Date: 20190121

File: 566-34-08752

Citation: 2019 FPSLREB 6

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

MARILYN DORO

Grievor

And

CANADA REVENUE AGENCY

Employer

Indexed as
Doro v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Employer: Richard Fader, counsel

Heard at Hamilton, Ontario,

August 21-23, 2018.

REASONS FOR DECISION

I. Summary

1 Marilyn Doro self-identifies as divorced and a single mother of three teens. She has enjoyed a career of over 30 years with the Canada Revenue Agency (CRA) working as an appeals officer (classified SP-06) in a cadre of mostly female employees at the CRA's office in Hamilton, Ontario.

2 Her direct supervisor, Domenic D'Ippolito, sexually harassed her both at the workplace and on evenings and weekends away from it. This began soon after he became the team leader of her section and moved to her floor of their Hamilton office building. He was part of a cadre of predominantly male managers in her section. The harassing behaviour lasted from May to October 2010, after which Ms. Doro gathered the courage to report it to the CRA. There was no evidence that she welcomed or condoned any of the harassing behaviour. Ms. Doro filed a written complaint and the CRA engaged an independent investigator who issued a detailed report approximately two years later which concluded that 13 different incidents of sexual harassment occurred.

3 The harassment included almost daily unwanted attention while she was captive at her desk in her work cubicle. On two occasions, Mr. D'Ippolito touched her while she was stuck at her desk, with one of those occasions described as a "back rub" that was witnessed by a co-worker. He made and gave her two compact discs of love songs. He told her to listen to the songs only at home. He invited her many times to coffee or lunch; he offered her rides home, embarrassed her by sending her chocolate in the office mail, and offered to help her with home chores. He texted her in the evening and on weekends, and he made disturbing comments to her that suggested he was watching her residence. He sent sexually-themed emails to her personal email account.

4 Mr. D'Ippolito received a six-day suspension without pay as discipline for his sexually harassing Ms. Doro.

5 None of Ms. Doro's allegations or the guilt of her harasser were at issue in the matter before me but provide a necessary foundation of fact to consider the referral of

her grievance to adjudication before this Board, which alleges a breach of the no-discrimination clause of her collective agreement and that her human rights, as enshrined in the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*), were violated.

6 Ms. Doro requests a financial award of damages from the CRA as allowed under the *CHRA* for pain and suffering, for the CRA's reckless behaviour, and damages of $22,955 for out-of-pocket costs for psychological treatment for her anxiety and depression, which she claims were caused by the months of harassment she suffered at her workplace.

7 For the reasons to be outlined later, I find that the CRA failed Ms. Doro, and I hold it accountable to pay her financial damages pursuant to the *CHRA.*

8 The CRA should have taken more effective measures to prevent sexual harassment at the workplace, and it should have acted upon the plain and obvious evidence of the harassment when it was first presented. The CRA should have acted quickly to remove the harasser from the workplace and to provide Ms. Doro with a safe work environment in her own office and at her own desk.

9 It was also insensitive of the CRA to ask Ms. Doro if she wished to move her workplace to St. Catharines, Ontario, which added to the harm she suffered as it made her feel as if she were at fault.

II. Background

10 Given the fact that the sexual harassment of Ms. Doro by her supervisor and the harm this caused to her was not challenged at the hearing, the outcome of this grievance and human-rights claim will rest upon my determination of three matters set out in the *CHRA*, which provide a statutory defence to this grievance. The relevant section, s. 65 of the *CHRA*, states as follows:

> ***Act of employees, etc.***
>
> ***65 (1)*** *Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of*

> *the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.*
>
> ***Exculpation***
>
> ***(2)*** *An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and subsequently, to mitigate or avoid the effect thereof.*
>
> [Underline emphasis added]

11 It is well established that under that section, any harassing act committed by an employee in the course of employment is deemed an act committed by the employer; see *Jane Doe v. Canada (Attorney General)*, 2018 FCA 183 at para. 21.

12 However, the *CHRA* provides for the employer to respond to the allegations that it is liable for harassment by establishing three different aspects of its due diligence, upon which it will be absolved of responsibility.

13 The parties jointly submitted in argument that the burden of proof was on the employer to establish the three aspects of s. 65(2) of the *CHRA*, to show as follows:

i) that it did not consent to the acts of harassment;

ii) that it exercised due diligence to prevent the acts of harassment; and

iii) that it exercised due diligence after the acts of harassment occurred to mitigate the effects of the harassment on Ms. Doro.

14 However, if I find that one or more of those three requirements were not met, then I can find the CRA liable. I must then consider the CRA's claims that it already satisfied all the requests for remedial action that Ms. Doro made and further whether this grievance should be dismissed as it did not allege a violation of the collective

agreement when it was originally submitted to the CRA.

15 The grievor alleged that the CRA violated article 19 of the relevant collective agreement, which is the no-harassment and discrimination clause. She alleged that being sexually harassed at the workplace by her supervisor amounted to differential treatment to her detriment that was based upon her gender, thus sustaining a finding of gender discrimination under the collective agreement and the *CHRA.*

16 Article 19 is titled "No Discrimination", and clause 19.01 states as follows:

> ***19.01*** *There shall be no discrimination … harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national 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.*

17 Article 19 essentially incorporates into the collective agreement the prohibitions on discrimination set out in the *CHRA*.

18 Section 226(2)(a) of the *Act* empowers this Board with the authority to interpret and apply the *CHRA* to matters referred to adjudication. Section 7 of the *CHRA* states that it is a discriminatory practice to adversely differentiate against an employee in the course of their employment on a prohibited ground of discrimination, which includes a person's sex (s. 3(1) of the *CHRA*).

19 The *CHRA* specifically addresses workplace sexual harassment in section 14 as follows:

> ***Harassment***
>
> ***14 (1)*** *It is a discriminatory practice,*
>
> ***(a)*** *in the provision of goods, services, facilities or accommodation customarily available to the general public,*
>
> ***(b)*** *in the provision of commercial premises or residential accommodation, or*

> ***(c)*** *in matters related to employment,*
>
> *to harass an individual on a prohibited ground of discrimination.*
>
> ***Sexual harassment***
>
> ***(2)*** *Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.*

20 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 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 continued under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

21 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 names of the PSLREB, 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*").

III. Facts

22 Ms. Doro showed strength and the courage to step forward and report the sexual harassment she was suffering from, and more so, to endure the marathon two-

year internal investigation and the time it took for her grievance to be scheduled before this Board. It is not easy for anyone to file a grievance and appear before this Board as a witness. It is especially challenging when one testifies about being sexually harassed. Ms. Doro spoke about the severe feelings of embarrassment and shame that she felt from being subjected to sexual harassment, the related gossip about her, and the isolation that she felt at work. She was visibly affected by testifying at the hearing, and the harm that she testified that being harassed caused her is still plainly evident.

23 Darrell Mahoney, the retired assistant commissioner for the CRA's Ontario Region, testified that there is a much higher incidence of harassment than is ever reported. Many people in Ms. Doro's position, who have been sexually harassed, choose not to endure the added trauma of being subjected to prolonged investigations and hearings such as this one.

24 The grievor first reported to her employer that she was being sexually harassed by her direct supervisor on October 6, 2010. A note to file taken from a CRA Human Resources Consultant confirmed that on that date, she received a call from Arun Khanna, the chief of the CRA's Appeals Division in its Toronto West area, who was the harasser's manager. This note confirmed that a "sexual harassment claim" had been made and that the issue of a "harassment complaint" and "harassment grievance" were all discussed with him in that phone call (Exhibit E-1, Tab 6).

25 Mr. Khanna was based in the CRA's Mississauga offices and had 30 staff there plus 20 in Hamilton and 10 in St. Catharines whom he oversaw with the help of several team managers.

26 Within approximately two weeks, and being disappointed by what she saw as CRA management's inadequate response to her complaint and request for a safe workplace, Ms. Doro filed a grievance on October 21, 2010. The details of what happened once the complaint was reported shall be examined in considerable detail later in this decision.

27 The grievance was heard at the CRA's final level on June 4, 2013. The Board received the referral of the matter to adjudication on July 9, 2013.

28 Also on July 9, 2013, the Canadian Human Rights Commission (CHRC) was given notice in the proper form that a grievance had been filed against the CRA alleging that it had discriminated against Ms. Doro and that it had treated her in an adverse differential manner because of her gender, contrary to the *CHRA*.

29 In the notice to the CHRC, Ms. Doro stated that she had been subjected to harassment, including sexual harassment at the workplace, and she requested the following corrective action:

> *1. That the discriminatory actions and harassment cease.*
>
> *2. That the employer takes the necessary steps and makes every reasonable effort to return Ms. Doro to her regular work area/workstation.*
>
> *3. That the employer reinstates Ms. Doro's sick leave credits.*
>
> *4. That the employer ensures that Ms. Doro and her harasser aren't working in the same unit and workplace.*
>
> *5. To make Ms. Doro whole and to provide her with monetary compensation for the pain and suffering that she experienced as a result of this discrimination.*
>
> *6. Any other corrective actions as deemed appropriate under the circumstances.*
>
> …
>
> [*Sic* throughout]

30 Ms. Doro reported to Mr. D'Ippolito as her direct supervisor from January to October 2010. She testified that he moved onto the third floor of the office where she worked as he assumed the team leader position upon the retirement of her former team leader.

31 The harassing behaviour occurred between March 2010 and October 2010 inclusively, and then it continued in a much more limited way, as shall be described later, for a period of a few weeks after the complaint was filed as Mr. D'Ippolito continued to work in close proximity to Ms. Doro, to watch her, and to leer at her from his desk as she was forced to walk down a hallway to her cubicle, and from his

desk, he could see her in the hallway.

32 The un-contradicted testimony of Mr. Khanna established that upon learning of the harassment allegations, the CRA moved quickly. Within days of the complaint being made, it identified a new team leader to supervise Ms. Doro's group, effective October 18, 2010. Ms. Doro was away from work ill for several days after reporting the harassment.

33 On October 12, 2010, Mr. Khanna communicated to Ms. Doro and her union representative, Maria Wormsbecker. He stated that he had several options for creating some physical separation for Ms. Doro from her harasser. He suggested that one option was that she move her workplace to St. Catharines and that she be paid her vehicle mileage and receive a lunch allowance as on travel status, or that she move to another team performing different tasks in a different part of her building in Hamilton, or that she have her desk moved several metres within the same open area and be located in what was known as the SRED area of the same floor.

34 Mr. Khanna met with Ms. Doro and Ms. Wormsbecker again on Monday, October 18, and repeated the three options to achieve a physical separation of Ms. Doro from her harasser. His meeting notes indicated that if she moved her workplace to St. Catharines, it was expected to last until April 2011. As a fourth option, Mr. Khanna asked Ms. Doro to consider teleworking from her home. The notes also state that he advised that he had obtained Mr. D'Ippolito's agreement to take Mondays off for his compressed workweek rather than his preferred Friday, so that for only three days per week, both the harasser and Ms. Doro would be in the office. Although it was contested in testimony and somewhat put in doubt by Mr. Khanna's statements in cross-examination, his notes also indicate that Ms. Doro agreed to have her workstation moved to the SRED upon her return to work from sick leave.

35 In his notes from October 15, 2010, Mr. Khanna states that in his discussions with representatives from the union local, it was "acknowledged by all" that even with Ms. Doro being moved to the SRED area that she and her harasser "… would not be able to avoid each other". Another note from that same date by Mr. Khanna states that he told his labour relations advisor that Ms. Wormsbecker had told him that

day that Ms. Doro was threatening to quit her job as she refused to accept his three options to move her workstation to different areas on her same floor or to a different floor in her same building.

36 I point out that this note contains cut-and-pasted text from an email from October 18, 2010, from the same labour relations advisor and includes the following (Exhibit E-1, Tab 11, page 35):

> *… Additionally, if it is felt by management that harassment has occurred, measures can be taken regardless of whether or not the employee files a formal complaint. In the meantime, it is advised that management continue with their fact finding and implement any interim measures required to ensure the well-being and rights of both parties….*

37 Mr. Khanna advised his labour relations advisor on October 25, 2010, and then informed both Ms. Doro and her harasser by email that Ms. Doro would "… move to the workstation near SRED", that she would report to a different team leader effective October 18, 2010, and that, as if there were any doubt on the part of Ms. Doro, both she and her harasser were prohibited from having any communication with each other.

38 By October 21, 2010, Ms. Doro testified that she came to the conclusion that her concerns over her having a harassment free workplace were not being taken seriously. She testified that she was surprised and disappointed by her returning to work after being away ill for several days to find her workstation had been moved to the SRED section. Ms. Doro then decided to file a grievance on this same date.

39 Once the grievance was filed the CRA began the process to identify and contract an independent investigator to look into the various allegations. Mr. Mahoney testified to the process of the harassment complaint investigation. He said that by September 20, 2011, the independent investigator had completed the interviews but that the access to information and privacy (ATIP) vetting took an "extraordinary" amount of time.

40 The investigative report was released to the parties in its final form on October 18, 2012, approximately 24 months after the complaint was filed. It appears from a timeline of events jointly submitted by the parties that 10 of these 24 months

were required for the "ATIP vetting" of both the draft and final versions of the report.

41 Mr. Khanna testified that near the end of his time dealing with this matter, in the spring of 2012, the findings of the investigation were known and that he was aware that Mr. D'Ippolito was then moved out of the Appeals Division and into the Audit Division on a different floor of the same Hamilton building.

42 As noted in the report, the CRA's "Preventing and Resolving Harassment Policy" describes harassment as follows at page 3:

> ***Harassment*** *is a form of misconduct / improper behaviour by an employee that is directed at, and is offensive to, another employee, and which that person knew or ought reasonably to have known, would be unwelcome and cause offence or harm. It comprises objectionable conduct, comment, or display that demeans, belittles, or causes personal humiliation or embarrassment, and any acts of intimidation or threats, which detrimentally affects [sic] individual well-being or the work environment.*
>
> *It includes harassment within the meaning of the* Canadian Human Rights Act ….

43 The investigative report, at page 4, notes that "All administrative investigations apply the civil standard of proof in arriving at a finding. The civil standard is a 'balance of probability'; meaning that credible evidence must establish that it is more likely than not that the events occurred as alleged."

IV. Analysis

Issue 1: Did the CRA consent to the harassment?

44 The first step under the test in s. 65 of the *CHRA* for the employer to defend itself from an accusation of what amounts to vicarious liability for the harassing actions of an employee requires me to consider if the CRA consented to the harassing actions complained of.

45 The grievor said that while there was certainly no consent by the CRA to the harassment prior to it being reported, her counsel argued that the harassment she suffered after being moved to the SRED did amount to CRA consent.

46 On the surface of this issue, the CRA's counsel gave a quick and sure "No", in reply to this point in argument. The CRA clearly did not consent to the months of harassment suffered by Ms. Doro before she filed her complaint. And it was obvious that once the complaint was received, the responsible officials were all genuinely concerned for her and that they took meaningful actions to help her.

47 However, twice I invited the CRA's counsel to reply to the grievor's assertion that she advocated to have her harasser moved and that instead, she was moved a few cubicles away from her original workspace on October 18, 2010. This was 12 days after the first meeting with Mr. Khanna at which he was given details of the harassment. I invited the CRA's counsel to speak to whether the outcome of this move, which was the continued harassment of Ms. Doro, could be seen as consent. The reply was, "No."

48 Counsel for the CRA also pointed to disputed evidence to assert that in fact, Ms. Doro had consented to the move, presumably implying that this somehow vitiated the CRA's responsibility for the lack of a safe workplace for her that came from the new seating arrangement.

49 Ms. Doro's new workspace was still in the immediate vicinity of her harasser. In fact, he could sit at his desk and watch her come and go from her cubicle. She said that he would regularly watch her from his desk and that he would "leer" at her as she walked through the passageway that she had to pass through to enter and leave her work area.

50 The hearing did not receive the exact measurements of the office floor plan entered in evidence, but a diagram of it was tabled as an exhibit. It showed that Ms. Doro was moved a distance of six or seven individual workspace cubicles for her efforts to receive a safe and harassment-free workplace subsequent to filing her complaint. There was no evidence as to the exact measurements of each cubicle, but the parties agreed that they were rather normal in size. I take as notice that each cubicle might have been two or three metres by two or three metres in size.

51 Mr. Khanna confirmed all this by testifying as to the great lengths he

strived to try to rectify the staring and leering problem caused by his new seating plan. He explained in detail how he told the harasser he would have to shut his door and stop leering at Ms. Doro. The request to close the door then turned into what sounded like a negotiation with the harasser, who complained of stale air in his office. Then, an agreement was reached under which the door would be closed 80% of the time. Mr. Khanna's testimony also included his efforts to have the harasser agree to move his desk or chair so as to make it more difficult to stare down the hallway and observe Ms. Doro. He testified that the harasser strongly opposed the efforts to have the desk and chair reoriented.

52 Ms. Doro testified that in the end, her harasser continued relatively unabated to sit in his office and stare and leer at her as she came and went from her new cubicle. Mr. Khanna moved her after what she testified were her repeated requests to be moved away from the harasser so that she could have a harassment free workplace.

53 Ms. Doro's co-worker and union representative, Ms. Wormsbecker, helped with reporting this continued harassment and with the many follow-up meetings and communications with management. She testified that on October 19, 2010, she observed the contents of Ms. Doro's desk being packed and moved. She said that she spoke with Mr. Khanna that day and that she told him that Ms. Doro did not want to move.

54 Counsel for the CRA pointed to an email that Mr. Khanna sent to Ms. Doro on October 18, 2010, which purports to provide notes from their recent meeting. The emails states in part as follows:

> *… The following points were agreed to:*
>
> *…*
>
> *3. Marilyn will move to the SRED station and use the SRED door as her entrance and exit point.*
>
> *4. Contact with Domenic* [D'Ippolito] *will be avoided as much as possible.*

…

55 I draw attention to the fourth point as it must have been bitterly ironic for Ms. Doro to read that after her pleas to the CRA to have Mr. D'Ippolito restrained from harassing her, her senior manager would consider it necessary to tell her to minimize her contact with him.

56 The following document tendered as an exhibit that Mr. Khanna testified was his written meeting notes stated that he met with Ms. Doro and Ms. Wormsbecker on October 18, 2010:

…

> *3. AK reiterated his options for separating complainant and respondent and added a 4th option:*
> *a) MD reporting to St. Catharines until Apr 2011,*
> *b) MD working out of Audit on 4th floor and reporting to …,*
> *c) MD working out of the SRED station slightly removed from Appeals, and*
> *d) A new 4th option of MD teleworking until issue is resolved. It was noted that MD had been a teleworker prior to the change in policy in April 2009.*
>
> *…*
>
> *5. It was proposed that to minimize contact between MD + DD, MD could move the SRED station and that DD would be asked to take Mondays off since both MD + DD are off on Fridays. This way, they would only be in the office Tues, Wed + Thur.*
>
> *…*
>
> *7. Also subsequent to the meeting, MW informed AK that they would be going the formal harassment route. They were also agreeable to MD moving to the SRED station since DD had agreed to change his days off to Mondays.*

…

57 In his examination-in-chief on this matter, Mr. Khanna stated that in the first two weeks after he learned of the situation, he held several meetings. He knew that the two parties to the complaint had to be separated, and he sent meeting notes to Ms.

Doro and Ms. Wormsbecker that stated that she would be moved to the SRED area. He testified that she never said that she did not want to move; nor did she reply to his meeting notes that indicated that she had agreed to the move.

58 In her sworn testimony, Ms. Doro vehemently denied ever agreeing to move her work station several meters away to the SRED area. She testified that in fact, after being away on sick leave, she returned to her office and was terribly shocked and upset to see that her workstation and personal belongings had been moved, without her knowledge or consent.

59 The documentary evidence tabled as exhibits at the hearing corroborated that testimony as the meeting notes that Mr. Khanna testified he wrote (Exhibit E-1, Tab 11) clearly stated that on October 15, Ms. Wormsbecker told Mr. Khanna that his option to move Ms. Doro to SRED was problematic as Ms. Doro and Mr. D'Ippolito would not be able to avoid each other. The notes also mention Ms. Wormsbecker's concern with the suggestion that Ms. Doro needed to move (specifically, options 1 and 2), as she was the victim. These same notes also indicate that Ms. Wormsbecker said she would ask Ms. Doro if option 3 (her moving) would be acceptable.

60 Another note from Mr. Khanna on that same date states that in discussions with his labour relations advisor, he said that Ms. Doro would not accept any of his three options to move her workplace and that she had threatened to quit. He added that he told the labour relations advisor that "MD had refused to move and most likely DI would also refuse."

61 When asked again in his examination-in-chief about Ms. Doro's reaction to being moved to a new workstation in the SRED area, Mr. Khanna backtracked somewhat and testified, "She did not enthusiastically embrace the move."

62 He then testified that Ms. Doro was so adamant about being properly physically separated from her harasser that she said he should be removed from the building and fired. Mr. Khanna stated that this showed that her perception was biased.

63 Rather, Mr. Khanna stated that he had no other options since the harasser had denied any wrongdoing and that he had already forced the harasser against his will

to change his compressed workweek day off. Mr. Khanna added that he thought it would be a "nightmare" to have to change a team leader.

64 Mr. Khanna was challenged in cross-examination to explain the apparent contradiction in his evidence that Ms. Doro had agreed to her workstation being moved (according to his meeting notes) when compared to his *viva voce* testimony that she did not enthusiastically embrace the move. He then testified that these were not contradictory statements on his part as Ms. Doro did both things. He said that she did agree to move but that she was not enthusiastic about it. He stated that she supported moving to some extent as an interim measure.

65 While my finding on the first step of the test under s. 65(2) of the *CHRA* does not depend on this, I do find that Ms. Doro consistently opposed efforts to move her workstation and that Mr. Khanna's notes to his representative are accurate when he stated that Ms. Doro opposed all three moving options that he presented to her.

66 To summarize, then, I find that the CRA viewed Ms. Doro's desire for a safe workplace as a burden that she needed to solve herself by either moving her workplace to a new city or to a different floor or to stay home and telework. Mr. Khanna's meeting notes of October 18, 2010, confirm this, as noted earlier when he gave Ms. Doro four options to move her workplace.

67 Ms. Doro testified as to the terrible stress and fear this arrangement caused her as she had reported the harassment, spent a brief period home ill due to stress, and then returned to work to find her workstation moved under the new arrangement that had been dictated by Mr. Khanna.

68 Given the facts confirmed by Mr. Khanna, which are that the new seating arrangement resulted in the harasser continuing to stare and leer at Ms. Doro, how she came to fear for her safety while coming to work every day at this juncture, and how she then had to leave work and begin a long period of sick leave due to the fear, anxiety, and depression caused by being sexually harassed, I find the CRA is responsible for the aggravation of harm to her caused by the continuing harassment that occurred after Ms. Doro was moved to the SRED area.

69 The CRA clearly knew of these actions and the consequences to Ms. Doro. Thus, they make the CRA responsible. The CRA's direct knowledge of and responsibility for the seating arrangement amounted to consent. Therefore, I find the first step of the test under s. 65 of the *CHRA* not met by the CRA in defending itself in this grievance.

Issue 2: Did the CRA take reasonable steps to prevent the harassment?

70 The second part of the CRA's defence under s. 65(2) of the *CHRA* is that it may attempt to establish that it exercised all due diligence to prevent the act from being committed. The CRA asserted the issue of due diligence in preventing the harm, which was examined in testimony.

71 Mr. Mahoney testified to the details of a CRA anti-harassment program. He testified about the background to this campaign in that in a survey, one in five CRA employees replied that they had experienced workplace harassment or discrimination. But the actual number of complaints filed was far lower than the level of one in five who had responded that way.

72 Mr. Mahoney testified to the details of the program. He discussed a series of exhibits, which displayed copies of emails sent to all CRA staff. He also explained that harassment policies were updated and reissued to all staff and that workshops were conducted for them to ensure that they knew what harassment and discrimination are and how to recognize them.

73 Mr. Mahoney also explained how a website was launched as part of a respectful workplace campaign and that it contained a statement of commitment to the effort by the CRA's commissioner. The campaign included plain-language messaging and an entire policy on preventing and resolving harassment.

74 When asked in his examination-in-chief about a manager's role under the policy, he explained that all employees were responsible for coming forward and if needed, for going to management as soon as possible or to their union representatives to report harassment. He also testified that managers could use alternative dispute resolution as one option to address harassment but that it did not take the place of

taking action and of possibly having the complaint pursued through the formal grievance route.

75 The CRA offered as exhibits copies of the April 14, 2010, emails from "NAT-Distribution" titled "Message from the Commissioner and Deputy Commissioner" that contained policy messages and at times videos. These emails and attachments "encourage" CRA staff to familiarize themselves with the policies promoting "…a respectful work environment that values positive working relationships" and "individual well-being" as well as expected workplace behaviour and what does and does not constitute workplace harassment. The message ended by stating, "Promoting a respectful workplace is a collective effort. We encourage each of you to take part, and we thank you for your commitment to this important national initiative" (Exhibit E-1, Tab 2). (emphasis added)

76 I find these well-intentioned policies to be harmless bromides at best in the context of the sexual harassment suffered by Ms. Doro at the hands of her supervisor. I find the operative phrases of this national awareness effort, which are "Promoting" and "We encourage" too passive to properly address sexual harassment.

77 The next email sent out to all staff in this series of awareness campaigns contained another video. None of the videos were tendered as evidence at the hearing. The August 5, 2010, email promotes a respectful workplace initiative. It states that everyone can help develop and maintain a respectful workplace and that establishing professional workplace etiquette and demonstrating behaviour conducive to harmonious and productive work relations had to be an integral part of the staff's daily activities (Exhibit E-1, Tab 3).

78 Importantly, I note that no evidence was tendered to show that any harassment prevention awareness or training material was actually received, read, and understood by Mr. D'Ippolito. Nor did I receive any testimony or documentary evidence purporting to establish that he attended and participated in the harassment prevention workshop that I was told was conducted for all employees. Some record of the harasser receiving these materials, and much more importantly, some record of his attendance at a workshop and of some evaluative method to attest to his comprehension of the

materials would have been helpful for my consideration of the second step of the test under s. 65 of the *CHRA*.

79 Counsel for the CRA cited the Canadian Human Rights Tribunal (CHRT) case of *Francois v. Canadian Pacific Ltd.*, 1988 C.H.R.D. No. 1 (QL), in support of the submission that the harassment awareness and prevention program it undertook should be found, as in *Francois*, to exonerate it from liability under the second step of the analysis under s. 65(2) analysis. I distinguish *Francois* on its facts as it did not deal with sexual harassment, and a witness in that case testified to his actual attendance at a workplace harassment seminar.

80 While not cited by the parties, I note that in my decision *Campbell v. Canada Revenue Agency*, 2016 PSLREB 66 at paras. 28, 29, and 49, I gave close attention to and relied upon the extensive training that the CRA and the union provided to all staff to warn them of the rules in the relevant code of conduct and the grave consequences in place to sanction violations of it, including termination of employment, as follows:

> ***28 …*** *I think that an employer rightly finds it very problematic any time an employee consciously decides for his or her own reasons to break very clear and strict rules that he or she understands and is repeatedly reminded of both by managers and by the bargaining agent. I have many examples in the evidence before me of both his employer and his bargaining agent urging all staff to follow the employer's code of conduct. Among other things, this code of conduct prohibits staff from accessing their own files. It also prohibits employees from helping family, friends, or acquaintances. If an employee is assigned a file of someone he or she knows or is related to, he or she is supposed to immediately report it to his or her supervisor.*
>
> ***29*** *The grievor was required to attend a seminar at which all staff were reminded of the different aspects of the code of conduct and were given examples of being asked to help family and friends. The presentation advised that any such contact and assistance was prohibited and that employee misconduct might be subject to discipline, up to and including termination of employment. The seminar concluded by advising employees of the statement, "Don't put your careers on the line", and explained that despite repeated*

> *communications on unauthorized access and employee misconduct, employees were continuing to engage in these behaviors, jeopardizing their careers. It was also noted that the majority of such infractions are committed by experienced employees.*
>
> …
>
> ***49** … He had been presented with dozens of teaching aids, reminders, and joint employer-bargaining agent supports to ensure his understanding of and compliance with the code of conduct….*
>
> [Emphasis added]

81 I find that the concerted efforts of both the CRA and the union in *Campbell* stand in stark contrast to the evidence before me in this matter as it relates to awareness and training and, most importantly, the consequences for sexual harassment in the CRA's workplace.

82 Obviously, both the CRA and the union are far more advanced in their thinking on how to stop employees from breaching the relevant code of conduct and have established and clearly communicated the harsh consequences for such a breach. Such in-person training for all managers, with clearly communicated harsh consequences for sexual harassment perpetrated like Mr. D'Ippolito did on his staff member, might have given Mr. D'Ippolito cause to pause and ponder the consequences of his actions, both for himself and for Ms. Doro.

83 In light of the harm caused to Ms. Doro by her team leader, both the CRA and the union representing both employees and management would be well-served in the future to put the same amount of effort into sexual harassment prevention and the creation and dissemination of the awareness of more meaningful consequences (as was the case here for Mr. D'Ippolito) for harassment, especially when the harasser is in a position of authority, as was the case with the harasser managing Ms. Doro's day-to-day activities.

84 To show that it acted diligently to prevent the sexual harassment, under s. 65(2) of the *CHRA*, the employer should create, preferably in cooperation with the union, an awareness campaign that it can point to at hearings such as this to show that

all staff, especially managers, have received training about the anti-harassment policy and that they have also been made aware of the sanctions in place for violating it.

85 The evidence before me very clearly established the fear of Ms. Doro's management that forcing the harasser to move to a new workplace would be grieved. This panel of the Board would be very hesitant to uphold a grievance by a sexual harasser who, upon some evidence of wrongdoing, had to be promptly relocated to restore a safe and respectful workplace environment for the person who has been harassed.

86 When a robust anti-harassment program warns staff of the consequences they will face if they are found sexually harassing anyone, and the harasser was made aware in advance of the potential consequences of their harassing activities, including being removed from the workplace, it will be much harder for such a person to successfully grieve any reasonable actions taken promptly to mitigate the harm being caused to the subject of the harassment.

87 For the reasons that I have outlined, I find that the CRA failed to adequately take steps to prevent the sexual harassment that Ms. Doro suffered.

Issue 3: Did the CRA take reasonable steps to mitigate the harm to Ms. Doro once she reported being sexually harassed?

88 Immediately upon the report of harassment, the employer responded with commendable promptness to look into the matter.

89 Mr. Khanna travelled to Hamilton the next morning to meet with Ms. Doro and her union representative. That was on a Thursday, and the next day on which the harasser was at work and could be interviewed was the next Tuesday after a long weekend. Mr. Khanna returned at this first opportunity to investigate the allegations he had heard first-hand five days earlier.

90 Mr. Khanna testified that upon presenting Mr. D'Ippolito with the fact that a sexual harassment complaint had been filed against him, the accused was adamant and very emotional in denying everything. Mr. Khanna testified that Mr. D'Ippolito rebutted all the accusations.

91 Mr. Khanna testified that at the meeting, he presented the harasser with some of the allegations, such as him making a CD with love songs and giving it to Ms. Doro. In response, Mr. D'Ippolito explained to Mr. Khanna that he gave many staff music CDs, thus explaining away but not denying the allegation that he gave Ms. Doro love songs.

92 Having just heard testimony that the harasser admitted giving Ms. Doro music but having not received any further testimony about it, I questioned Mr. Khanna on what he was able to elicit from the harasser about the music he gave to Ms. Doro. Mr. Khanna became defensive and abruptly stated that it did not matter what kind of music was given to her as there are many kinds of music, including protest songs, which he offered as an example of the music that could have been given to Ms. Doro.

93 Had Mr. Khanna inquired as to the CD's contents (the final investigative report indicates at page 99 that Ms. Doro described receiving two CDs of music from Mr. D'Ippolito, the first of which was received in early June) or actually sought the CD, he would have discovered that Mr. D'Ippolito gave Ms. Doro the following songs, both by Rod Stewart: "When a man loves a woman", and "Have I told you lately that I love you?"

94 Ms. Doro told the investigator that when she first played the first CD, she heard the song, "When a man loves a woman", which immediately made her feel sick, and that she stopped the music and then did not listen to any more of the 13 songs on that CD (see page 99 of the investigative report).

95 Perhaps more than any other aspect of his testimony, this very deliberate decision of Mr. Khanna to turn his mind away from important facts shows me that the employer's response was inadequate to address the harassment and mitigate its harmful effects on Ms. Doro.

96 Had Mr. Khanna asked the obvious next question after the harasser admitted to giving music CDs to staff, which would have been asking what songs were on them and specifically which ones he gave to Ms. Doro, it could have provided the evidence the employer needed to take much more meaningful and prompt action.

97 Another obvious line of inquiry into this important matter would have been for Mr. Khanna to ask to see and listen to the CD himself if one of the parties still had it. I have no evidence before me as to whether he made such a request.

98 More to Mr. Khanna's failure to take obvious and simple steps of further inquiry into the music was his testimony admitting that one evening prior to the harassment being reported, he had attended a work dinner at a restaurant with many staff, and when someone asked why Ms. Doro was not there, someone replied that she might be on a date.

99 Mr. Khanna admitted to seeing the harasser immediately take his phone out and start texting Ms. Doro. As the group noticed it too, a female staff member who was present said out loud, "Domenic, don't you dare text Marilyn." Mr. Khanna testified that this incident stuck out in his memory as being somewhat odd — a supervisor texting an employee in the evening under such a circumstance — but he testified that he did nothing more about it.

100 Given this earlier episode of unusual and suspicious behaviour of the harasser towards Ms. Doro that was noticed by Mr. Khanna, the later failure to investigate the CD music is even more problematic.

101 When he was asked about the specific circumstances of Ms. Doro's harassment complaint, Mr. Mahoney testified that the first he had heard of it was when he saw that the formal grievance had been filed. He stated that he immediately sought an investigator and that he inquired and was told that Ms. Doro had been separated from Mr. D'Ippolito.

102 Mr. Mahoney testified that with many allegations and witnesses to interview, the investigation proceeded slowly, and that the ATIP vetting took an extraordinary amount of time. He also testified that in hindsight, the CRA should have forced Mr. D'Ippolito to move his office earlier and against his will. He said that everyone in such investigations has a right to be heard and that it might have been unjust to force Mr. D'Ippolito to move before the report was complete but that in this case, it might have been prudent to force him to move. In cross-examination on this

point, he added that in hindsight, he should have moved Mr. D'Ippolito out of his job and transferred him to the Audit Division.

103 While the CRA did act promptly to first investigate the allegations and then to provide organizational separation of the harasser from Ms. Doro, the same cannot be said for the very important aspect of providing a safe level of physical separation of the harasser from Ms. Doro.

104 In addition to the failure of CRA management to take meaningful action based upon the evidence, which was plainly available to it as I have just noted, I find very problematic the fact that it tried to move Ms. Doro to a workplace in a different city and that it then moved her desk without her agreement.

105 Ms. Doro had done nothing wrong. At a time when she most needed the support of her colleagues and a safe and secure workplace, the CRA thought it might move her workplace to another city to solve its own problem. This was a shameful way to find an easy way out of a situation that demanded urgent attention and it added additional stress and harm to Ms. Doro. She testified as to how upset it made her when she was asked if she would move to St. Catharines as she said it made her feel as if she had done something wrong.

106 The CRA should have taken the proper route of confronting Mr. D'Ippolito with the evidence that was readily available to it within days of the harassment being reported and, after offering him a chance to present his side of the story (right up to when he was disciplined, he sought to deny any responsibility), it could have either placed him on administrative leave pending the outcome of the investigation or taken other action to ensure Ms. Doro's well-being.

107 The employer argued that the St. Catharines workplace was nearby, even though it was approximately 55 km and an approximate 1-hour drive away in rush hour, and it pointed out that it would have paid Ms. Doro's mileage and lunch money for her trouble. But she testified that the thought of being pushed to work in a different city made her feel even worse, as if she had done something wrong, and that it made her very upset, as she thought that she could be seen by others as a wrongdoer and that

she would be separated from her work colleagues.

108 A statement that Mr. Khanna made in his examination-in-chief about asking Ms. Doro to move her workplace to St. Catharines betrayed the wrong-headedness of the whole idea. He stated that he offered to reimburse her vehicle mileage and pay her a lunch allowance to show her that the move "was not punitive". Why would he have been concerned that he needed to show her that his move request was not punitive, if he did not foresee how his request would upset her and make her feel as if she was the wrongdoer?

109 In what was obviously a self-serving rationalization, Mr. Khanna explained that Ms. Doro refused to move to the St. Catharines office and that he felt that "something had to be done to keep a semblance of peace and order" in the office. He added that she and her union representative did not offer any concessions.

110 I find it appalling that Mr. Khanna had the temerity to pressure Ms. Doro to move her workplace to a different city but felt it inappropriate to even ask the harasser to move his office to a different floor of the same building. Counsel for the CRA pointed to the email Ms. Wormsbecker sent to Mr. Khanna on November 18, 2010, which stated the following:

> *I hear what you are saying now, but I believe the agreement reached at the end of our meeting yesterday should rectify the concern expressed by Marilyn.*
>
> *The only concern raised at the meeting was the staring/glaring that occurred from Domenic while Marilyn walks [sic] down the hallway. She has with the help of her co-workers been managing to avoid any other form of contact in the work area. Marilyn has been staying away from the common areas as much as possible.*
>
> …

111 The CRA pointed to that email as evidence that in fact its efforts to remedy the harassment had been successful or at least that it had taken action to the satisfaction of Ms. Doro.

112 I disagree. The burden to create a safe and harassment-free workplace is

not on the person being harassed. It was not the grievor's responsibility to try to conduct herself at the workplace so as to avoid common areas, avoid her harasser, and basically avoid being harassed by her harasser's staring and leering behaviour.

113 If there was any doubt as to the workplace being safe, the next set of meeting notes in the CRA's book of exhibits dated December 8, 2010, states as follows at points 3 and 4:

> *3. AK confirmed that DD was strongly opposed to reconfiguring his desk. He felt this was too intrusive into his day to day work. He also felt that shutting the door 80% for the better part of the day would achieve the objective of addressing MD's concerns about leering.*
>
> *4. AK noted in this meeting that he agreed with DD's position on reconfiguring the desk but noted that he would speak to DD again about a stronger effort to keep the door nearly closed.*

114 Ms. Doro testified that she left the workplace shortly after this and that she was at home for an extended period of sick leave due to what she said were the ill effects of the stress, anxiety, and depression caused by the continuing harassment.

115 Clearly, by then, which was weeks after she filed her harassment complaint, and after she had repeatedly said that she did not feel safe at her workplace, Mr. Khanna was still struggling to respond effectively and was taking inadequate measures to provide Ms. Doro with a safe workplace.

116 In Mr. Khanna's meeting notes (Exhibit E-1, Tab 11), he has an excerpt from an email sent to him by Cheryl Stacey, a labour relations advisor, which states as follows:

…

> *… Additionally, <u>if it is felt by management that harassment has occurred, measures can be taken regardless</u> of whether or not the employee files a formal complaint. In the meantime, it is advised that management continue with their fact finding and <u>implement any interim measures required to ensure the well-being and rights of both parties</u>. It is also recommended that the Director be kept up to date on the*

steps taken.

…

[Emphasis added]

117 Progress on the matter virtually ground to a halt once the grievance was filed. A procurement process had to be launched to contract an independent investigator. Many interviews had to be scheduled. The response period had to elapse; drafts were written, and parties were allowed time to provide rebuttal comments. Once a draft was ready, the CRA was then required to vet it past ATIP screening, which took months. All told, the process to investigate the harassment allegations took two years to conclude from the time the complaint was first reported. I find this an unacceptable amount of time for all parties involved.

118 Counsel for the employer addressed the issue of doing more to take action earlier in the process and strongly asserted that his clients were guided and in fact limited in their actions by a past Board decision, which dealt with a situation in which the employer did take decisive action quickly following a report of very disturbing criminal activity by an employee, only to have the Board uphold the grievance striking down the employer's prompt actions.

119 Specifically, the employer referred to *Basra v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 53. This is a disturbing case in which Mr. Basra, a correctional officer, was charged with and later convicted of an off-duty violent sexual assault in which he surreptitiously drugged and sexually assaulted a lady while she was sedated.

120 Upon a complaint being filed with the police, Mr. Basra was investigated and initially was alleged to have lied, denying any knowledge of the incident. Phone records were used to identify him and then DNA evidence taken from the woman was matched with Mr. Basra. The Correctional Service of Canada (CSC) was alerted to Mr. Basra's arrest and to the facts I have just noted, including his positive identification by DNA testing, by means of a letter from provincial officials involved in the case.

121 The Board's decision focuses upon Mr. Basra having been denied his right

to be heard before the employer decided to suspend him without pay pending an investigation.

122 At paragraph 42 of *Basra*, the Adjudicator states:

> *This case is about the sufficiency and quality of the information tendered by the deputy head at the original hearing to support an indefinite disciplinary suspension of the grievor without pay, after he was charged with sexual assault*.

123 And, at paragraph 93, added:

> *I am extremely uncomfortable with the proposition suggested by the deputy head that an employer may simply receive a letter from another government official outlining that a charge has been laid and suspend an employee indefinitely without pay, without any further investigation and in particular without interviewing the employee*.

124 The Adjudicator determined that the suspension became disciplinary and punitive after 30 days and ordered the grievor reinstated (see *Basra* at paragraph 98).

125 The Adjudicator cited the Supreme Court of Canada's decision in *F.H. v. McDougall*, 2008 SCC 53, which found that evidence must be clear, convincing, and cogent and further that the written notice from justice officials noted earlier was not sufficient in this respect.

126 In his dismissal of the CSC's submissions on the point, the Adjudicator stated as follows in *Basra*:

> *[69] I note that the deputy head's argument continues to gloss or spin the information the CSC received beyond reasonable inferences that can be drawn from the privacy coordinator's letter. The deputy head argues as follows:*
>
> …
>
> … The facts of this case reveal a far more serious situation for the employer. This is an employee charged with a violent sexual assault who when first questioned

> by the police lied about his name, lied about knowing the victim and lied about not having had sex with the victim. This raises the seriousness far beyond what was required in the McManus decision.
>
> …
>
> *[70] With respect to that argument, I note that, although the grievor was charged with sexual assault, there is no indication in the privacy coordinator's letter … that the charge was of violent sexual assault. The definition of sexual assault in the* Criminal Code *encompasses a variety of acts, from an unwanted kiss to groping or vaginal intercourse. I can infer that the allegations are serious because they raise the issue of consent to sexual acts possibly being vitiated because of the administration of a substance. As I pointed out in the original decision, I cannot infer that it was a violent sexual assault just because the Crown chose to proceed by indictment. A lengthy period passed between the date of the alleged offence and the date on which a charge was laid. I take adjudicative notice that there is a six month-limitation period for summary conviction offences, and the Crown may simply have chosen to proceed by indictment because of the expiration of the limitation period.*
>
> …
>
> *[73] The deputy head points to the presence of DNA evidence. Sometimes testing provides a good indicator of probable guilt, such as a DNA analysis of seminal fluid collected from swabbing a complainant's vagina. The privacy coordinator's letter … does not disclose what part if any of the complainant's body was swabbed during the testing process. Given the lack of detail in the privacy coordinator's letter … , I cannot conclude that the DNA testing rises to the level of clarity, cogency and convincingness of proving that sexual activity occurred.*
>
> [Emphasis added]

127 Counsel for the CRA cited *Basra* in support of the proposition that the Board has set a very high standard for the treatment of those accused of serious misconduct, which protects the accused's procedural fairness. While I think this is a fair submission by counsel, I find that it is a very unfortunate standard given some of the comments about sexual assault made by the Adjudicator and it is one that I do not

agree with the submission of the CRA as to how Basra should inform the consideration of the matter before me.

128 I reject the suggestion in *Basra* that it might be relevant whether a victim of a violent sexual assault is found to have DNA from her attacker on her vagina as opposed to some other part of her body (*Basra* at paragraph 73). The clear insinuation is that if the DNA material from her attacker is not found in her vagina but on some other part of her body, it is a less serious matter. I also find it disturbing that the Adjudicator questioned the level of violence involved in a sexual assault.

129 There should be no doubt that serious allegations such as sexual assault or sexual harassment, when supported by some reliable evidence, can be properly relied upon by an employer that takes very prompt action to ensure workplace safety. *Basra* stands for the proposition that a person being suspended without pay must be presented with the allegation against them and have a chance to reply. This fundamental right was indeed afforded to Mr. D'Ippolito shortly after the allegations were first reported.

130 Counsel for the CRA also referred as follows to the CHRT's decision in *Dhanjal v. Air Canada*, [1996] C.H.R.D. No. 4 (QL) at paras. 225 to 229, and in particular several passages that cite with approval *Hinds v. Canada* (1989), 10 CHRR D/5683:

> ***225*** *… In Hinds … par. 41611, a Tribunal applied this diligence principle as follows:*
>
> > *In considering whether an employer has "exercised all due diligence…to mitigate or avoid the effect" of the act of the co-employee, one must examine the nature if the employer's response. Although the CHRA does not impose a duty on an employer to maintain a pristine working environment, there is a duty upon an employer to take prompt and effectual action when it knows or should know of co-employees' conduct in the workplace amounting to racial harassment.[…] To satisfy the burden upon it, the employer's response should bear some relationship to the seriousness of the incident itself.[…] To avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the*

> *distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment. A response that is both timely and corrective is called for and its degree must turn upon the circumstances of the harassment in each case.*
>
> ***226*** *It follows from this discussion, which we wholeheartedly adopt, that, in the first place, an employer will be liable only "when it knows or should know" that an employee is harassing another employee. In this regard, we believe, like Aggarwal, supra, pp. 70-73, that this is an objective test and that it must be the "reasonable victim" test that we discussed earlier. In Hinds, the employer was found liable under this test because the victim had clearly informed it of the objectively very offensive document he had received though internal mail as well as other racist actions taken against him in the past.*
>
> *…*
>
> ***228*** *… in determining whether the employer acted diligently or whether the alleged acts or words were sufficiently serious to constitute harassment, it is the objective test of the "reasonable victim" that must be applied ….*
>
> ***229*** *Hinds also indicates that the employer's reaction must be prompt and effective once it has been informed of conduct amounting to harassment, and that this reaction should bear some relationship to the seriousness of the incident itself. In short, the more serious the incident the more vigorous the employer's reaction should be, to indicate clearly to the staff that discrimination and harassment are not tolerated within the company.*

131 Counsel for the CRA noted a similar outcome in the Federal Court's judicial review of another human rights case in *Utility Transport International Inc. v. Kingsley*, 2009 FC 270 at para. 17, which states as follows:

> *[17] In considering whether an employer has exercised all due diligence, it is necessary to examine the nature of the employer's response. To avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the workplace environment and to reassure those concerned that it is committed to the maintenance of a workplace free from harassment. A response that is both timely and corrective is called for and*

> *its degree must turn upon the circumstances of the harassment in each case….*

132 While counsel for the CRA did not argue this, I note how *Dhanjal* speaks of an objective test for the harm being suffered by the person claiming harassment. I find on the facts before me in this matter that the employer clearly knew or ought to have known that Ms. Doro was in fact suffering sexual harassment of such significance that a serious, prompt, and effective response was required.

133 I concur with the CHRT's decision in *Dhanjal* that when warranted, the employer's response must be prompt and effective. In the matter before me, the evidence clearly establishes that while the CRA responded promptly, it did not respond effectively. An effective response would have created a harassment-free and safe workplace for Ms. Doro. The testimony of Mr. Khanna, when he described in detail how he begged and negotiated with Mr. D'Ippolito to stop staring and leering at Ms. Doro as she came and went from her new workplace bears witness to the CRA's ineffective response.

134 The failure to respond effectively caused real and ongoing harm to Ms. Doro. Based upon the uncontested evidence of her testimony, it exacerbated her illness and led to her being away on sick leave for months.

V. Remedy

135 At the outset of the submissions on remedy, counsel for the CRA stated that I should find the entire matter of the harassment settled as the grievance was upheld in part at the final level and that nothing further was owed the grievor. More so, counsel submitted that everything requested in the grievance had been granted.

136 Under the heading "Grievance details" on the CRA grievance form, the following allegation was made: "Between May 2010 and October 2010 I allege I was harassed by Domenic D'Ippolito."

137 Under the heading "Corrective action requested", the following was inserted into the form (note that the original text is in all capitals but that it has been reproduced in a more readable format):

- *The action cease*
- *I return to my regular workstation/work area*
- *My sick leave credits be reinstated*
- *I never again work for or report to said individual*
- *Domenic no longer work in Appeals or any section I work in as long as I remain employed in CRA*
- *I be made whole*

138 The grievance form was then signed by Ms. Doro and her local union representative, Ms. Wormsbecker, who was a co-worker in the Hamilton Appeals Section.

139 Counsel for the employer pointed to the original grievance and said that it did not even mention the collective agreement or a violation of any terms of it. Counsel stated that given these facts, the grievor could not change her grievance upon referring it to adjudication, which is a principle that the Federal Court of Appeal recognized and that the Board has regularly followed (see *Burchill v. Attorney General of Canada*, [1981] F.C. 109 (C.A.)).

140 Counsel also stated that the original document of the grievance made no reference to damages being requested and argued that the phrase “be [made] whole” is vague and insufficient when later claiming that financial damages were sought. Counsel pointed out that it was not until the third-level hearing that the grievor put forward financial damages. Counsel stated that that was two years after the grievance was filed and that it was well outside the 25-day time limit to file a grievance. In *Burchill*, the Court stated as follows at paragraph 5:

> ***5*** *In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1)… In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a*

> *camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under subsection 91(1) was not laid. Consequently, he had no such jurisdiction.*

141 Thirty years later, the Federal Court looked at the same issue again and affirmed its view that the employer should not be required to defend in arbitration against a substantially different characterization of the issues that it encountered during the grievance procedure (see *Boudreau v. Canada (Attorney General*), 2011 FC 868 at para. 19). The Court stated as follows at paragraphs 12 to 14:

> *[12] Essentially, the employer claimed that at no point during the grievance process was the issue the employer's failure to respect the collective agreement. Since the specific requirements found in the Harassment policies do not form part of the collective agreement, the employer submitted that the union was now attempting to change the true nature of the grievance by identifying clause 16.01 of the collective agreement as the subject of the reference to adjudication….*
>
> *[13] In response, the union submitted that the reference to adjudication did not change the nature of the grievance. The essence of the applicant's case was that he suffered undue stress and illness and had to remain off work for 17 months because the employer did not comply with its harassment policies. This failure to comply with the policies violated the collective agreement and the reference made to clause 16.01 did not change the legal issues and facts to be determined, but merely made explicit what had been implicit from the start. In any case, the union argued that the employer had not provided any evidence that it had suffered prejudice from the reference to clause 16.01 of the collective agreement.*
>
> *[14] The union attempted to distinguish* Burchill*, above, by stating that the reference to adjudication did not raise a new issue, as was the main problem in* Burchill*, above. Rather, the issue of the applicant's health had been raised throughout the grievance process. The employer was thus not deprived of the opportunity to address the subject matter of the grievance….*

142 The Board considered the same argument in a sexual harassment grievance that it has yet to report but that the Federal Court of Appeal has heard. The Court considered a judicial review of the Board's decision in what is known as *Jane Doe v. Attorney General (Canada)*, 2017 PSLREB 55. On this matter, the Board ruled as

follows at paragraphs 68 to 73:

> *[68] The employer argued that I lack jurisdiction to award damages with respect to grievance 101797 because a request for damages was not made in the original grievance form.*
>
> *[69] The employer took the position that "… any request to enlarge the scope of this grievance to deal with damages or financial compensation would be contrary to the established* Burchill *principle." It relied on* Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.),* Boudreau v. Canada (Attorney General)*, 2011 FC 868,* Babiuk v. Treasury Board (Department of Citizenship and Immigration)*, 2007 PSLRB 51, and* Chase v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 9, for this proposition.*
>
> *[70] I cannot see how requesting damages at adjudication enlarges the scope of the grievance.*
>
> *[71] The scope of a grievance is defined by the issue or issues it raises. The purpose of the* Burchill *principle is to ensure that grievors do not attempt to adjudicate issues that were not raised during the grievance procedure, thus taking the responding party by surprise. It ensures that the responding party always knows the case it has to meet, which is a well-known principle of fairness and natural justice.*
>
> *[72] A change to the remedies sought does not necessarily change the nature of the dispute raised by the grievance. The employer knew the case it had to meet. The allegation was clearly stated in the grievance. The employer failed to provide a harassment-free workplace. That was the same issue presented and argued at adjudication. There was no change in position and no surprises.*
>
> *[73] Accordingly, I find that the* Burchill *principle does not prevent me from considering a claim for damages in respect of grievance 101797, despite the fact that the claim was first raised at the adjudication stage.*

143 I agree with this aspect of the Board's decision. The evidence before me clearly establishes that on the first day that the CRA was aware of the harassment, the Labour Relations Advisor first assigned the matter informed Mr. Khanna and wrote in her notes (Exhibit E-1, Tab 6, page 23), "sexual harassment claim" and "harassment

grievance", among other things.

144 In its third-level reply, the CRA stated that "… your grievance is allowed" and "[t]he corrective action requested will be allowed in part …", along with, "[t]he additional corrective measures requested pertaining to costs for damages will not be forthcoming" (Exhibit E-1, Tab 29, page 72).

145 Counsel for the grievor argued that, and I agree, this evidence leaves no doubt whatsoever that there was a valid grievance before the employer and that it contained a claim for damages. Counsel also argued that this matter has at all times been treated by the CRA as a grievance and not a harassment complaint.

146 In the matter of remedy, I note that I received no challenge from counsel for the CRA as to the injuries to Ms. Doro or their extent as a direct result of the harassment she suffered from her CRA supervisor.

147 Ms. Doro testified that she had been off work on a lengthy period of sick leave due to the stress of being at work during the investigation. She testified that once the investigation concluded, she was able to recommence work but that she worked from home as her doctor recommended she not work in the office. She testified that she felt humiliated in front of her co-workers by how Mr. D'Ippolito treated her.

148 She explained in detail how her anxiety would rise as she arrived at and departed from work as he would come to her cubicle regularly and invite her to coffee and lunch. She also testified that he would sometimes wait near the parking lot for when she left work and on some occasions asked her for a ride, offered her one, or tried to share an umbrella, when it was raining.

149 Ms. Doro testified that she did not feel safe coming to work due to the animosity she felt from Mr. D'Ippolito after she filed the complaint against him. Upon reporting the harassment, Ms. Doro described how in her initial meeting with Mr. Khanna, when she was describing the harassing activities, he listened to many of the incidents and then said that he had heard enough. She testified that she thought it meant that he believed her, which gave her hope. But within days, Mr. Khanna met with Mr. D'Ippolito and then came to her and asked her why the actions of Mr. D'Ippolito had

been okay for a long time but were no longer. Ms. Doro interpreted this as telling her that he saw her as a liar. She stated how diminished this made her feel.

150 During this time, Ms. Doro testified that she was scared to use the elevator or stairwells at work for fear of coming face-to-face with Mr. D'Ippolito and that she was also in fear that he was watching her home in the evening and on weekends due to statements that he had made to her.

151 When asked why she decided to leave work and go on sick leave after her desk was moved, Ms. Doro stated that her health continued to deteriorate due to what she said was the "extreme stress" she experienced in the workplace. She testified that the harassment has caused her personal and professional harm and has been very difficult for her family. She said that she believes that she has lost the opportunity for promotions and that to this date she is still undergoing trauma counselling to treat her severe anxiety and depression.

152 The grievor's representative requested the full amounts of $20,000 for each head of damage allowed under the *CHRA*.

153 He also tendered receipts for $22,955 in treatment costs for which the grievor is out of pocket for the ill effects of the anxiety and depression she has suffered as a direct result of the months of harassment from her supervisor.

154 For the reasons I have just explained, I find that the sexually harassing actions directed at Ms. Doro at the CRA came within the definition of prohibited behaviour in s. 14 of the *CHRA* and constitute a violation of article 19 of the relevant collective agreement. Based upon the evidence, the CRA failed to establish on a balance of probabilities that it has satisfied any of the three requirements set out in s.65(2) of the *CHRA*, which could otherwise serve to shield it from liability for the sexual harassment caused by its employee.

155 As such, the CRA shall ensure that Mr. D'Ippolito ceases all forms of harassment of Ms. Doro and that measures are taken to prevent any further harassment from occurring in the future.

156 The CRA shall reimburse the grievor's out-of-pocket expenses for treatment and related costs arising from the harm caused to her health and well-being from the sexual harassment she endured that were valued at the hearing to be $22,955.

157 The CRA shall pay $20,000 to Ms. Doro, which is the maximum compensation allowed under the *CHRA* for the pain and suffering she experienced due to the sexual harassment she suffered from Mr. D'Ippolito. This award of damages is based upon the repeated acts of harassment that went on for over five months and that humiliated Ms. Doro in front of her co-workers and caused her stress and anxiety at work, in the evenings, and on weekends and that was particularly harmful, given that her harasser was her direct supervisor, who used predatory tactics, including trapping Ms. Doro in her work cubicle.

158 Under s. 53(3) of the *CHRA*, the CRA shall pay the grievor an additional $20,000, which is the maximum allowed compensation for the reckless manner in which it handled the initial investigation of her complaint that resulted in her being left in the immediate proximity of her harasser and that allowed him to continue harassing her by watching her and leering at her, causing her to go on medical leave. As I determined above, the CRA's direct knowledge of and responsibility for the seating arrangement amounted to consent and, as such, I find their conduct in this regard not only reckless, but wilful.

159 Organizationally, the CRA must be better prepared to act quickly and to provide meaningful physical separation so that a person claiming to have been sexually harassed will not be expected to remain in the same building or physical location as their harasser if there is any credible evidence available upon initial review that could substantiate the sexual harassment allegation.

160 I also recommend that the CRA consider a comprehensive anti-sexual-harassment program to raise awareness of what sexual harassment is, of how to identify it in the workplace and among co-workers outside the workplace, of the harm it causes, of how to help prevent it or stop it, and of how to report it.

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

VI. Order

162 The grievance is allowed.

163 The employer shall reimburse the grievor $22,955 for expenses for treatment costs arising from the harassment.

164 The employer shall pay the grievor $20,000 in compensation for pain and suffering under s. 53(2)(e) of the *Canadian Human Rights Act*.

165 The employer shall pay the grievor $20,000 in special compensation under s. 53(3) of the *Canadian Human Rights Act*.

January 21, 2019.

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