2012, alleging that it was a disciplinary demotion.

212 The employer submitted that an adjudicator is without jurisdiction to consider this grievance because the grievor failed to demonstrate that the temporary assignment to Records Suspension constituted a demotion within the meaning of s. 209(1)(c)(i) of the *Act*. There is no demotion if the employee's classification and pay remain unchanged. A demotion under s. 12(1)(d) of the *FAA* must involve placing that employee in a position at a lower maximum rate of pay.

213 The employer temporarily assigned the grievor to carry out other tasks in an effort to help him improve his performance. It is purely a matter of exercising its managerial rights to assign duties. The assignment letter sets out the reason for the assignment, which was to address his poor performance. In this respect, the employer referred me to *Sharaf v. Deputy Head (Public Health Agency of Canada)*, 2010 PSLRB 34, and *Garcia Marin v. Treasury Board (Department of Public Works and Government Services Canada)*, 2006 PSLRB 16 ("*Marin*").

214 In the alternative, the employer argued that if I find that the grievor was in fact demoted to the PM-03 RSO position, it was not done as discipline but for unsatisfactory performance and that as such, s. 230 of the *Act* applies, and I have no jurisdiction.

215 While Parliament has legislated that a myriad of disciplinary actions can

be grieved under s. 208 of the *Act*, it has specifically limited the scope of the disciplinary actions that can be adjudicated under s. 209(1)(b). To be adjudicable under the *Act*, a grievance referred under s. 209(1)(b) must involve (i) a disciplinary action that (ii) resulted in a termination, demotion, suspension, or financial penalty. The term "disciplinary action" is not sufficiently wide to include any or every action by the employer that might have been harmful or prejudicial to an employee's interests. When assessing if there was a disciplinary action, a primary factor is the employer's intention. An employee's feelings about being unfairly treated do not convert administrative action into discipline. In this respect, the employer referred me to *Canada (Attorney General) v. Frazee*, 2007 FC 1176, and *Marin*.

216 There is no evidence that those who assessed the grievor's performance were involved in a bad-faith exercise.

3. Performance appraisal grievance: Board file no. 566-02-10258 (departmental grievance no. 53264)

217 This grievance concerns the same performance appraisal that was the subject of the grievance in Board file no. 566-02-9976, which was withdrawn. In that file, the grievor had raised concerns about the 2012-2013 PER. At the second level of the grievance process, the delegated authority granted that the grievor's request to amend that PER by removing certain comments. Despite this, the grievor referred the grievance to the third level, where the decision maker there overturned the second-level decision and reinserted the comments that the grievor had requested be removed.

218 The grievor filed the grievance in Board file no. 566-02-10258 in response to that third-level reply, alleging that it was an attempt to intimidate him into abandoning that grievance, that it was discriminatory, and that it breached article 19 of the collective agreement. He did not allege that that PER was disguised discipline, so that issue is not before the Board.

219 No evidence was submitted to support the allegation that the 2012-2013 PER was discriminatory or that the final-level response was an attempt to intimidate the grievor into abandoning his grievance.

220 Performance appraisals are outside the Board's jurisdiction. An adjudicator cannot revise a PER if an employee does not agree with it. If such a grievance is denied, the proper recourse is a judicial review at the Federal Court.

221 The grievor alleged that the PER violated clause 56.01(2) of the collective agreement. However, he withdrew his grievances challenging the 2010-2011, 2011-2012, and 2012-2013 PERs.

222 In this respect, the employer referred me to *Spacek v. Canada Revenue Agency*, 2007 PSLRB 115, *Johnson-Paquette v. Canada,* [1998] F.C.J. No. 1741 (QL), *Trépanier v. Canada (Attorney General)*, [2004] F.C.J. No. 1601 (QL), *Dubé v. Canada (Attorney General)*, 2006 FC 796, and *Agard v. Canada (Attorney General)*, 2011 FC 1327.

4. Duty to accommodate

223 If a *prima facie* case of discrimination has been established, the principles in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*") come into play, and the employer must establish that the grievor could not have been accommodated without undue hardship. In this respect, the employer referred me to *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4.

224 The employer admitted that the grievor established *prima facie* discrimination but stated that he could not be accommodated in the workplace without undue hardship.

225 The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded when working conditions can be adjusted without undue hardship to the employer. Its purpose is not to completely alter the essence of the employment contract, which is the employee's duty to perform work in exchange for remuneration. In this respect, the employer referred me to *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43.

226 Under s. 15 of the *CHRA*, accommodation amounts to undue hardship if it would impose an unreasonable or undue burden on the employer, considering health, safety, substantial interference with its operations, the impact on other participants, and cost. Each case depends on the context and circumstances. In this respect, the employer referred me to *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* [1990] 2 S.C.R. 489, and *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525.

227 As set out in *Canadian National Railway Co. v. Brotherhood of Locomotive Engineers* (2003), 118 L.A.C. (4th) 228, and *St. Paul's Hospital v. H.E.U.* (2001), 96 L.A.C. (4th) 129, an employer is not obliged to create a position for an employee to fulfil its duty to accommodate. This principle is also supported by *Everaz Inc. NA Canada v. Shopmens (International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local Union No. 805)*, 2010 CanLII 96500, and *Glenn Dale Curry*, ALTA. G.A.A. 2010-009.

228 *Callan v. Suncor Inc.*, 2006 ABCA 15, stands for the proposition that the duty to accommodate does not imply a perfect and instant accommodation.

229 *Pourasadi v. Bentley Leathers Inc.*, 2015 HRTO 138, held that the duty to accommodate may require arranging an employee's workplace in a way that enables her or him to perform the essential duties of that employee's work. However, it does not require permanently changing the essential duties of a position or permanently assigning them to other employees. It does not require exempting employees from performing the essential duties of their positions.

230 *Gables Lodge Limited v. C.U.P.E., Local 1315* (2009), 187 L.A.C. (4th) 286, held that the threshold of undue hardship is crossed if the employer is required to maintain an employee with a disability in a position that is not a useful and productive job in the context of its operations.

231 As set out in *St. Paul's Hospital*, an employee seeking accommodation does not have the right to refuse a reasonable accommodation even if another one is available that would not cause undue hardship to the employer and that the employee would prefer. An employee seeking accommodation cannot expect a perfect solution. If

the employee turns down a proposal for reasonable accommodation, then the employer's duty to accommodate is discharged.

232 The duty to accommodate is not a one-way street on which the employer is to make all the accommodation efforts (see *McGill University Health Centre (Montreal General Hospital)*).

233 A physician's role is limited to identifying and providing expertise on a patient's needs and limitations. The appropriate accommodation is up to the employer, the employee, and the bargaining agent. Based on what the physician identifies and provides, the employer must determine how best to accommodate the employee's workplace needs and limitations. In this respect, the employer referred me to *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97.

234 *Leclair* also held that it is a misconception held by employees that finding an accommodation is *carte blanche* to be given the position of their choice because of the employer's duty to accommodate them to the point of undue hardship. Employees are not entitled to their preferred accommodations but to reasonable accommodations that meet their identified needs.

235 In *Canada (Attorney General) v. Cruden*, 2013 FC 520, the Court held that there is no separate procedural component of the duty to accommodate; therefore, if an employee cannot be accommodated without causing the employer undue hardship, then there is no discrimination.

236 The employer submitted that it did not discriminate against the grievor but to the contrary provided a proper accommodation to him to the point of undue hardship.

237 The evidence disclosed that between 2008 and July of 2012, the grievor was tasked with performing his substantive AS-05 SPA position duties. The employer had not been aware of any medical condition. It cannot accommodate a medical condition that is not disclosed.

238 From August of 2012 until June of 2013, the grievor was assigned RSO duties at the PM-03 group and level. In August of, 2012, the employer received the August 14 letter from the grievor's treating psychologist setting out certain terms relating

to accommodation, which were that the grievor engage in work familiar to him, that he be given concrete directions for expectations on work-related tasks, and that accommodation measures would best be directed through an evaluation by HC.

239 Mr. Ryan testified that the concept of work familiar to the grievor was confusing because when he was in his substantive SPA position, he did not complete its duties in a satisfactory manner.

240 The employer followed the grievor's treating psychologist's recommendation that an HC evaluation be carried out, which was arranged and executed. HC did not provide the FTWE results until February of 2013. Between August of 2012 and February 2013, the grievor was on sick leave for two months; he returned on a graduated return-to-work schedule under which he reached full-time hours only in February of 2013.

241 Between August of 2012 and February 2013, the action plan that had been developed for the grievor was set aside, and he carried out only some of an RSO's duties, namely, screening. During this time, he was assigned a coach and had weekly meetings with his supervisor. Based on the facts known to the employer, and the medical information, between August of 2012 and February of 2013, it accommodated the grievor.

242 The February 2013 FTWE set out the following recommendations with respect to the grievor, if they were operationally feasible:

- limiting his duties that required multitasking, such as planning, coordinating, and implementing strategic or operational plans;
- limiting his duties that required sustained attention, acquiring new information, and decision making;
- performing duties that he was familiar with;
- being coached by someone familiar with the work duties; and
- having regular guidance meetings with his supervisor.

243 Mr. Ryan testified that based on the February 2013 FTWE recommendations, it was clear that the grievor could not perform the duties of his substantive SPA position. The duties that that FTWE suggested limiting were in fact the duties of the SPA position. In essence, the FTWE stated to limit the duties essential to that position. The evidence disclosed that the grievor had not been succeeding in his SPA position and that based on the FTWE's recommendations, he could not carry out the analytical work, time management, and attention to detail required of him in that SPA position. Assigning him his SPA tasks would not have been in his best interests, and as such, the employer determined that it was best to keep him in the RSO position, with the accommodation measures in place.

244 The employer sought clarity from HC with respect to the accommodation recommendations set out in the February 2013 FTWE. Between April and the end of June 2013, the grievor was required to carry out all an RSO's assigned tasks, albeit carrying a lesser caseload than other RSOs.

245 On May 13, 2013, the employer received a response from HC indicating that the grievor's condition was chronic. Two weeks later, he went on sick leave until the end of June 2013. During this period, while waiting for the clarifications from HC that it had requested, it did not discriminate against him by tasking him with the RSO duties at the PM-03 group and level.

246 The PBC is not a large employer. Mr. Clair testified that he spoke to all his mangers and that he looked at possibilities for work where it was needed. The RSO duties assigned to the grievor corresponded to a real need. He was given clear objectives that could be measured, along with coaches and mentoring. A targeted training plan and feedback were put in place to keep him on track. He was not entitled to either a perfect or an instant accommodation.

247 To accommodate the grievor, beginning in July of 2013 and continuing until his termination, the grievor was assigned a special project under Ms. Ouellette's supervision. His work did not correspond to an actual position at the PBC, which did not need or require that work and has not used it. While the position was titled "AS-05 Auditor/Investigator", the only function that corresponded to the AS-05 work description

was reading PBC Board members' decisions. The grievor's performance was rated satisfactory during that period of the special project. However, he was not rated against the substantive duties of the AS-05 SPA or all the duties of the auditor/investigator position as set out in the accommodation agreement and PER for the period.

248 In June of 2014, responding to a request from the employer, HC stated that the grievor was not considered able to resume the full duties of his substantive AS-05 position and that the workplace accommodations that were in place should remain. The response did state that depending on his treatment, the grievor might be able to assume further duties of the AS-05 position in the future. HC also stated that it was willing to assess the grievor in six months' time. In light of this information, his accommodation agreement and special project with Ms. Ouellette was extended until January of 2015.

249 Ms. Gaudet testified that given that the grievor's accommodation agreement would end in January of 2015 and that the PBC was a small organization and like other departments was subject to the DRAP and budget cuts, it could not sustain the accommodation, which entailed paying him at the AS-05 group and level for work that was not needed in a position that did not exist. The grievor could not continue in the special assignment with Ms. Ouellette.

250 Meetings took place in January of 2015, and the grievor eventually consented to the employer's IME request. Despite this, he filed a grievance the next day alleging that the requirement to participate in the IME was an abuse of authority. While the employer disagreed that it had discriminated against him by requesting the IME, it granted his grievance and stated that it would make a decision on its ability to accommodate him based on the information it had on hand from his health care professional and HC's earlier evaluations. After that came another letter from the grievor's treating psychologist in which she repeated that he should engage in work familiar to him and encouraged the employer to ask him what "accommodation measure" meant to him.

251 The grievor, his bargaining agent representative, and the employer held a further meeting, at which options for moving forward were discussed, including

potentially finding a job that was congruent with the recommendations. One option was demotion, which the grievor was not interested in.

252 According to Mr. Cenaiko's evidence, at a meeting, the grievor had told him that he was not interested in a demotion. While the grievor testified that he did not decline the demotion option, the employer submitted that his evidence is just not credible. Rejecting a demotion offer would align with his character and testimony. He was not pleased with being assigned the RSO work, which he felt was demeaning and embarrassing, and he grieved that assignment, alleging it was a disciplinary demotion. It would also align with Dr. Suddaby's evidence. He testified, and his report stated that the grievor's style was to blame others for difficulties and to minimize or deny his accountability.

253 As part of the accommodation process taking place in March of 2015, the grievor was asked to provide a list of key activities for both the policy analyst and SPA positions and to identify the ones he felt were congruent with his psychologist's recommendations. He provided a list. Pursuant to another request, he provided details of how he felt he met those activities. According to his evidence, he felt that he could only partially perform three of the nine key SPA activities.

254 There were no vacant AS-05 auditor/investigator positions; nor were there vacancies in the Board Member Secretariat or in policy analyst positions, which were the other areas the grievor indicated he felt qualified to work in.

255 Ms. Gaudet stated that the medical evidence indicated that the grievor could not multitask, which was essential to both the AS-05 policy analyst and SPA positions.

256 Therefore, the employer met the duty to accommodate to the point of undue hardship for the following reasons:

- the grievor could not remain in the temporary special project with Ms. Ouellette; the jurisprudence states that the employer does not have to create a new job, one that is not productive, or one for which the core duties are removed;

- the grievor indicated that he could perform only three of the nine essential key activities of the SPA position; therefore, it would have been an undue hardship for the employer to return him to that position given that he could not perform its core duties;

- HC stated that the recommendations in the February 2013 FTWE were to remain in effect;

- there were no AS-05 policy analyst positions, AS-05 auditor/investigator positions, or AS-05 positions in the Board Member Secretariat, and even if there had been some, the duties were such that the grievor would not have been able to do them; and

- the grievor rejected the demotion option, and it was doubtful that he could have performed the duties of the lower-level position in any event, given HC's assessment that he could not multitask.

257 HC stated that the grievor's condition is chronic. His treating psychologist testified too that his condition is chronic and that he needed accommodation permanently so that his stress levels would not worsen. She stated that accommodating him is necessary all the time, to not exacerbate his symptoms, so he always needs to carry out familiar duties.

258 It would be an undue hardship for the employer to create a position for the grievor in which he would get to choose what a familiar duty is so that he would not become stressed and that would not involve multitasking, sustained attention, acquiring new information, and decision making.

259 Dr. Suddaby testified that the grievor had non-medical character-trait deficits that could explain his poor performance, which was substantiated in the medical reports of Dr. Dessaulles submitted into evidence. The grievor self-diagnoses his skill-set deficits as a medical issue even when he is not experiencing an episode of depression or anxiety. He stops seeking help when not in crisis because his emotions are no longer front and centre. When he is not receiving perceived entitlements or feels unjustly treated, a depression episode will be triggered. Dr. Suddaby testified that it is

very challenging for an employer to accommodate someone with these character-trait deficits. He said that the challenge is trying to determine when and whether something is a legitimate medical issue.

260 The employer submitted that the grievances should be dismissed.

B. For the grievor

261 This case deals with both performance and accommodation, which are inextricably connected. While they are two different concepts with different and distinct criteria to be applied, they are sometimes parallel, sometimes merge, and sometimes split. They must be considered independently before being considered jointly.

262 The grievor submits that there is not a lot of disagreement with respect to the facts; the disagreement is in the characterization the parties attribute to the facts.

263 At the time his employment was terminated, the grievor had been employed in the federal public service for more than two decades, which is a significant length of service. There is no suggestion that he has been a discipline problem or that there is any disciplinary record.

264 The grievor had long public service with the CSC working in Kingston, Ontario, before moving to Ottawa in 2005. After a medical leave, he was placed on a priority staffing list. He competed for an AS-05 policy analyst position, and despite being successful, it was awarded to someone else, and he was offered the SPA position, also classified at the AS-05 group and level. The grievor stated that both positions were identical; he was told that if he did not take the SPA position, his priority would be jeopardized, so he accepted it.

265 In his first year as an SPA, the grievor's performance was rated unsatisfactory. In 2009, Mr. Ryan became his supervisor, and his second PER was rated satisfactory. At some point between April of 2010 and the summer of 2012, Mr. Ryan formed the impression that the grievor was not performing at the level expected of him, and despite this, neither Mr. Ryan nor anyone else provided the grievor with a written action plan.

266 In 2011, the grievor was subject to harassment.

267 In early 2012, Mr. Ryan noted some behavioural issues, about which the grievor was spoken to via a letter in February of 2012.

268 The grievor's performance for fiscal years 2010-2011 and 2011-2012 was rated as unsatisfactory. Mr. Ryan did not follow the TBS Guide with respect to performance management.

269 In July of 2012, the grievor was demoted to the RSO position.

270 Dr. Moustgaard's August 14 letter arrived sometime in August of 2012. It set out significant information with respect to the grievor's disability, of which she described a degree of severity in stark terms. She was specific as to what the disability does to him and suggested that the illness impacted his ability to engage in work-related responsibilities.

271 HC conducted an FTWE, and in early February 2013, it issued the February 2013 FTWE. At the same time, the grievor filed a grievance with respect to the employer's failure to accommodate him.

272 In July of 2013, the grievor was assigned to work on the special project with Ms. Ouellette. According to her, his work was fully satisfactory. He submitted that this work was at the AS-05 group and level.

273 In January of 2015, the employer wanted the grievor to participate in a further FTWE [IME], which he did not agree was necessary. He filed a grievance against the employer, which in turn acted in bad faith and determined that it would forgo the assessment and make determinations based on the information it had on hand.

274 Ms. Gaudet's evidence on this point is critical. She stated that the employer could not make a determination on accommodation without the new FTWE [IME], which was never completed. At that juncture, the parties discussed accommodation.

275 Eric McMullen of HR told Mr. Cenaiko, the PBC's chairperson, in the fall of 2014 that the grievor needed another medical assessment so that the employer could obtain more concrete information with respect to his competencies and his fitness to work. Once the medical assessment was completed, the employer could carry out the accommodation analysis. Mr. Cenaiko's evidence was that not only did he agree with this recommendation, but also, had the grievor refused the assessment, he would have been put on leave without pay until he complied.

276 The grievor agreed that Mr. Cenaiko had authority under s. 12(1)(d) of the *FAA* to terminate employment for unsatisfactory performance. The grievor admitted that the Board's jurisdiction is limited with respect to terminations or demotions for unsatisfactory performance (under s. 230 of the *Act*) and referred me to the criteria set out in *Raymond* and the other cases cited by the employer.

277 The grievor submitted that human rights law is quasi-constitutional, and as such, obligations set out in human rights legislation prevail over other legislation. In this respect, he referred me to *A.J. v. Attorney General of Canada*, 2008 FC 591.

278 In August of 2014, before the employer received Dr. Moustgaard's letter and after it had moved the grievor from the SPA to the RSO position (after the three unsuccessful PERs), it was not considering terminating his employment.

279 When it sought the FTWE, the employer specifically asked if the grievor's performance issues related to his medical condition. This clearly demonstrates that this issue had crossed its mind. Dr. Lazaridis addressed this question in her letter of May 13, 2013, when she stated as follows: "Mr. Herbert's medical conditions likely contribute to [the] performance concerns described in your letters." It is clear that two years before deciding to terminate the grievor's employment, the PBC knew that his PERs were being influenced by his disability.

280 The decision to terminate cannot be supported by the 2012-2013 PER, as it was prepared for duties that were "not familiar" and at a point when the grievor's treating psychologist and the HC physician had said that he should be carrying out familiar duties.

281 The employer dismissed the grievor's positive performance appraisals for July of 2013 through April of 2015. He was working under an accommodation agreement that set the performance standards. It is discriminatory and unreasonable to expect an employee who is being accommodated at one level to perform to a higher level.

282 The grievor was also not made aware that he would be assessed at a level other than AS-05.

283 The work the grievor did for Ms. Ouellette either was real work or was not real work. If it was not real work, then it was not a real accommodation, and it fails with respect to the law of accommodation. If it was real work and a legitimate accommodation agreement, Ms. Ouellette's evidence was that she was satisfied with the grievor's work. If so, then he could not have been terminated for unsatisfactory performance.

284 The entire purpose of the DTA policy and the reason human rights legislation exists is to remove barriers so that with appropriate accommodation, persons with disabilities can succeed.

285 The grievor submitted that there was a *prima facie* case of disability, and therefore, there was a need to accommodate him. At that point, the burden of proof shifted, and the employer had to demonstrate that it could not accommodate him. The questions now become: Did the employer demonstrate undue hardship? Did it demonstrate that it had no other way to accommodate the grievor?

286 The grievor referred me to *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 2, which states that the duty to accommodate has both procedural and substantive aspects. The procedural aspect requires the employer to seriously consider how it can accommodate the employee, and the substantive aspect requires the employer to show that it could not have accommodated the employee's disability without undue hardship (see *Panacci* at paragraph 85). The procedural aspect requires the employer to obtain all relevant information about the employee's disability, which could include information about his or her current medical condition, the prognosis for recovery, and his or her ability to perform the duties of the employee's

substantive position or of alternate work. Failing to give any thought or consideration to the accommodation issue is failing to satisfy the duty to accommodate (see *Panacci* at paragraph 86).

287 As set out in *Panacci*, which referred to *Hydro Québec*, the substantive aspects of the duty to accommodate require the employer to demonstrate that it could not have accommodated the grievor's disability short of undue hardship. The duty to accommodate does not require the employer to change working conditions "in a fundamental way" that would change the essence of the employment relationship.

288 At paragraph 125 of *Giroux v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 102, the adjudicator stated that ". . . from her return to duty until her termination some four years later, the grievor was never given the opportunity to attempt to perform the duties that constitute the bulk of her job." At paragraph 126, the adjudicator stated as follows: "How could he, as he stated, be comfortable with the decision to terminate a 31-year career without any current medical evidence on her functional abilities to perform that or other jobs and without revisiting job availability since it was last done in 2002?"

289 At paragraph 138 of *Giroux*, the adjudicator stated as follows: "The duty to accommodate and the [*CHRA*] are neither new nor unknown in the federal public service. Nor is the duty to accommodate a stagnant concept . . . ."

290 At paragraph 149 of *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8, the adjudicator stated as follows:

> *149 Before taking the drastic step of terminating the grievor's employment on the basis that he was no longer able to attend work, the employer has the obvious duty to establish the exact medical condition of the employee and a prognosis that he will be unable to return to work in the foreseeable future. In the instant case, the employer had no such conclusive evidence. The evidence is irrefutable that the employer made up its mind to terminate the grievor's employment before obtaining any evidence of his complete disability. It relied on a medical opinion given in 2004 obtained during the mediation process with respect to another grievance and the opinion of another manager. . . .*

291 *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3 at para. 121, states that the duty to accommodate requires the employer first to reasonably accommodate an employee at his or her substantive level before considering lower-level positions. In the grievor's case, this never happened.

292 *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, stated that the employer's failure to consult the employee with respect to the potential accommodation measures can be a failure to accommodate. Accommodation is a two-way street. In this respect, the grievor also referred me to *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15.

293 The burden of proof was on the employer to demonstrate that it initiated, conducted, and completed an appropriate accommodation exercise and that accommodation was not possible.

294 The grievor also referred me to *Ransanz v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1109, *Vuktilaj v. Canada (Citizenship and Immigration)*, 2014 FC 188, *Lapointe v. Canada*, 2004 FC 244, *Fischer v. Canada (Attorney General)*, 2012 FC 720, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, *O'Leary v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSRLB 10 (upheld in 2008 FC 212), *Meiorin*, *Stringer v. Attorney General of Canada*, 2013 FC 735, *Audet v. Canadian National Railway*, 2006 CHRT 25, and *Attorney General of Canada v. Grover*, 2007 FC 28.

1. The grievance in Board file no. 566-02-8830 (departmental grievance no. 49061)

295 The Board can set aside a demotion on evidence that the employer's action was a sham or subterfuge or a veiled disciplinary action. In *Stevenson v. Canada Revenue Agency*, 2009 PSLRB 89, the Board refused to find disguised discipline because the employer had never raised disciplinary issues with the employee.

296 The grievor submitted that the employer's decision to demote him was disguised discipline and that it was carried out in bad faith. In support, he stated the following:

- the employer's allegations of poor performance were unreasonable and without merit;

- Mr. Ryan was not a supportive manager. He provided little assistance or training to assist the grievor, never drafted an action plan or engaged in performance meetings, and paid no attention to the grievor's allegation that he was being harassed; and

- shortly before the demotion, Mr. Ryan sent the grievor a warning letter about his behaviour at work and his work hours that stated that if he did not improve, he would face disciplinary action, and that the situation would be reassessed in a month. A few months after this letter was sent, Mr. Ryan demoted the grievor.

2. The grievance in Board file nos. 566-02-8829 and 566-02-10258 (departmental grievance no. 50267 and 53264)

297 On February 13, 2013, the grievor lost his patience waiting for the PBC to implement his doctor's recommendations, which were then six months old. At that point, no one had spoken to him about accommodation.

298 Only on March 12, 2013, did Mr. Clair speak to the grievor to explain the accommodation measure that the PBC was prepared to implement. The grievor submitted that the PBC's only proposed accommodation was to extend the assignment in the RSO position. He submitted that Mr. Clair refused to consider his request to return to his SPA position. The employer acted in an autocratic, rather than collaborative manner. The new role in the RSO position was unfamiliar to him and was exacerbating his disability.

299 The grievor again contacted both Mr. Clair and Mr. Bender about accommodation issues. He submitted that they responded to his request with hostility. Despite his attempts to engage Messrs. Clair and Bender about accommodation, the PBC was not willing to discuss it.

C. The employer's reply

300 Although Dr. Moustgaard might have started treating the grievor in 2007, in some periods, she did not treat him. She is a patient advocate.

301 The grievor did not carry out the full range of the duties while assigned to the RSO position.

302 The grievor could not be reassigned to his substantive SPA duties because he said he could only partially perform some of them.

303 From July 2013 until his termination, the grievor was in an auditor/investigator position in name only and was not performing the full duties of that position. The uncontested evidence was that it was an accommodation measure.

IV. Reasons

A. Sealing documents

304 *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 to 11, states as follows:

> *[9] The sealing of documents and records filed in judicial and quasi-judicial hearings is inconsistent with the fundamental principle enshrined in our system of justice that hearings are public and accessible. The Supreme Court of Canada has ruled that public access to exhibits and other documents filed in legal proceedings is a constitutionally protected right under the "freedom of expression" provisions of the* Canadian Charter of Rights and Freedoms*; for example, see* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1996] 3 S.C.R. 480;* Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835;* R. v. Mentuck*, 2001 SCC 76,* Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII).*
>
> *[10] However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and administrative tribunals have the discretion to grant requests for confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering requests to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as* Dagenais *and* Mentuck*. These decisions gave rise to what is now known as the* Dagenais/Mentuck *test.*
>
> *[11] The* Dagenais/Mentuck *test was developed in the context of requests for publication bans in criminal proceedings. In* Sierra Club of Canada*, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:*

. . .

> 1. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> 2. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

. . .

305 Entered into evidence were a number of the grievor's medical reports or letters, physician's clinical notes, and medical testing results. These reports go into great detail about many different aspects of his life, much of which is not necessarily germane to the issues before me. Those parts that are germane have been set out in some detail in this decision. This has been done so that the parties and those who read this decision may understand how it was made.

306 However, the balance of the information has no bearing on the grievances, and as such, I find that the salutary effects of keeping confidential the personal information in the medical reports or letters, physician's clinical notes, and medical testing results outweigh the deleterious effects, including on the right to free expression, which in this context includes the public's interest in open and accessible court proceedings, of not making public the grievor's personal medical history and information. Therefore, I have ordered sealed the following documents, related to the harassment allegations:

1. Exhibit E-1, Tab 8: letter from Dr. Moustgaard dated August 14, 2012, one page;

2. Exhibit E-1, Tab 10: letter from Dr. Lazaridis dated February 12, 2013, two pages;

3. Exhibit E-1, Tab 41: letter from Dr. Moustgaard dated March 6, 2015,

one page;

4. Exhibit E-1, Tab 55: letter from Dr. Moustgaard to Dr. Lazaridis dated November 15, 2012, three pages;

5. Exhibit E-1, Tab 56: letter from Dr. Kasbia to Dr. Lazaridis dated November 21, 2012, two pages;

6. Exhibit E-1, Tab 57: letter from Dr. Dessaulles to the grievor dated December 10, 2012, three pages;

7. Exhibit E-1, Tab 58: letter and report from Dr. Dessaulles to Dr. Lazaridis dated December 10, 2012, 11 pages;

8. Exhibit E-1, Tab 59: letter report from Dr. Suddaby to Dr. Lazaridis dated May 1, 2014, 13 pages;

9. Exhibit E-3: letter from Dr. Lazaridis to Dr. Kasbia dated March 20, 2014, with the following attachments:

    - ROH Sleep Disorders Clinic initial assessment dictated by Dr. Douglass and dated July 12, 2013, four pages,

    - ROH Report of Sleep Laboratory Study nocturnal polysomnogram signed by Dr. Douglass and dated December 23 and 30, 2013, two pages, and

    - ROH Report of Sleep Laboratory Study nocturnal polysomnogram with CPAP titration signed by Dr. Douglass and dated January 6, 2014, two pages;

10. Exhibit E-5: handwritten notes of Dr. Lazaridis dated July 7, 2014, two pages;

11. Exhibit E-6: handwritten notes of Dr. Lazaridis dated October 24, 2012, five pages, double-sided;

12. Exhibit E-7: handwritten notes of Dr. Lazaridis dated June 5, 2014,

three pages, double-sided;

13. Exhibit G-3: brief of medical reports, with the following tabs:

    - Tab 1: letter from Dr. Moustgaard dated August 14, 2012, one page,
    - Tab 2: letter from Dr. Moustgaard to Dr. Lazaridis dated November 15, 2012, three pages,
    - Tab 4: letter from Dr. Moustgaard dated March 6, 2015, one page,
    - Tab 5: letter from Dr. Moustgaard dated April 29, 2015, one page,
    - Tab 6: “Psychological Consultation Report” from Dr. Moustgaard dated June 25, 2015, five pages,
    - Tab 7: handwritten notes of Dr. Moustgaard from several dates, 17 pages,
    - Tab 7: Queensway Carleton Hospital Mental Health Outpatient Consultation of Dr. Michael Browne dated June 29, 2015, three pages,
    - Tab 7: letter from Dr. Moustgaard dated August 14, 2012, one page, and
    - Tab 10: letter from Dr. Lazaridis dated February 12, 2013, two pages; and

14. Exhibit G-5: handwritten notes of Dr. Lazaridis dated January 28, 2015, two pages.

307 Also entered into evidence were documents related to harassment complaints the grievor made against two co-workers. During the hearing, given that eight grievances had been referred to adjudication, I suspected that the harassment complaints might have some bearing on the issues I had to decide. In the end, they did

not.

308 As the allegations in the harassment complaints have no bearing on these grievances, I find that the salutary effects of keeping confidential the allegations against those other employees (who were not parties to these proceedings; nor did they attend and give any evidence) outweigh the deleterious effects, including on the right to free expression, which in this context includes the public's interest in open and accessible court proceedings, of not making public these contentious and potentially damaging allegations. Therefore, I have ordered sealed the following documents, related to the harassment allegations:

1. Exhibit G-2, Tab 11: a two-page email chain. The first email is dated March 30, 2011, and is from the grievor to Suzanne Brisebois, alleging harassment, and the last email is dated April 11, 2011, sent by Mr. McMullen to Michèle Lampron.

2. Exhibit G-2, Tab 13: a six-page document titled "Harassment Complaint –Keith Herbert" and dated May 29, 2011, sent by the grievor to Ms. Trevathan, and adding details to a harassment complaint he filed dated March 30, 2011.

3. Exhibit G-2, Tab 14: a two-page email exchange between the grievor, Eric McMullen, and Ms. Trevathan dated August 3, 2011, and adding details to the harassment complaint.

4. Exhibit G-2, Tab 16: a two-page harassment complaint of the grievor dated December 14, 2011.

5. Exhibit G-2, Tab 18: a 42-page document entitled "Final Report on Harassment", dated May 2012, and completed by Charron Human Resources Inc., with respect to the grievor's harassment complaint dated March 30, 2011.

B. The grievance in Board file no. 566-02-8830 (departmental grievance no. 49061)

309 The grievor grieved the contents of his assignment agreement, dated July 12, 2012, and the assignment itself. He alleged that the assignment was disguised discipline and that it violated article 17 of the collective agreement, the TBS Guide, and the *PSEA*.

310 The employer objected to my jurisdiction to hear this grievance. It submitted that the grievance did not fall under s. 209 of the *Act*. For the reasons that follow, the employer's objection to jurisdiction is allowed, and the grievance is dismissed.

311 While Parliament has legislated that a myriad of actions can be grieved under s. 208 of the *Act*, it has specifically limited the scope of the grievances that can be adjudicated under s. 209 of the *Act.* This grievance was referred under s. 209(1)(b), meaning that it arose from disciplinary action that resulted in a termination of employment, demotion, suspension, or financial penalty.

312 If it is to fall under s. 209(1)(b), the grievor must establish that he suffered either a termination of employment, a demotion, a suspension, or a financial penalty that arose from a disciplinary action of the employer. It is insufficient to prove only that it happened; he must also establish that it was disciplinary.

313 Disciplinary action is not sufficiently wide to include any or every action by the employer that may harm or prejudice an employee's interests. As set out in *Frazee* and *Marin*, when assessing if disciplinary action occurred, a primary factor is the employer's intention. An employee's feelings about being unfairly treated do not convert administrative action into discipline.

314 There is clearly no evidence that the assignment or the contents of the assignment agreement was a termination of the grievor's employment, a suspension, or a financial penalty, as he remained employed and was not sent away from work (with or without pay), and while on the assignment, he continued to receive his pay at the AS-05 group and level.

315 This leaves demotion. For me to have jurisdiction, the grievor had to establish that on a balance of probabilities, the employer's action constituted a demotion.

316 One characteristic of a demotion is being placed in a position at a lower pay level. While the evidence clearly established that the assignment was to a position at a lower pay level, it also disclosed that the grievor continued to receive his pay at the AS-05 group and level.

317 Before being placed on assignment on July 12, 2012, three of the grievor's four PERs had been unsatisfactory. The only satisfactory one was the 2009-2010 PER done by Mr. Ryan. In addition, Mr. Ryan stated that while he had rated the grievor's performance as satisfactory, he said that he had not assessed the grievor against all the competencies of the SPA position. In addition, when the grievor was placed on assignment and when he filed this grievance, he had not yet seen Dr. Moustgaard; nor had the employer received her August 14 letter.

318 The evidence indicates that the grievor had performance difficulties in his SPA position. It also indicates that the employer intended to try help him raise his work to the level necessary for him to do his job. These facts are supported by the medical evidence that clearly points to the grievor having a medical issue or issues that all the medical professionals, who either appeared before me or provided reports as part of the FTWE process, indicated caused him cognitive difficulties, specifically with what Mr. Ryan described as the key functions of the SPA position, namely, multitasking, planning and coordinating strategic plans, acquiring new information, and decision making.

319 As the evidence did not disclose that the assignment to the RSO position or the contents of the assignment agreement were either a demotion or disciplinary in nature, I have no jurisdiction with respect to this grievance.

320 While the grievor did receive a letter dated February 7, 2012, which referred to his behaviour at work and complaints from some of his colleagues, there is no evidence that links this letter, dated some six months earlier, to the assignment.

C. The grievance in Board file no. 566-02-10258 (departmental file no. 53264)

321 The grievor filed this grievance in response to the final-level grievance response to a grievance that has since been withdrawn (Board file no. 566-02-9976).

322 In Board file no. 566-02-9976, the grievor raised concerns about his 2012-2013 PER. At the second level of the grievance process, the delegated authority determined that the request to amend the 2012-2013 PER by removing certain comments would be granted. Despite this outcome, the grievor referred the grievance to the third level, at which the delegated authority, Mr. Cenaiko, overturned the second-level response and reinserted the comments that the second-level delegated authority had allowed. The grievor filed the grievance that became Board file no. 566-02-10258 in response to Mr. Cenaiko reversing the second-level response to the grievance that became file 566-02-9976.

323 In Board file no. 566-02-10258, the grievor alleged that Mr. Cenaiko's reversal of the earlier decision (for Board file no. 566-02-9976) was an attempt to intimidate him into abandoning that grievance, that it was discriminatory, and that it breached articles 18, 19, and 56 of the collective agreement. In that portion of the grievance form in which the grievor set out the relief he sought, he stated that he wanted the second-level reply in Board file no. 566-02-9976 reinstated.

324 For the reasons that follow, this grievance is dismissed.

325 The grievance process in the federal public service is currently set out in the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") and is a continuation of the process that has been in place, largely unchanged, for decades. The process was initially implemented at the time of the Board's predecessor, the Public Service Staff Relations Board, under the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35), and then, it was continued under the *PSLRA*.

326 The process set out by the *Regulations* provides that if an employee who has filed an individual grievance is unsatisfied with a decision at a level in the grievance

process, he or she can refer the grievance forward in the process until it is exhausted. When that happens, depending on the nature of the grievance, the grievor may refer it to the Board for adjudication, if the Board would have jurisdiction over it (currently, under s. 209 of the *Act*).

327 The grievor filed this grievance despite having also referred the grievance that became Board file no. 566-02-9976 to the PSLRB for adjudication.

328 Mr. Cenaiko testified at the hearing. He was not asked any questions during the course of his evidence about his final-level decision on the grievance that became file 566-02-9976.

329 When he gave his evidence, the grievor did not speak about the final-level grievance response for the grievance that became Board file no. 566-02-9976.

330 Just before the arguments, the grievor withdrew the grievance in Board file no. 566-02-9976.

331 With respect to article 18 of the collective agreement, there was no evidence presented of an act of intimidation, threat of dismissal, or any other threat made against the grievor such that to cause him to abandon his grievance, the one that would become Board file no. 566-02-9976, or to refrain from exercising a right to file one. Indeed, the evidence with respect to this latter part of article 18 (". . . refrain from exercising a right to present a grievance . . .") discloses that when Mr. Cenaiko ruled against him, the grievor filed the grievance that became Board file no. 566-02-10258.

332 With respect to article 19 of the collective agreement, again, there was no evidence of any discrimination, interference, restriction, coercion, harassment, intimidation, or disciplinary action exercised or practiced with respect to the grievor by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted, relating to filing the grievance that eventually became Board file no. 566-02-9976.

333 Finally, with respect to article 56 of the collective agreement, there was no

evidence as to how it has any bearing on the grievance. While it might have had some bearing on the content of the grievance that became Board file no. 566-02-9976, it has no bearing on this grievance.

334 In his argument, the grievor submitted that Mr. Cenaiko's final-level decision for the grievance that became Board file no. 566-02-9976 was a failure to accommodate him. There is absolutely no evidence as to how this grievance has any relation to his disability or to the duty to accommodate.

D. The grievances in Board file nos. 566-02-8829, 11308, and 11309

335 I have grouped the two grievances that became Board file nos. 566-02-8829, 11308, and 11309 as they address the grievor's disability within the workplace, the accommodation issue he raised, and his termination of employment, which was tied to the disability and accommodation issues.

336 The grievance that became Board file no. 566-02-8829 was filed on February 14, 2013, two days after the February 2013 FTWE report was issued. The grievor signed it on February 12, 2013, and the bargaining agent representative signed it on the next day. The grievance states that the date on which each act, omission, or other matter giving rise to the grievance occurred was February 8, 2013.

337 The grievance that became Board file nos. 566-02-11308 and 11309 was filed on April 24, 2015, and resulted from the termination of the grievor's employment. He also alleged in it that the employer had discriminated against him due to his disability and that it had failed to accommodate him.

338 Unlike the employer's representatives who were involved with the grievor either as supervisors or as being responsible for him in the organizational hierarchy, I had the benefit of seeing all the medical reports and letters written by either his family physician, his treating psychologist, the HC doctors (including psychiatrists), and the sleep specialist.

339 It is clear to me that during the period that relates to the facts that led to

these grievances, and likely for some time before, the grievor was experiencing and presenting to his health care providers and FTWE specialists a very complex mental health situation that affected him in his work environment and that presented a difficult and challenging situation for not only him but also for his colleagues and those tasked with supervising him.

E. The grievor's disability

340 Drs. Moustgaard, Lazaridis, and Suddaby all testified before me. In addition, entered into evidence were the following reports, letters, and clinical notes that they wrote about the grievor:

- Dr. Moustgaard's letters or reports dated August 14 and November 15, 2012, and March 6, 2015, and her notes dated August 8, September 6, September 28, October 22, and November 14, 2012; March 1, April 5, and May 23, 2013; September 26, 2014; and March 6, April 29, June 22, October 8 and 29, and December 3, 2015.

- Dr. Lazaridis's FTWE report of February 12, 2013; letters of May 13, 2013, and June 5, 2014; and her notes of October 24, 2012, June 5 and July 7, 2014, and January 28, 2015.

- Dr. Suddaby's report dated May 1, 2014.

341 In addition, also entered into evidence were the following:

- the report of the grievor's family physician, Dr. Kasbia, dated November 21, 2012;

- the report of Dr. Dessaulles, psychiatrist, dated December 10, 2012; and

- the reports of Dr. Douglass, dated July 12, August 29, and December 5, 2013.

342 None of Drs. Kasbia, Dessaulles, or Douglass testified.

343 With the exception of Dr. Douglass, who assessed the grievor's sleep

difficulties, it is not in dispute that the grievor suffered from a major depressive disorder. That said, the extent of the disorder and its effect on him varied, depending on a number of different variables, and it presented itself in different ways to the different health care professionals, depending on when he saw them and what was happening in his life at those particular points in time.

344 It also appears undisputed that the depressive disorder was not new but a recurrence or relapse of an illness for which the grievor had been treated by both his family physician (Dr. Kasbia) and his treating psychologist (Dr. Moustgaard) and that had been seen in an FTWE done by Dr. Dessaulles in 2006-2007.

345 In the August 14 letter, Dr. Moustgaard said that the grievor's disorder was "recurrent" and ". . . consistent with a Severe level of clinical pathology" [emphasis in the original]. In her testimony, she stated that when she saw him on November 14, 2012, his anxiety disorder was "not otherwise specified", meaning that he presented with a disorder that was "so multi-faceted [*sic*] that it was difficult to assess what it was." In his December 10, 2012, report, Dr. Dessaulles described the grievor's disorder as a "recurrence of a depressive disorder". In the February 2013 FTWE, Dr. Lazaridis was not as specific, but she did describe the grievor's condition as "chronic in nature", adding that he was receiving treatment and that his conditions were not fully resolved.

346 In May of 2014, Dr. Suddaby diagnosed the grievor with "Major Depression, Recurrent, Mild to Moderate, Without Psychosis, In Remission". He also diagnosed "Obstructive Sleep Apnea, With Possible Resultant Cognitive Impairment" and "Possible Mixed Personality Traits With Paranoid and Avoidant Characteristics".

347 The evidence from the health care professionals also disclosed that the disorder or disorders that the grievor suffered from presented emotional, physical, and cognitive symptoms. While none is unimportant from the grievor's perspective, since he has to deal with the disorder, the cognitive and physical symptoms, identified again by the professionals, directly impacted his ability to carry out the duties and responsibilities of his SPA position. The evidence disclosed that they would affect his concentration and decision making and that they would decrease his energy and affect his sleep.

348 In summary, the key activities of the grievor's substantive SPA position required him to acquire, assimilate, and analyze information and provide summaries and recommendations. It is trite to state that a disability that affects a person's cognitive abilities, when that person's work is largely cognitive, would have a devastating effect on that person and his or her work. The grievor is such a person.

349 The evidence disclosed that the grievor's depressive disorder affected his sleep. In addition, Dr. Douglass's reports (covering July through December of 2013) disclosed that the grievor also suffered from sleep apnea. Again, depending on what is happening in his life, he could have cognitive problems due purely to his lack of sleep from sleep apnea, or he could have a double dose of problems caused by the sleep apnea and the depressive disorder.

350 There is little doubt that the grievor had a disability and that the duty to accommodate applied to him.

F. The grievance in Board file no. 566-02-8829

351 For the reasons that follow, this grievance is dismissed.

352 In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 ("*Central Okanagan*"), the Supreme Court of Canada set out the now well-recognized principles to follow in duty-to-accommodate cases as follows:

. . .

> *The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in* O'Malley*. At page 555, McIntyre J. stated:*
>
> > *Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.*

> *To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.*
>
> *This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in* O'Malley. *The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.*
>
> . . .

353 As set out in *Central Okanagan*, the accommodation process does not mean that an employer is required to put into place what a doctor states is required or what an employee wants. Many factors and variables must be taken into account when an employee's illness or disability intersects with his or her work environment, which then can lead to other potential issues.

354 A little more than a month after the grievor had been temporarily moved to the RSO position, he provided the employer with the August 14 letter, in which Dr. Moustgaard stated that he was suffering from a major depressive disorder that was "recurrent" and ". . . consistent with a Severe level of clinical pathology [emphasis in the original]". As such, it caused him to experience emotional, cognitive, and physical symptoms of depression.

355 Dr. Moustgaard identified the cognitive symptoms as difficulty with concentration and decision making, and she said that they affected his sleep.

She stated that it would be in his best interests for accommodations to be put in place but that they might be best directed through an HC evaluation. She then stated that he might require concrete direction for expectations on work-related tasks, to limit demands on his creative reasoning. She said that she encouraged him to engage in work that was familiar to him.

356 It is clear to me from the evidence of the health care professionals both in their testimony before me and in the documents provided that the problems identified and brought forward in the August 14 letter existed before the grievor's move to the RSO position. He had reported difficulties with respect to work, stress at work, and, difficulty concentrating at work as early as January of 2012 (see Dr. Kasbia's letter to Dr. Lazaridis, dated November 21, 2012).

357 The evidence disclosed that the grievor appears to have suffered from PTSD related to events that occurred earlier in his life and to other events that occurred when he was employed by the CSC. The medical evidence introduced disclosed that Dr. Dessaulles had diagnosed him with major depression and PTSD in 2006-2007. In the August 14 letter, Dr. Moustgaard set out that she had treated the grievor between January 13 and March 10, 2007.

358 The grievor's mental health issues and difficulties were not known to the employer when it moved him to the RSO position in July of 2012. Only after the move and after he delivered the August 14 letter did he and the employer embark on their journey down the path of medical assessments, FTWEs, and potential accommodation measures.

359 The following two things happened upon receipt of the August 14 letter:

1. the grievor went off work on extended sick leave from sometime in August of 2012 and then returned to work on a very graduated schedule starting in October or November of 2012; and

2. the employer took steps to conduct an FTWE of him.

360 The grievor did not return to full-time hours until February 1, 2013. When he did return, it was still to the RSO position and not to his substantive SPA position.

361 The grievor filed a grievance (Board file no. 566-02-8829) on February 14, 2013. However, he signed it on February 12, 2013, the same date on which Dr. Lazaridis signed her February 2013 FTWE report. The grievance alleges as follows: ". . . my employer has denied me Accommodation measures in the workplace in contravention of the [DTA policy], thus causing me serious financial, physical and psychological injury." As corrective action, he requested that the employer immediately implement accommodation measures in keeping with his diagnosed medical condition, as well as losses including pay and benefits, additional expenses, and damages pursuant to the *CHRA*.

362 Between the time the grievor left work in August of 2012 and returned full-time in February of 2013, he was fully aware that the employer had taken steps to carry out an FTWE, as he was integral to that process, given the following:

- he saw Dr. Moustgaard, who authored the August 14 letter that suggested the HC evaluation;
- he signed a consent to an FTWE;
- he had been provided with the documents sent to HC in anticipation of an FTWE;
- he had been seen, as part of the FTWE process, by Dr. Lazaridis on October 24, 2012, and by Dr. Dessaulles on November 16 and December 10, 2012;
- he had been seen by Dr. Moustgaard on September 6, September 28, October 22, and November 14, 2012, and her clinical notes reflect discussions with him about the HC evaluation; and
- he had been sent a letter by Dr. Dessaulles on December 10, 2012, which summarized his findings of the psychological assessment carried out on the grievor.

363 The employer received the February 2013 FTWE either on February 12, 2013, or shortly after that, and it was sent to the grievor.

364 Making this situation difficult and complex for the parties to address is the multifaceted medical and mental health condition that the grievor suffered from, coupled with the mandate and type of work of the employer and the functions that he was required to carry out to fulfil the tasks tied to the duties and responsibilities that were required of him in either the SPA position or the RSO position.

365 In both the SPA and the RSO positions, the tasks that the grievor was required to do to carry out the functions of those positions were cognitive; the difference was in the level of detail and difficulty of the tasks specific to each position. The evidence of the health care professionals was that at certain times, his illness was debilitating, and that it caused him immense difficulties. Paramount were the difficulties his disorder appeared to cause to his cognitive functioning.

366 As of July of 2012, the grievor had been in the SPA position for more than four years. The evidence before me disclosed that his managers felt that not only was he not performing at that level, but also he was not performing all the position's required tasks. By moving him to the RSO position, the employer hoped to get him to the level of being able to carry out simpler yet similar types of tasks. He was in the RSO position for close to a month when he saw Dr. Moustgaard on August 8, 2012, for the first time since or about 2006-2007. She wrote the August 14 letter, and the evidence disclosed that the grievor was absent from work for a significant period starting sometime in August of 2012 until he returned in either late October or November of 2012, on a graduated basis. Upon his return, he did not carry out a full range of RSO duties.

367 Without a fulsome FTWE, and given the nature of the grievor's disability and the August 14 letter, it was difficult if not impossible for the employer to determine how exactly to accommodate him in the workplace. When Dr. Moustgaard wrote the August 14 letter, she had not been treating him on an ongoing, continuous basis. He had seen her between January 13 and March 10, 2007, before his employment with the PBC. From the evidence, he had also seen her about issues that arose due to the incident and leave from work at the CSC in 2006-2007. Only on August 8, 2012, did he see her again.

368 The meeting with Dr. Moustgaard on August 8, 2012 (and the resulting

August 14 letter), while certainly insightful and beneficial, was not an assessment of the grievor's work environment. Nor had the meeting been an FTWE, and it was not meant to set out accommodation measures for the employer to put into place for the grievor. Principally, the August 14 letter gave the employer notice of the ongoing significant and severe mental health issues that the grievor was encountering and provided suggestions for his benefit. While the letter did suggest that it might be best to put some accommodations in place, Dr. Moustgaard suggested that they would be best directed through an evaluation by HC.

369 In the evidence, the grievor often refers to the SPA position not being the one he had competed for and states that he was better suited to the policy analyst position. He also suggests that he was a priority. While both facts may be true, there is no evidence that he filed any complaint under the *PSEA* over the appointment process for the policy analyst position, and he willingly accepted the SPA position. It is equally clear that the employer felt that he was qualified for the SPA position.

370 When the grievor filed his grievance on February 14, 2013, the evidence disclosed that the employer provided the grievor with supervision, concrete direction, and coaching. It also disclosed that he burned through coaches. Until the February 2013 FTWE was provided to the employer, the employer took the steps it believed were all that was necessary and that could have been done, based on their understanding of the situation at the time.

371 While the duty to accommodate is an ongoing obligation, and this grievance could be seen as continuing, the February 2013 FTWE did little to alleviate the predicament in which the grievor and the employer were mired. In essence, it stated that the employer should do two opposite things. Dr. Lazaridis said that the grievor should carry out tasks he was familiar with, but she also said that the employer should limit those of his duties that required multitasking, such as planning, coordinating, and implementing strategic plans as well as those that required sustained attention, acquiring new information, and decision making. Dr. Moustgaard's August 14 letter used similar language, albeit directed at the advice that she had given the grievor, which was "to engage in work that is familiar" to him. When asked in the hearing what she meant by this, she said that it meant "work that he was comfortable and competent in."

372 The employer's evidence was that the tasks that the February 2013 FTWE stated that the grievor should not perform, which involved multitasking such as planning, coordinating, and implementing strategic plans, as well as those that required sustained attention, acquiring new information, and decision making, were the key activities of his SPA position and were also tasks key to the RSO position. When Dr. Moustgaard sent the August 14 letter, he had already had been assessed on those tasks in his SPA position and had received three unsatisfactory PERs out of four. In addition, the move to the RSO position was the second time he had been moved out of the SPA position.

373 This was a problem in the goal of accommodating the grievor. Faced with this dilemma, the employer wrote to Dr. Lazaridis on March 18, 2013, and again on April 26, 2013, and asked her what she meant specifically about performing duties with which the grievor was familiar.

374 "Familiar" is defined in the *Canadian Oxford Dictionary*, Second Edition, as "well known; no longer novel; common, usual; often encountered or experienced; knowing a thing well or in detail; well acquainted".

375 On May 13, 2013, in her response, Dr. Lazaridis stated as follows: "'Familiar duties' refer to duties which Mr. Herbert has performed in the past. This is contrary to new, unfamiliar duties."

376 In her response, Dr. Lazaridis also stated that her recommendations were based on the grievor's medical condition and that they did not apply to a particular work position. She left the decision to the employer. This was not helpful for the determination of the tasks required in carrying out the duties of either position. In her evidence before me, when asked what she meant by "familiar duties", Dr. Lazaridis said that she meant duties that were routine and that the grievor had done in the past. The grievor received a copy of her May 13, 2013, letter to the employer.

377 On May 30, 2013, Dr. Moustgaard wrote a letter recommending that the grievor be off work for one month, starting on June 3, 2013. In her evidence before me, she stated that he should not have and could not have worked in any capacity. His work absence coincided with the end of his work assignment in Records Suspension.

378 Upon his return to work in July of 2013, the grievor was assigned a special project under Ms. Ouellette's supervision. He was not assigned to a different position in the organization. He remained in this position until January of 2015. Ms. Ouellette supervised him, gave him concrete direction, and assessed his performance.

379 Given the nature of the recommendations set out in the February 2013 FTWE and the evidence of both Drs. Moustgaard and Lazaridis and of the grievor's managers as to his performance in both the SPA and the RSO positions, the tasks in either position might have been something he had done in the past, but it certainly could

not be said that he had done them competently.

380 At the hearing before me I had the benefit of hearing all of Drs. Moustgaard, Lazaridis, and Suddaby. In addition I had the benefit of seeing reports from these professionals and other professionals who either treated the grievor or saw the grievor as part of the FTWE process. I also had the benefit of hearing the evidence of the grievor's supervisors, Messrs. Ryan and Bender, and the grievor himself. Despite having had the benefit of hearing all of this evidence, something the employer was not privy to, I am at a loss to determine what if any additional measures could have been put in place in the spring of 2013 to accommodate the grievor.

381 At the time the grievor filed this grievance, the limited medical information the employer had was the August 14 letter. At the time this was sent Dr. Moustgaard had seen the grievor on one occasion (August 8, 2012) since she had last seen him, which was possibly as far back as five years. Dr. Moustgaard is candid in the August 14 letter in stating that the grievor's disorder was "recurrent" and ". . . consistent with a Severe level of clinical pathology" [emphasis in the original]. In her testimony, she stated that when she saw him on November 14, 2012, his anxiety disorder was "not otherwise specified", meaning that he presented with a disorder that was "so multi-faceted [*sic*] that it was difficult to assess what it was."

382 If the grievor's disorder was so multi-faceted that it was difficult for his treating psychologist to assess, and her recommendation that this be done through a HC assessment, I am at a loss to know exactly what measure or measures of accommodation the employer could implement prior to the recommended HC assessment. In short, if the medical professionals were confounded as to what exactly his ailment(s) were that they were suggesting another resource assess him, how could managers with no training in the medical and mental health fields (that the specialist professionals who were treating him had) be in any position to determine at that point in time what any accommodation should be.

G. The grievance in Board file nos. 566-02-11308 and 11309

383 The grievor filed a grievance against his termination on April 24, 2015

(departmental grievance no. 54954). His bargaining agent referred the grievance to adjudication on two separate grounds and it has been allocated two file numbers by the Board. It was filed against the termination of the grievor's employment (s. 209 (1)((c)(i) of the Act) (Board file no. 566-02-11308) and for the employer failing to accommodate his disability (violation of Articles 17 and 19 of the collective agreement) (Board file no. 11309).

384 For the reasons that follow, these grievances are allowed.

385 The employer submitted that it has the authority to terminate an employee for unsatisfactory performance and that an adjudicator's jurisdiction to review such decisions is limited by s. 230 of the *Act*. In this respect, it referred me to *Reddy*, *Kalonji*, *Plamondon*, and *Mazerolle*. It further pointed out the criteria that this Board and its predecessors have accepted that set out when the Board can intervene in such cases.

386 The difficulty with the employer's position is that it ignored the obvious facts of the grievor's situation and attempted to argue its case in a vacuum, wholly disregarding his obvious disability and the duty to accommodate.

387 I am prepared to accept that the grievor's performance in his substantive AS-05 SPA position was unsatisfactory. Had the employer not moved him to the PM-03 RSO position and had he not disclosed his disability to the employer, then the employer's case and argument might have had some sway. However, once his illness and disability were disclosed, the path the parties followed after August 14, 2012, changed the character of his employment relationship and his termination. The employer's DTA policy (let alone the law on the duty to accommodate) was applicable as they moved forward in the employment relationship. The employer could not simply rely on the criteria set out in *Raymond* and similar cases. The parties were required to address the grievor's situation in light of the employer's DTA policy and the law on accommodation in the workplace. Simply put, the rules had changed.

388 Some three years after the grievor disclosed his illness and disability and after the employer engaged itself and him in a significant process involving the duty to accommodate, the employer could not simply state that the grievor was not performing satisfactorily and that it did everything it could, as set out in the jurisprudence. This is

simply not true. While the grievor did receive three unsatisfactory performance appraisals out of four ending with the 2011-2012 fiscal year, the evidence clearly disclosed that he had an illness and disability that existed before the August 14 letter arrived in 2012.

389 In addition, while the grievor might not have been in a specific position from July of 2013 until April of 2015, Ms. Ouellette's evidence was that she was fully satisfied with his work. Had the evidence disclosed that he was fully accommodated for his illness and disability and that his work had remained unsatisfactory, then the employer's position might have had some credence; however, that is not what the evidence disclosed.

390 As set out earlier, it is well documented that the grievor was suffering from a major depressive disorder, which likely had its genesis in events that occurred before he began his employment with the PBC. It appears from the medical evidence that the mental health issues coupled with sleep apnea (diagnosed in late 2013) likely played a significant role in causing his difficulties carrying out the functions of both his substantive SPA position and his assigned RSO position.

391 The employer submitted and provided me with jurisprudence suggesting that it had done everything that it could to accommodate the grievor; it just could not accommodate him and had reached the point of undue hardship. He suggested that it did not accommodate his needs, which were clearly spelled out, and that he should have been placed back into his SPA position with accommodation measures. I disagree with both parties.

392 In *Central Okanogan*, the Supreme Court set out that the search for accommodation is a multi-party inquiry. While in some cases, the multi-party search can be dealt with simply by a short letter or note from a family physician and can be easily implemented by an employer, in other cases, the facts will dictate a requirement for a more fulsome process and much more extensive discussion, input, and co-operation. This is one of those cases.

393 In his testimony before me, Dr. Suddaby stated that most psychiatrists and psychologists make accommodation recommendations that are not appropriate because they do not know enough about the workplace or the job at issue. He stated that when all the stakeholders involved communicate effectively with the appropriate level of disclosure, it is likely that the employee will be in a better position. The input of all stakeholders is important but highly unusual in our healthcare system. Dr. Suddaby's

comments are particularly well placed, especially when dealing with the grievor and his situation.

394 From the evidence before me, while all the parties engaged in this multi-party process, it was not as robust as it should have been. The grievor's mental health and medical issues, set against the backdrop of his work requirements, demanded a much more engaged process from all of them. While the employer submitted that it did everything it could and that it had reached the point of undue hardship, and the grievor submitted that the employer did not accommodate him, both are incorrect.

395 The system was not conducive to resolving the grievor's situation. HC was tasked with carrying out the FTWEs. Dr. Lazaridis spearheaded this task and sought input from the grievor's family physician and his treating psychologist, and she sought expert opinions from (albeit at different times) both a psychologist and a psychiatrist. All the health care professionals agreed that the grievor suffered from a major depressive disorder. However, at any given point between August 2012 and June of 2014, they often had very different views of how the illness presented, if it did present; how it affected the grievor; and how its effects on him should be addressed in the workplace through accommodation.

396 Before delivering her February 2013 FTWE, Dr. Lazaridis not only assessed the grievor herself, she also received information from Drs. Kasbia (a family physician), Moustgaard (a treating psychologist), and Dessaulles (an expert psychologist). While Dr. Lazaridis received reports from these sources and written information from the employer, she spoke to none of them. While that is not necessarily unusual, the difficulty is that the reports from the health care professionals were, in some significant respects, in conflict. While Dr. Moustgaard felt that the grievor could remain at work and that work was a protective factor for him, Dr. Kasbia actually put him off work and then on a graduated return to work. On the other hand, Dr. Dessaulles stated (on December 10, 2012) that the grievor was not fit to work, suggested a period of six months leave, and stated that if he remained at work, he could potentially face serious consequences as his work performance would continue to be an issue.

397 In the spring of 2014, when the employer requested that HC reassess the

grievor with respect to an FTWE, Dr. Lazaridis saw him again and sought input from Dr. Suddaby. During this period, Dr. Moustgaard stated in her testimony that she had not seen the grievor since May of 2013, and she did not see him again until September of 2014 (those times were well before and after the June 2014 FTWE). In June of 2014, when Dr. Lazaridis wrote to the employer and stated that the accommodation measure in place based on the February 14 FTWE and subsequent May 2013 letter should remain in place, the expert she had sent the grievor to see and assess him, Dr. Suddaby, stated in his 13-page report to her that the grievor's major depressive disorder was in remission and that he was not in need of any accommodations for it. The grievor and Dr. Moustgaard seem to have accepted that fact, as reflected in her evidence before me. In addition, Dr. Suddaby stated that the grievor had significant behaviour issues that were not medical in nature and that the employer should deal with in the normal administrative course.

398 Despite Dr. Suddaby's views, in the June 2014 FTWE, Dr. Lazaridis stated that the grievor was not considered medically able to resume the full duties of his AS-05 position (the SPA position). She stated that he was continuing his treatment. Why he was not considered medically able to resume those full duties was not made clear to me. The treatment he was receiving was not spelled out for or made clear to me. Based on the evidence before me, his treating physician was Dr. Kasbia. I heard no evidence from him, and the last medical report in evidence was the report he issued to Dr. Lazaridis in November of 2012. Dr. Douglass, who addressed the grievor's sleep apnea, did not testify, and his last report was dated December 5, 2013. Therefore, I am left to suspect that when she referred to the treating physician, Dr. Lazaridis meant Dr. Moustgaard; however, she is a psychologist and not medical doctor. That said, the evidence disclosed that the grievor had not seen her since May 23, 2013, at least one year previously.

399 As set out earlier, the grievor's assignment in the RSO position ended in June of 2013, after which he went on a month of sick leave. He returned to work on a special project under Ms. Ouellette's supervision until his employment was terminated.

400 In January of 2015, the grievor was asked to meet with Ms. Gaudet, who at that time was responsible for CSP group at the PBC; indirectly, in his substantive

position, the grievor reported to her. On January 7, 2015, the grievor; his bargaining agent representative, Ms. Habraken; Ms. Gaudet; and Ms. Gratton, an employer HR representative, all had a meeting. According to Ms. Gaudet, who was the driving force behind the meeting, its purpose was to start the process to obtain the grievor's collaboration for an IME, which she said was required because he was still having difficulties with multitasking, and the familiar duties were not helping return him to his SPA position. She characterized the process as finding out how to help him obtain and retain information, to better help him return to his SPA position. She stated that he could not remain on the special project under Ms. Ouellette's supervision because, without mincing words, it was a make-work project.

401 The employer had been contemplating this new IME since the fall of 2014. In his evidence, Mr. Cenaiko confirmed that the grievor had to be sent for an IME because it was necessary to obtain more information with respect to his competencies and fitness to work.

402 What evolved from the January 7, 2015, meeting was an ongoing disagreement between the employer and the grievor over the IME. It appeared to him that the employer wanted a neuropsychological assessment of him. The employer was somewhat cagey in agreeing that this was what it was looking for, but in the end, it was exactly that. On the other hand, the grievor did not appear willing to undergo this type of evaluation.

403 The evidence disclosed that while the grievor suggested that he was against the neuropsychological assessment, in the end, he did sign a consent form. This was short-lived because, despite his alleged consent, he immediately filed a grievance against the process. It was dealt with at the final level of the grievance process, and on March 4, 2015, Mr. Cenaiko allowed it and decided that the grievor did not have to participate in a further FTWE. In his final-level response, Mr. Cenaiko stated as follows:

. . .

> *I understand that clarifications are required in order to reasonably and appropriately accommodate your disability in the workplace. In order to do so, your collaboration was*

> *sought to participate in an Independent Medical Evaluation (IME) for the purpose of providing the Parole Board of Canada with the necessary information regarding your functional and occupational strengths and limitations.*
>
> *You have expressed on numerous occasions that you are very ambivalent with consenting to another medical evaluation and consider this request as "*another example of the harassment and discrimination (…)" *you have been subjected to by managers at the Parole Board of Canada.*
>
> *Although I disagree with your statement that management has discriminated against you by seeking your collaboration to participate in an IME, I do not want to exacerbate your disability any further. We will therefore make a decision regarding the employer's ability to accommodate you at the Parole Board of Canada based on the information we have already received from your health care professional, Dr. Amy Moustgaard, and the previous evaluations conducted by Health Canada.*
>
> . . .

404 Immediately after that response, on March 6, 2015, Dr. Moustgaard wrote to the employer, stating as follows:

> . . .
>
> *Mr. Herbert continues to be under my care from a Psychological therapy perspective. He has recently related to me that there has been a grievance decision rendered related to the Parole Board of Canada's request that he undergo a Neuropsychological Assessment. Being a Neuropsychologist myself, it is not clear to me why this form of assessment was raised as a requirement to determine his need for accommodation. Mr. Herbert suffers from Major Depressive Disorder, recurrent and Generalized Anxiety Disorder. During the eight years that I have known Mr. Herbert, subjective limitations in cognitive functioning (e.g., information processing speed, decision making, focused attention) present only during periods of acute depression and stress-related anxiety. During periods of stabilized mood, these issues are not present, however.*
>
> *Mr. Herbert has related to me that my original recommendation for accommodation (August 14, 2012) requires clarification. I am recommending that Mr. Herbert be engaged in work that is familiar to him and within his skill set and experience.*

> *So as not to exacerbate Mr. Herbert's disability, I would encourage you to ask him what the accommodation measure means in his case. This would be in accordance with the Duty to Accommodate Persons with Disabilities in the Federal Public Service. Mr. Herbert has strong insight into his skills and would be in a position to articulate this without difficulty.*
>
> . . .

405 At that critical juncture, neither the employer nor the grievor was in harmony with the principles enunciated by the Supreme Court in *Central Okanagan.*

406 In her evidence before me, Ms. Gaudet stated that the IME, either as a neuropsychological assessment or something else, was needed because the employer believed that without a specialized assessment of the grievor, it could not pursue accommodation. She stated that this belief was based on the fact that the employer did not have enough information to carry out a proper accommodation exercise. The IME was necessary to compare results specifically with respect to the grievor's cognitive profile, to assess his strengths and weaknesses and his individual learning and cognitive styles. She said that the employer needed a specialist and that it had concerns that the grievor's occupational functions were limited. In not so many words, that was also Mr. Cenaiko's evidence.

407 I have no reason to doubt what Ms. Gaudet stated about the reasoning for seeking a further medical evaluation. Unlike the health care professionals, I had the benefit of hearing from the grievor's three supervisors, Mr. Ryan, Mr. Bender, and Ms. Ouellette. I also had the benefit of hearing about the work that was required of him in the SPA and RSO positions, the difficulties he had doing the work required of him in those positions, and the work environment. And unlike the employer, I had the benefit of hearing from three health care professionals, including the grievor's treating psychologist, the HC physician tasked with carrying out the FTWEs (Dr. Lazaridis), and the expert psychiatrist (Dr. Suddaby).

408 The following is patently clear from all the evidence provided from the health care professionals:

- the grievor suffers from a major depressive disorder, which, when it is

not in remission, can be extremely debilitating and cause him cognitive difficulties;

- his disorder is not static; it varies in its level of severity and its effect on him;
- his disorder does go into remission, so he should be able to function at a much higher level;
- in addition to the major depressive disorder, he suffers from sleep apnea, which also likely has an effect on his cognitive functioning in and of itself and perhaps in addition to the major depressive disorder; and
- Dr. Lazaridis had recommended a follow up six months after the June 2015 FTWE, as the grievor was supposed to be receiving treatments.

409 There is no doubt with respect to aspects of the grievor's mental health and his abilities to carry out certain functions and tasks. As of March of 2015, the following was known about him:

- he had not worked in his substantive SPA position for close to three years;
- during the period from July of 2012 to June of 2014, he never carried out the full functions of the RSO position; and
- during the period from July of 2014 to January of 2015, he worked on a special project that was not a specific position and was doing tasks that were not required; however, his supervisor saw him as doing well in his work.

410 From the evidence that I saw, which the employer or the grievor's supervisors did not necessarily see, it is equally clear that the assignment to the RSO position affected the grievor's depressive disorder. Despite perhaps the good intentions of Messrs. Ryan and Bender, it appears from Dr. Moustgaard's clinical notes that this assignment might have made the grievor's disorder more acute and as such created

more difficulties for him rather than resolving his work-related deficiencies.

411 In the end, rather than conduct a robust and fulsome FTWE, the employer yielded to the grievor's grievance, and, rather than gathering the medical and accommodation information it required, (which, at the hearing, it admitted it had needed) it determined that it would make a determination on the grievor's employment and accommodation based on outdated medical information and his contribution of a self-assessment of his skills and competencies. This process was deeply flawed and doomed to fail.

412 The grievor fought against a further FTWE in the form of an IME or neuropsychological assessment and filed a grievance against having to undergo one. That said, he suffered from the major depressive disorder that the employer was well aware caused him significant cognitive issues. I have no doubt that given the mental health issues that afflicted him, the grievor was likely not the best person to judge what he could and could not do or his level of competency. Yet the employer did just that, in the face of this and of stating that it could not assess the grievor's competencies and accommodation without another specialist evaluation.

413 Dr. Moustgaard's correspondence at this juncture (March 5, 2015) did not help the situation. While she was treating the grievor, an important factor to be taken into account is that a person's treating physician (or in this case, treating psychologist) provides the person with attention and treatment advice, based on the physician's diagnosis of that person. Their goals are the well-being of their patients and to help them recover from what ails them. Depending on any number of different facts and factors, their intervention, comments, or recommendations may or may not assist or be feasible in an accommodation.

414 That said, again I had the benefit of hearing the evidence of what was going on in the workplace, while Dr. Moustgaard heard only what the grievor chose to tell her. In addition, she could have made assumptions and assessments based on misinformation he provided to her.

415 In her testimony before me, when describing "work that is familiar", Dr. Moustgaard described that it meant work that the grievor was "comfortable and

competent in". Her area of specialty is psychology. On the other hand, the grievor's supervisors were well aware of what he was required to do to carry out the functions at issue. Suggesting again some three years after the August 14 letter that he carry out functions that he was familiar with might have made sense to her. However, a careful review of her notes and of her testimony before me indicate that the grievor told her that he had returned to his previous SPA position and that he was keeping up and meeting work demands. This was clearly not the case, yet it could well have skewed Dr. Moustgaard's assessment in March of 2015, by causing her to assume that there was work (his substantive position) that was familiar to him.

416 While some of the grievor's own actions may have not helped his situation, one cannot ignore that he was suffering from a complex mental health issue that may have affected his actions. The employer and his bargaining agent were required to act responsibly to ensure that at the very least, he had the opportunity to be accommodated. They did not. In the end, while more was required from everyone, it was the grievor who lost his employment.

417 It is impossible to assess whether the grievor could have returned to his substantive SPA position, with or without some accommodation, or could have filled some other vacancy or position at the PBC, because the employer acquiesced to the grievance against having a further FTWE (in whatever form it may have taken) in the face of knowing that the information it had on file was insufficient for it to make the necessary decisions to address his employment and accommodation needs (if any). Rather than do what was necessary, it took the easy way out.

418 Perhaps the grievor could have returned to the SPA position, or perhaps his disability is such that he just would not have been able to do the work required in that position or in any position at the PBC. However, that question could not be answered because the process was not followed; as such, the employer failed in the accommodation process.

419 As set out above, the parties requested and I agreed that the Board only determine the question of liability following this hearing. Having allowed the grievances, I have retained jurisdiction to hear, at a later time, evidence and arguments from the

parties on the question of remedy.

420 For all of the above reasons, the Board makes the following order:

V. Order

421 The grievance in file 566-02-8829 is dismissed.

422 The grievance in file 566-02-8830 is dismissed.

423 The grievance in file 566-02-10258 is dismissed.

424 The grievances in files 566-02-11308 and 11309 are granted.

425 Within 15 days of the date of this decision, the parties are to consult one another and to provide to the Registry mutually convenient dates for an additional hearing to address any outstanding issues. The suggested dates must be within 120 days of this decision.

September 11, 2018.

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