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**Citation: 2018 FPSLREB 93**

*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

**NADRINE MAHER**

Grievor

and

**DEPUTY HEAD**
**(Correctional Service of Canada)**

Respondent

Indexed as
*Maher v. Deputy Head (Correctional Service of Canada)*

In the matter of individual grievances referred to adjudication

**Before:** Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Grievor:** Christopher Schulz, Public Service Alliance of Canada

**For the Respondent:** Richard Fader, counsel

Heard at Toronto, Ontario,
October 10 and 11, 2018.

## I. Summary

[1] Nadrine Maher ("the grievor") was employed with the Correctional Service of Canada ("the employer") and worked as the coordinator, case management, at the Beaver Creek Institution north of Toronto, Ontario. Her last day of work was June 23, 2006, after which she began sick leave, which she eventually exhausted. The employer then advanced her additional sick leave. After that, her request for leave without pay (LWOP) was approved and was then extended several times over approximately seven years (October 2006 to December 2013).

[2] Despite her sincere desire and effort to recover and return to work (RTW), Ms. Maher remains medically unable to work and is receiving disability insurance benefits. The employer asked about her status several times, and after receiving medical evidence from her doctor and repeatedly telling her that she could not remain on LWOP indefinitely, it terminated her employment for non-disciplinary reasons, effective January 3, 2014.

[3] The employer acknowledged the grievor's medical condition and was supportive of her taking sick leave; it granted her an advance of sick leave credits and finally approved approximately seven years of LWOP. It remained in regular contact with her and requested updates on her condition. Eventually, it indicated that it could not continue to extend her LWOP and that more details from her physician were required, including a date or time frame for her RTW, for it to consider another extension.

[4] After it received the response from the grievor's physician, the employer concluded that it was unlikely that she would be able to RTW at any time in the foreseeable future, and it decided to terminate her employment.

[5] For the reasons set out later in this decision, I find that the employer acted reasonably at all times during this unfortunate matter. Therefore, I conclude that it accommodated the grievor to the point of undue hardship, and I dismiss the grievances.

## II. Background

[6] On September 7, 2004, the employer offered the grievor a deployment to the Beaver Creek Institution in a position classified at the WP-05 group and level to work as the coordinator, case management. She accepted and began to work there shortly

after. Within approximately two years, she was the subject of a harassment allegation, which was upheld on investigation. On discussing it with management, she became ill and began sick leave on June 23, 2006. The employer learned later that a previous traumatic workplace event had caused the grievor to suffer from post-traumatic stress disorder (PTSD), which triggered her stress and anxiety illness when her manager spoke to her about the harassment complaint.

[7] The employer supported the grievor by approving her sick leave and by advancing her sick leave credits when her banked time was fully depleted. Once the additional sick leave was used, the employer approved LWOP and extended it until the end of 2013.

[8] For much of the grievor's time away from work, she and her doctor had both instructed the employer not to communicate with her directly, as her doctor had cautioned that doing so would exacerbate her illness. Nevertheless, the grievor and the employer stayed in periodic contact either through an intermediary or occasionally through direct contact via telephone calls and written correspondence.

[9] The employer terminated the grievor's employment effective January 3, 2014. A grievance was filed alleging that the termination was a discriminatory act on the basis of the grievor's disability, contrary to s. 7 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) (CHRA) and Article 19 of the collective agreement. Her bargaining agent referred the grievances to adjudication pursuant to s. 209(1)(a) and s. 209(c)(i) of the *PSLRA*, after receiving the employer's final-level response.

[10] The grievor was the only witness to testify on her behalf. The employer called Deputy Warden David Dunk, Warden Charles Stickel, and Labour Relations Advisor Daniel Winter to testify as all had had direct dealings with the grievor and the matters related to these grievances. The employer also called to testify Aphrodite Drakopoulos of Industrial Alliance (IA), an insurance company; she was the case manager handling the grievor's disability insurance file at all times relevant to this matter. IA was the private disability insurance administrator for the federal government.

[11] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board (PSLRB) as well as the former Public

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

[12] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the 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.

**III. Issues**

[13] I must determine whether the employer discriminated against the grievor when it terminated her employment. In their submissions, the parties agreed that the outcome of this grievance would turn upon whether it was reasonable for the employer to determine that it was unlikely that the grievor would be able to RTW at any time in the foreseeable future. If so, then any continued efforts on its part would have been an undue hardship, and it would be relieved of liability for terminating her due to being medically unable to work.

[14] To answer this question, several issues shall be examined that the parties argued in the context of whether the employer's ultimate decision was reasonable. The grievor argued that the employer unreasonably relied upon insufficient information from IA declaring her totally disabled and that it also disregarded a letter from the treating physician stating that the grievor planned to RTW in one year. The employer argued that it relied upon all the information it had available over the approximately seven years of the grievor's absence from work to conclude that she would not be able to RTW in the foreseeable future.

[15] According to s. 226(2)(a) of the *Act*, the Board may, in relation to any matter referred to adjudication, interpret and apply the CHRA, other than its provisions

relating to equal pay for work of equal value, whether or not there is a conflict between the CHRA and the collective agreement, if any.

**A. Did the employer improperly rely upon the determination of the private insurer that the grievor qualified for long term disability insurance benefits and therefore could not work?**

[16] Counsel for the grievor examined the witnesses and argued about the issue of the employer improperly relying upon IA's determination when it decided that she was unable to RTW and that that would continue for the foreseeable future. The employer's witnesses admitted that they had relied in part upon information from IA when they assessed whether the grievor might be able to RTW in the foreseeable future.

[17] Counsel for the grievor questioned all three of the employer's management witnesses about how much they actually knew of the facts supporting IA's decisions. Many questions were posed about IA's letters and whether it had actually declared the grievor disabled or totally disabled or it had merely stated the definition of "disability" and then implied that the grievor was disabled as one letter confirmed that she was approved for disability benefits.

[18] Near the end of the grievor's seven years of LWOP, when she told the employer that she planned to RTW, it asked IA about a potential change of status for her as her intent to RTW implied that some previously unseen amelioration of her medical condition had occurred.

[19] The employer's inquiry caused IA to organize another rehabilitation consultation and another independent medical evaluation (IME). The un-contradicted testimony shows that the Rehabilitation Consultant's August 2012 telephone interview found that the grievor herself did not yet feel ready to consider or prepare for a RTW.

[20] When the grievor attended her IME, which was only a few months before her employment was terminated, she spoke briefly with the Doctor and then chose to terminate the evaluation over concerns that she might not be able to obtain a copy of the Doctor's report via having it sent directly to her, given her attempts in the past to obtain reports from IA.

[21] Counsel for the grievor challenged each of the employer's management witnesses on the matter of this final rehabilitation consultation and its conclusion as

no witness was able to specify which consultant did the assessment or his or her qualifications. Counsel for the grievor went so far as to ask in cross-examination if the Rehabilitation Consultant might have been a speech therapist, implying that IA's efforts had been unreliable and that the employer had been irresponsible by relying upon IA's findings that the grievor was disabled.

[22] The hypothetical nature of the question about the speech therapist was discovered once Ms. Drakopoulos took the witness stand. She and her counsel had many volumes of documents that they said affirmed their extensive efforts to assess, provide treatment for, and finally determine that the grievor was not a good candidate for successful rehabilitation. They stated that her case was finally placed on permanent disability status with notice to the employer of this decision given on September 20, 2013.

[23] The permanent disability status was reviewed and confirmed by an IA manager and departmental director and meant that no further rehabilitation efforts wold be pursued and that only an annual status check with the grievor would be carried out.

[24] When counsel for the grievor began to ask Ms. Drakopoulos questions about how she had arrived at her final decision to declare the grievor permanently disabled, Ms. Drakopolous reached for a large stack of papers and reports and asked if she should begin reading doctors' report about the grievor's condition and treatment. Having already heard the grievor's counsel put so many questions to the employer's management witnesses about these same matters, I invited her to read one report. She read from a February 2009 report from the grievor's treating physician, Dr. McIntosh, who wrote at that time that the grievor was not medically fit to perform any work. Ms. Drakopoulos also testified that after several other medical referrals and rehabilitation efforts all the resulting reports came back saying the grievor was not fit to work.

[25] Having heard that testimony, I asked Ms. Drakopoulos to pause before she began to read the next medical report. I asked the grievor's counsel if he wished for the hearing to receive any further medical evidence from IA. I offered him a brief recess to consider the matter with the grievor. When we resumed, no further questions were posed to Ms. Drakopoulos about her many medical and rehabilitation reports.

[26] The most relevant aspect of Ms. Drakopoulos's testimony was her clear and firm statement that IA protects the confidential information of its clients such as the

grievor and that it does not share details of which professionals are providing exactly which details about a client's medical condition.

[27] Ms. Drakopoulos also acknowledged that she had shared basic conclusions about the grievor being approved for disability benefits and that later, on September 20, 2013, she had the file placed on "permanent status", as the grievor had been determined a "… poor rehab candidate for return to work." She explained that permanent status meant that no further efforts would be undertaken regarding the grievor's qualification for disability other than a once a year update with the grievor.

[28] Given IA's very clear and convincing evidence, I find the allegations, which are that the employer improperly relied upon IA's determinations and that it should have known more about the files that IA held, unsupported by evidence.

**B. Did the employer improperly disregard information from the grievor's doctor in determining that the grievor would not be able to return to work in the foreseeable future?**

[29] In his closing argument, counsel for the grievor stated that the employer improperly chose to rely upon IA's determination that she is disabled and that it unfairly disregarded a letter from her doctor, which counsel argued contains a prognosis for her to RTW.

[30] Very simply, the evidence does not support that argument, given what the employer received from the grievor's doctor. Each employer witness stated that they reviewed the totality of the documentation file of the grievor's condition from her doctor, and especially in light of the final letter that was received, each witness independently determined that it was highly unlikely that she would RTW in the foreseeable future.

[31] The grievor's counsel argued that the employer had no real evidence of her being disabled and being unable to RTW. This is not a reasonable submission. The fact that she was off work due to illness continuously for approximately seven years, with no medical evidence that she was fit to work, is evidence of her being unable to RTW in the foreseeable future. In the absence of clear medical evidence to the contrary, an employee who has been unable to work for so many years creates a presumption that a recovery sufficient to allow a RTW is unlikely.

[32] The evidence from the grievor's doctor shows the following:

> [October 10, 2006:]
>
> *Ms. Maher will be away for medical reasons from October 3, 2006 for an indefinite period. Your understanding in this matter is appreciated.*
>
> …
>
> [June 17, 2011:]
>
> *This letter was requested by Nadrine to support her request for an extension of her medical leave. Nadrine has been away from work since June 2006 during which time I have had ongoing correspondence with Alliance Insurance Company regarding her condition and her treatment plan.*
>
> *In terms of the request regarding Nadrine's work plan, the goal continues to be a return to work. Nadrine has been seeking medical care and receiving treatment over the past years with the hope that she will appreciate enough improvement to return to work. Her recovery has been slow.*
>
> …
>
> [July 11, 2012: The doctor provided a verbatim copy of her 2011 letter as noted above and then added this paragraph:]
>
> …
>
> *I am informed that Nadrine was offered choices regarding her leave status. In my opinion, the option of termination, or risk of termination, would set her back significantly in her recovery due to increased anxiety. I recommend that Nadrine be granted an extension of her medical leave.*
>
> …

[Emphasis added]

[33] And finally, after first advising the grievor in writing on July 13, 2009, that her LWOP could not continue indefinitely and doing so again at least annually after that (on March 8, 2010, May 2, 2011, and June 7, 2012), the employer wrote again on February 21, 2013, to confirm what had been discussed on the phone with the grievor with Warden Stickel several weeks earlier. That was that the grievor had been absent from work since 2006 with an illness or injury, that IA considered her totally disabled, and that she needed to opt to resign or retire or to retire for medical reasons.

[34] The grievor replied on March 8, 2013, to request an extension to her LWOP for "up to one year". She stated that her medical information consistently stated that she was "working towards returning to work" and added that she was pursuing a Workplace Safety and Insurance Board (WSIB) claim.

[35] The employer replied on April 17, 2013, and said that it would allow a five-week LWOP extension for the grievor to obtain updated medical information from her physician with a specific RTW date or time frame. The letter specifically stated that "more detailed information from your physician" was required to consider the request for another year of LWOP and that the medical documentation would have to be submitted on or before May 22, 2013.

[36] The grievor's doctor replied promptly on April 23, 2013, with the following two-line letter: "*Ms. Maher plans to return to work June 2014 with a review 2 months prior to that time. Recovery from PTSD has been slow. She continues to be compliant with therapy and follow-up through this office.*"

[37] All the employer's witnesses testified that they found the information from the grievor's doctor inadequate as it did not provide any medical information or the doctor's opinion of the grievor's health and of her RTW.

[38] If, in fact, as the grievor argued, the medical note contains a treating physician's opinion that she is fit to RTW, I find it so cryptic and oblique as to be unintelligible. Rather, I find that the note is only what it states — a repetition of the grievor's hope to RTW. The only medical information the doctor provided was that the grievor has PTSD and that she is recovering from it slowly.

[39] The employer noted that it is well established in Canadian jurisprudence that once an employee produces evidence of a disability, the employer has a duty to accommodate that disability. However, this duty does not completely alter the essence of the employment contract, which is the employee's duty to perform work in exchange for pay.

[40] An employer has a duty to accommodate the medical disabilities of an employee up to the point of being able to show undue hardship. If an employee with an illness remains unable to work for the reasonably foreseeable future, even though the employer has tried to accommodate him or her, the employer will have satisfied the test.

[41] The employer's duty to accommodate ends when for the foreseeable future, the employee is no longer able to fulfil the basic obligations associated with the employment relationship. At that point, the test for under hardship will have been satisfied (see *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 at paras. 15 to 19; "*Hydro- Québec*").

[42] The Supreme Court of Canada has also considered the matter of an employee being absent from work for an extended period due to illness or injury and has determined that an arbitrator correctly concluded that "… the employer could not continue to employ someone who had been declared to be disabled for an indeterminate period"; see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de L'Hôpital général de Montréal*, 2007 SCC 4 at para. 36 ("*McGill*").

[43] Counsel for the grievor argued that despite the grievor receiving disability benefits for several years and being deemed totally disabled by IA, she did have the potential to make a full recovery and RTW as noted in the last note from her doctor.

[44] Counsel pointed to evidence that the grievor had been scheduled for an independent medical evaluation in August 2013 and that although she showed up for it, she did not allow it to proceed over her concern that she might not receive a copy of the report directly from the doctor. Counsel argued that had rescheduling that evaluation been allowed, it is possible that it might have reported progress, which would have meant that her RTW was more likely. Counsel also noted that by 2013

some of the medical evidence about the grievor's disability had become quite dated.

[45] While such an outcome of yet another medical evaluation was theoretically possible, the evidence received at the hearing of the approximately seven years of treatment, therapy, and evaluations showed that such a hope for recovery late in 2013 was unlikely.

[46] While I need not define precisely what I see as the "foreseeable future" given the facts before me, I note *McCormick v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26274 (19950918), [1995] C.P.S.S.R.B. No. 92 (QL) at 32, where the former Public Service Staff Relations Board found as follows:

> *The "foreseeable future" must be defined in keeping with the circumstances of each case and may vary depending on the area of law concerned… I am of the opinion that, after close to two years of absence a six-month period could reasonably constitute the foreseeable future….*

[47] If anything, I would see the period of foreseeability diminishing as the years of absence due to illness or injury extend, as the evidence before me showed that after several years on leave, IA ended the grievor's rehabilitation program and the work to assess her ability to RTW after it determined in a letter dated September 20, 2013, that she was a poor rehab candidate for RTW and that therefore, her file would be given permanent status.

[48] Counsel for the employer cited *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24 at para. 91, which, in turn, relied upon the Supreme Court of Canada' finding in *McGill* that the "… undue hardship resulting from the employee's absence must be assessed globally starting from the beginning of the absence."

[49] The Supreme Court of Canada repeated the finding it made in *McGill* when it stated that it chose to assess the duty to accommodate globally in a way that looked at the entire time the employee was absent (see *Hydro-Québec*, at para. 20). The Court also found in that case that the "…test for undue hardship is not total unfitness for work in the foreseeable future."

[50] I find that the evidence establishes that not one word from the grievor's doctor in seven years stated that her health was improving such that a RTW was expected or

even possible in the doctor's professional medical opinion. The final note from her doctor simply said the grievor plans to RTW in a year. That was not a professional medical opinion, based upon supporting information, of the grievor's health.

[51] Given my findings of evidence and relying upon the years of notes from the grievor's doctor as have been copied in this case, I find it reasonable that the employer concluded late in 2013 that it was unlikely that the grievor could RTW at any time in the reasonably foreseeable future.

**C. Did the employer have a duty to find out more about the grievor's medical condition before deciding to terminate her employment?**

[52] Counsel for the grievor argued strongly that there was a positive duty upon the employer to somehow direct or ask the grievor to undergo an independent medical evaluation, possibly by Health Canada, to secure one more opinion as to the prognosis for her recovery and potential RTW. I strongly disagree.

[53] Counsel for the grievor relied upon *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8 at paras. 149 to 157, in support of the argument that the employer had a positive duty to take steps to ascertain and discuss with the grievor her medical condition when it considered the termination. The Board stated as follows in that case:

> *[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… 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….*
>
> *[150] But more significantly, after obtaining the medical update, the employer rushed to a decision without giving any consideration to the possibilities that were being suggested. Dr. Rosenberg … stated that the grievor could return to work within three months if the workplace issues were ultimately resolved.…*
>
> *[151] Given that the grievor had already been absent for seven years, no adequate reason was advanced to justify why the employer could not take a few more weeks to reconsider its position.…*

…

> *[153] An employer's reasons for not considering accommodation must be supported by reliable, objective and persuasive evidence that its concerns are well founded.…*
>
> …
>
> *[155] Nor did the employer engage in meaningful discussions with the grievor about the consequences of the most recent medical information and the recommendations being made to determine if there was any work that he could perform that would meet his restrictions.…*
>
> …
>
> *[157] Therefore, I come to the inevitable conclusion that the employer decided to terminate the employment of the grievor without taking the steps to make an informed decision….*

[54] I reject the notion that the Board's decision in *Pepper* should inform my decision in the matter before me. In *Pepper*, management and the employee in question had an acrimonious relationship, which contributed to his lengthy absence due to illness. That employee's treating physician stated that he could RTW (in three months), with certain accommodations. And perhaps of most significance is that the Board found that the employer's actions amounted to what I consider bordering on bad faith as the adjudicator concluded that management had decided to terminate Mr. Pepper's employment before even receiving the medical opinion that he could have returned to work in three months if accommodations were put in place. None of these important aspects of *Pepper* was present in the evidence before me.

[55] As such, I reject the submission by the grievor's counsel that on the evidence before me, the employer could not have relied upon the final medical note of her doctor, and that given the totality of her seven years off work with no evidence of being medically fit to RTW at any point in the present or the future, in fact, the employer should have somehow taken her to another physician for another medical evaluation. I also reject her counsel's submission that the employer had a duty to check with the Doctor and communicate with the grievor yet again to indicate its lack of satisfaction with the medical note.

[56] What was at stake could not have been framed any more clearly for the grievor. Several letters and finally a telephone call from the Warden to explain what was happening all informed her clearly that she faced termination. In fact, the employer's

management kept in regular communication with her, despite her requests at times not to be contacted. She confirmed that the employer maintained positive and professional contact with her as she described a telephone call she received from Warden Stickel early in 2013.

[57] After speaking with the Warden and receiving correspondence again telling her that she could not remain on LWOP indefinitely, the grievor asked for one last chance to prove her progress to become medically fit to work. The employer replied by granting one last LWOP extension to allow her to obtain such an opinion from her doctor. When it arrived, it was found to lack any meaningful information about the prognosis for her recovery and ability to RTW.

[58] Any employee who is away from work and who is ill or injured carries the burden of proof to show the employer that she or he is ill or injured and then that she or he has recovered sufficiently to have a real and clearly communicated RTW date set by the treating physician, upon which the parties can begin to consider what may be required for accommodations for his or her RTW.

[59] My conclusion that an employee carries the burden to show that she or he is medically fit to RTW is consistent with the PSLRB's decision in *Halfacree v. Deputy Head (Department of Agriculture and Agri-Food)*, 2012 PSLRB 130 at para. 221, which found the following: "The obligation was on the grievor to provide the information the employer requested. It was not the employer's obligation to act as its own detective."

[60] The grievor also relied upon *Grover v. National Research Council of Canada*, 2005 PSLRB 150, to support the argument that the employer should have done more to question and clarify the medical information it considered deficient and upon which it finally decided to terminate the grievor's employment.

[61] I distinguish *Grover* on its facts as the adjudicator found that the employer had had many other options and that it had ignored the usual process for questioning tendered medical evidence. The grievor in *Grover* was found to not have had the opportunity to provide further medical evidence because he could not obtain a clear answer from his employer as to what it was looking for. Clearly, that was not the situation in this case, based on the evidence before me.

[62] The grievor also relied upon the arbitral decision in *Nelsons Laundries v. Retail*

*Wholesale Union, Local 580* (1997), 64 L.A.C. 4th 120 at 5. That case considered an employee who was returning to work after having been absent due to an injury. The employer continued to be concerned as to the employee's fitness to work. The arbitrator found that the employer carries the burden of gathering medical evidence to establish an employee's fitness. Again, such facts are not relevant given the very different situation in the case before me, and accordingly, I distinguish *Nelsons Laundries*.

[63] The grievor cited jurisprudence that states the employer is in the best position to determine workplace accommodations and that the employee must participate. However, this is not relevant in the matter before me as the grievor was never deemed medically fit to RTW by her physician. After years of *bona fide* efforts to support its employee and of patiently awaiting her recovery so that she would be able to work, the employer was under no duty to do anything more. Any further actions on its part would have been past the point of undue hardship.

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

*(The Order appears on the next page)*

## IV. Order

[65] The grievance is dismissed.

December 11, 2018.

**Bryan R. Gray,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**