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

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

BETWEEN

BLANDIE SAMSON

Grievor

and

DEPUTY HEAD (Department of Justice)

Respondent

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

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Herself

For the Respondent: Karen Clifford, counsel

Heard at Ottawa, Ontario,
June 25 to 29 and December 3 to 7, 2018, and January 8, 2019.

I. Individual grievance referred to adjudication

[1] Blandie Samson ("the grievor") was terminated from her employment with the Department of Justice ("DOJ" or "the respondent") on November 17, 2015. She filed a grievance against her termination on December 21, 2015; it was referred to the Federal Public Sector Labour Relations and Employment Board ("Board") on November 15, 2017. She also served notice on the Canadian Human Rights Commission, alleging a human rights violation, on November 13, 2017.

[2] The grievor referred only her termination grievance to the Board. In the accompanying submissions, she mentioned other disciplinary measures that were grieved. Her understanding was that all those grievances had also been referred to the Board. The respondent opposed the referral of the other grievances.

[3] I decided to deal with the other grievances as if a request for an extension of time to refer grievances had been made to the Board. Since the grounds for termination were essentially that a series of progressive discipline sanctions had failed to deal with what the respondent considered unacceptable behaviour, I stated at the outset that I would hear the evidence on all the disciplinary grievances and that I would decide in the written decision whether to accept them for the purposes of a remedy, if any.

[4] I find that the other grievances were never referred to adjudication. No effort was made to refer them individually to the Board, as the rules clearly provide for. In any event, in the end, I find that I do not need to decide whether to accept the additional grievances, since I find that the termination was justified, as well as all the disciplinary measures that led to it and that were grieved.

II. Summary of the evidence

[5] The respondent called seven witnesses. The grievor called her treating physician and testified. She also sought to introduce an affidavit, sworn by a former assistant in her office, which related to the way Duncan Fraser, one of her managers who testified at the hearing, had allegedly dealt with an instance of plagiarism, a behaviour for which the grievor was twice disciplined.

[6] The grievor sought to introduce the affidavit because the affiant could not come to Ottawa to testify, although she was willing to answer questions on cross-examination by phone.

[7] The affidavit was produced in November 2018, long after Mr. Fraser's testimony in June 2018. It contained allegations unrelated to plagiarism that were designed to show him in a bad light. I found that the allegations relating to a supposed incident of plagiarism involving other people could serve no purpose in the hearing. Context was entirely lacking, the parties involved would not testify before me, and I would be unable to draw any conclusions from the very partial facts, which were biased at that.

[8] As I stated at the hearing, the Board will accept affidavits as evidence in very limited circumstances, certainly not to shield available witnesses from testifying or to introduce evidence that the other party contests.

[9] The grievor is a black woman of Haitian origin. She is a lawyer. In 2007, she was hired in the Judicial Affairs section of the DOJ as an LA-1. That year, she received a positive *Performance Report on Employee Appraisal* ("PREA"). The narrative assessment included the following comment:

> *Ms. Samson worked well in our collaborative environment and was comfortable working both in English and in French. She was competent and responsible, and demonstrated perseverance and an interest to learn. She sought direction when needed, and accepted feedback positively. She had a friendly manner, and demonstrated tact and diplomacy in her dealings with others.*

[10] The contract at Judicial Affairs was for a short term. After several assignments, the grievor obtained a position at the Tobacco Litigation Unit (TLU), with Catherine Lunn as her supervisor. The first PREA (2008-2009) was positive, and in that year, the grievor was appointed indeterminately to the LA-2 level after participating in an advertised process.

[11] Lisa Carson testified at the hearing. She worked in labour relations for the respondent for 25 years until she retired in February 2016. For the purposes of the hearing, she prepared a series of colour-coded calendars, based on the DOJ's PeopleSoft leave database, as well as email exchanges, to show the types of leave the grievor took and the days she worked. The calendars spanned 2009 to 2015.

[12] She was questioned at the hearing on the exactness of the calendars. Ms. Carson stated that the version introduced at the hearing was the fifth iteration and that she was quite sure that all mistakes had been corrected.

[13] Ms. Carson attended the final-level reply hearing of the grievance as a senior

labour relations officer. She did not recall any talk of disability or accommodation. The grievor wanted to change her workplace and felt that she had been treated unfairly as others who had made harassment complaints had been moved.

[14] The respondent called Ms. Lunn as a witness. She has worked as a litigator with the DOJ for 23 years, mainly in Nova Scotia. She carried out a three-year secondment with the federal government from 2008 to 2011 to work on the tobacco class actions that had been launched against tobacco companies and in which the federal government was a third party. She moved to Ottawa in August 2008 to set up the TLU, which had been specifically designed for the class actions. By late December 2008, the TLU was, in her words, "up and running".

[15] The TLU team consisted of two groups of approximately eight to ten coders, who were paralegals, and from four to six lawyers (including the grievor) who were responsible for quality assurance, which meant ensuring that the documents were properly categorized and coded. The work pace was intense, as there were often production deadlines, and the work entailed dealing with consultants and experts.

[16] When asked how the grievor performed as an employee, Ms. Lunn answered that she had been "challenging to manage". Many issues arose towards the end of 2009. The grievor had difficulty with her computer equipment and her attendance was problematic, such that the quantity of work she produced was unsatisfactory. Ms. Lunn tried several solutions, but nothing worked.

[17] Ms. Lunn knew that the grievor had a young son and therefore tried to accommodate her with flexible work hours. Despite that arrangement, the grievor failed to work the expected number of hours. She would arrive late, leave early, and not perform the expected amount of work. The database being used, called "Ringtail", could produce the electronic footprint of any user. Therefore, it was easy for Ms. Lunn to see that some days, the grievor had used it only for a few hours.

[18] Ms. Lunn was very concerned because of the team's heavy workload, which was charged with coding and producing some 750 000 documents. The grievor was the only employee in the TLU who had an attendance problem. In December 2009, she met with the grievor to discuss it. The grievor emailed her in response, indicating that in fact she was working very hard, that she might not have many hours on Ringtail because she was answering many questions on privilege, and that she reviewed about 2000 documents a week, or 400 per day. The grievor also confirmed an arrangement

whereby she worked shorter weeks when she had custody of her son and longer weeks when she did not. In January 2010, Ms. Lunn and the grievor agreed that the work hours would be 9 a.m. to 5 p.m., every day.

[19] Ms. Lunn commented on notes she had taken after meeting with the grievor on March 19, 2010. Since they reflect the tenor of Ms. Lunn's testimony, I have reproduced them here in their entirety:

> *O/C [meaning office conference, an in-person meeting in Ms. Lunn's office] with Blandie*
>
> *again covered 2 issues of:*
>
> 1. *hrs of work(her output) in the database – gaps in time in Ringtail history – feel she is not putting enough hrs in each day, doing the work – some days she does very few docs and is on the database for very little time*
>
> *Blandie disagreed & refused to accept the info I showed her (Ringtail history for recent past) – says the history/stats/info I have from Ringtail is wrong – she is working full day each day – says the work is hard – has to take breaks from the screen throughout the day*
>
> *(I note this would not explain the hrs that are missing during the day for frequent working days)*
>
> 2. *compliance with times she is to arrive at & leave work – still a problem – she agreed to work 9-5, but that is not working out for her – she is not putting in 7.5 hrs/day and I advised that this situ must be corrected – we will look at re-adjusting her hrs again*
>
> *Blandie feels she is being unfairly treated & reminds me that we agreed to be flexible*
>
> *NB: Yes, we did agree to be flexible as to how she accumulated 7.5 hrs for each working day (she can make up the time on alternating weeks, if she wishes), but not to permit her to work less than 7.5 hrs a day which is required for each member of the team in our Unit*
>
> *we will meet next week to set out some goals*
>
> 3. *discussed leave still outstanding from January for which leave requests have not been put in*

[20] Ms. Lunn completed the grievor's PREA for fiscal year 2009-2010. Ms. Lunn rated her at 2, meaning, "The employee does not meet the objectives set and/or the requirements of the position." Ms. Lunn wrote of the issues that had arisen but added

that the grievor had expressed interest in litigation work and that efforts would be made to support that interest. The grievor grieved the PREA. She stated that "… the performance appraisal was arbitrary, discriminatory and in bad faith." She refused to sign it. She provided a list of her accomplishments for 2009-2010, noting as follows: "Obtained positive feedback from General Counsel, Catharine Moore on my work on the [tobacco class action] file."

[21] The grievor testified that she found the 2009-2010 PREA extremely unfair. It did not account for the numerous problems and glitches in Ringtail, which she documented extensively by introducing a number of emails exchanged with Information Technology staff. She presented them to Ms. Lunn in her cross-examination. Ms. Lunn conceded that there were problems, as in any system; however, she did not believe that those issues should have affected the quantity and quality of the work expected of the grievor. According to Ms. Lunn, the emails were snapshots of instances when the system was not working. However, on the whole, the system worked, documents were coded, and none of the glitches would have had an impact on the grievor's performance.

[22] At the hearing, the grievor also stated that receiving an unsatisfactory PREA meant that she was deprived of her pay increment at a time when she very much needed the money, to help her family in Haiti. The January 2010 earthquake had taken a toll on the whole country, and her family had not been spared. Sending money would have made a great difference.

[23] Ms. Lunn also testified about difficulties getting the grievor to enter leave requests in the leave database, as required. In a letter dated July 9, 2010, Ms. Lunn requested a note from the grievor's treating physician to document her sick leave (from June 9 to July 12) and asked the grievor to enter into the leave system all the leave she had taken, including in April and May. It appears that the matter was sorted out.

[24] Ms. Lunn spoke of her frustration, which she documented in a note dated July 26, 2010, caused by the grievor not doing the work she had been assigned on July 15 because she had lost the key to a cabinet that contained the necessary equipment to carry out the assignment. She told no one that the key had been lost until Ms. Lunn asked about the work.

[25] In September 2010, the grievor asked about the possibility of teleworking.

Ms. Lunn refused, since the system on which the work was done was secured and did not allow for remote access. The review of documents had to be done at the time and place the coders were working, to allow for timely corrections. Therefore, Ms. Lunn determined that teleworking did not fit the TLU's operational requirements. However, she did offer the grievor a flexible schedule, with shorter hours when she had her son and longer hours when she did not, for an average of 37.5 hours per week. Despite the arrangement, the grievor's attendance continued to be unsatisfactory.

[26] Ms. Lunn left the TLU in March 2011 and was replaced by Jacques Talbot, who also testified at the hearing. He has been a lawyer with the DOJ for the last 20 years or so. For the last 15 years, he has dealt with public safety, except for a one-year secondment at the TLU from March 2011 to March 2012. He supervised the grievor from March 2011 till January 2012, when she left to join another unit.

[27] The TLU was to be disbanded once the electronic production ordered by the courts in the class actions was completed. That was expected to occur in December 2011. Consequently, the team was somewhat nervous, since many were term employees who did not know if they would have their contracts renewed elsewhere. The grievor was the only indeterminate employee. Mr. Talbot did sense that she was not particularly happy in the TLU, which he understood as the work was rather tedious and painstaking. It was important but not obviously stimulating. He therefore encouraged conversations with the grievor so that they could discuss her wishes and ambitions to progress in her career at the DOJ.

[28] At the hearing, Mr. Talbot commented on the grievor's PREA for 2010-2011 that he signed in May 2011. He consulted Ms. Lunn, and despite her comments about the grievor's attendance, he decided to take the positive side and start afresh with the grievor. He gave her a rating of 3, which stated, "The employee fully meets the objectives and/or the requirements of the position; and may on occasion exceed them." His narrative assessment reads in part as follows:

…

> *I consulted Catherine Lunn, her previous manager. She expressed the opinion that "Blandie demonstrates a very comprehensive knowledge of critical issues and determinations in regard to the work she conducts, which is a crucial part of the team's mandate" and that she's "highly skilled at analyzing and exploring diverse and conflicting sources of information and systematically evaluating options to develop a comprehensive solution to complete*

> *assigned tasks".*
>
> *I will add that Blandie has a lot of untapped potential. She is definitely looking for more challenges as in working more closely with PCO on the Cabinet Confidence Certification Process, helping with the integration of new employees or with the coordination of the team when a close collaboration between different people working on the same binder or project is needed. With the recent departure of one of our more senior Counsel, she will have the opportunity to assume more and more responsibility within our units.*
>
> …

[29] At first, things went well, according to both Mr. Talbot and the grievor. Then, progressively, according to Mr. Talbot, attendance and lateness issues arose. The grievor was often nowhere to be found. She did not enter her leave requests in PeopleSoft as required. When he tried to address those concerns with her, the conversation was painful, as she was not receptive to any negative comment.

[30] Mr. Talbot noted, as had Ms. Lunn, productivity problems, as seen from the work trail in Ringtail. The grievor was the only employee with those problems; other team members attended work for their full complement of hours and were productive. Mr. Talbot also refused to permit the grievor to telework, as the nature of the work did not lend itself to it.

[31] For her part, the grievor found that Mr. Talbot monitored her excessively and that he lost his temper with her. By September 2011, she had many complaints about him, which she detailed in an email to her bargaining agent representative.

[32] Mr. Talbot was frustrated by the grievor's apparent lack of concern for matters that he deemed important. If she wanted to attend a conference, she needed to ask permission. She did not see the need to ask for permission, as she thought that such attendance was encouraged and that it was sufficient for her to inform his assistant.

[33] The grievor testified to the fact that she had let Mr. Talbot know about the training she intended to take. She introduced a number of emails to that effect. However, none indicated that she asked for permission to attend training.

[34] Mr. Talbot spoke at length of an incident that years later, it seemed to me, still made him highly uncomfortable. The female lawyers of the DOJ had been encouraged to attend a one-hour conference given by a female judge of the Ontario Superior Court of Justice on women in law. The grievor attended without asking permission (which

would have been granted), but Mr. Talbot had to remind her that permission was necessary to attend an outside conference during work hours.

[35] The starting time was 9 a.m., and as Mr. Talbot expected, the grievor arrived late. A senior lawyer in attendance, Anne Turley, noticed the late arrival, and informed Catharine Moore, the director who was Mr. Talbot's superior. Ms. Moore was also told that the grievor was "inappropriately" dressed for the conference. Her skirt was too short, too tight, or both. Ms. Moore asked Mr. Talbot to speak about it to the grievor.

[36] Again, years later, Mr. Talbot was still uncomfortable when recounting the story. He did raise the issue with the grievor, who reacted with outrage that a male supervisor would tell her how to dress. He testified that the conversation did not go well, and he mused that perhaps, it would have been preferable for a woman to have had it with the grievor.

[37] The grievor made a point of wearing the same skirt (so she said) at the hearing, to have Mr. Talbot pronounce on it again. He did not recognize it and refused to make any comment. When he was asked about the dress code he enforced in his office, he simply said that people there worked on computers and did not interact with the public, so that he really was not concerned by what they wore. If they attended outside events, they were expected to dress more formally.

[38] In her grievance submission to the Board as well as in her testimony, the grievor recounted the incident and stated that Mr. Talbot had yelled at her. He testified that he did not yell at that time, but he did remember deliberately raising his voice on another occasion because the grievor just was not listening to what he was trying to communicate to her.

[39] The grievor remembered the business attire incident differently. She claimed that she had been humiliated by Mr. Talbot, at Ms. Moore's instigation. In fact, Ms. Moore had not been at the conference but had responded to Ms. Turley's request that someone speak to the grievor. Ms. Turley did not testify at the hearing. However, the documentary evidence contained an email from her showing that she offered to discuss the matter with the grievor and that the grievor declined the invitation.

[40] Communication with the grievor at many levels was problematic. For example, Mr. Talbot instituted an in-and-out board at the front of the office. His assistant would show who was in or out and the reason for any absence, which could have been leave,

training, meeting with a client, etc. According to Mr. Talbot, none of the employees resented it, except the grievor. Instead, they found it useful to know where their colleagues were and if they could be expected in the office. It was a useful management tool for planning purposes as with a glance, Mr. Talbot could see who was in the office and available should an urgent project come up during the day. The grievor, on the other hand, perceived it as a tool to monitor her time and unfairly micromanage her.

[41] Mr. Talbot spoke of the need to document absences for both planning and accountability reasons. Absences could be allowed, of course, but he had to ensure that they were authorized and that he had all the required resources to carry out the TLU's mandate. The grievor often did not see the need to seek authorization or to account for all her movements in and out of the office. She had to be asked repeatedly to fill out leave request forms, and when she filled them out after the fact, they were of no use for planning.

[42] By October 2011, the grievor's lateness, absences, and lack of accounting for her time led Mr. Talbot to request a medical certificate from her for every sick leave. She responded by quoting the collective agreement to the effect that a signed statement by the employee that he or she was unable to work was sufficient. Mr. Talbot pointed out to her in an email that that clause is qualified by the introductory statement, "Unless the lawyer is otherwise informed by the Employer …". The grievor responded by saying that she was being discriminated against, as none of her colleagues had to submit a medical certificate for every sick leave.

[43] During the fall of 2011, Mr. Talbot was considering implementing a performance management plan for the grievor to deal with her absenteeism and her lack of productivity when she did come to work. He stated that she could perform very well when she wanted to but that she rarely put in the six or seven hours expected of her in a normal workday. At that time, she made an informal harassment complaint against him. He offered to deal with the problem through mediation. He believed that she was not interested by the TLU's work, which he conceded could be both demanding and tedious.

[44] Matters were not resolved with mediation, but a solution did appear in December 2011, when the director of litigation and E-Discovery, Mr. Fraser, offered to take the grievor on his newly created team. Mr. Talbot thought it would be a great opportunity for her to do more interesting work that drew on her knowledge of coding

documents, which had been the TLU's mandate. She accepted the offer and started working under Mr. Fraser's supervision in early January 2012.

[45] From then on, Mr. Talbot was no longer involved with the grievor, except to provide the narrative for her 2011-2012 PREA. In it, he noted positive achievements but still gave her a grade of "does not meet" the requirements of her position because of her lack of productivity on Ringtail and the difficulty having her meet administrative expectations, such as filling out leave forms. He ended the narrative with the following comment, which he said at the hearing summed up his year of supervision:

> [Translation]
>
> *It is difficult, indeed impossible to discuss with Blandie, when it is necessary to give her feedback on a performance issue so that she can correct the situation to management's satisfaction. She is not at all receptive and avoids all responsibility.*

[46] In March 2012, Mr. Talbot returned to his substantive position in public safety. A formal harassment complaint filed in September 2012 did not lead to a full investigation, as it was decided that there were insufficient grounds to proceed.

[47] Mr. Fraser testified at the hearing. He worked as a lawyer with the DOJ from June 1996 to April 2015. He is now in private practice. In 2009, he transferred to Ottawa from Winnipeg, Manitoba, to work on the management of electronic information, which became the E-Discovery project. In the course of his career, Mr. Fraser has mentored and trained a great number of lawyers. He was also a lecturer at the University of Manitoba's law school.

[48] He testified that he first met the grievor at a training session in the fall of 2011, when she approached him to discuss her interest in E-Discovery and litigation. Mr. Fraser knew that she had worked in the TLU coding and reviewing documents, and it seemed that she could be a good fit for the team he was starting to build for the E-Discovery project. She testified that she had never expressed interest; rather, he had asked that she work in his unit.

[49] The grievor started in E-Discovery in January 2012. In April 2012, Mr. Fraser completed her PREA. His narrative covered the last three months of the fiscal year ending on March 31, 2012.

[50] In his narrative, Mr. Fraser states that he expected the grievor's integration in his team to be marked by a steep learning curve, as she had no litigation experience. At first, she seemed keen and enthusiastic. Mr. Fraser gave her several tasks, some of which she did competently; others, less so. The main task was updating the discovery chapter of the *Civil Litigation Deskbook*. The idea was to familiarize her with rules relating to discovery while requiring that she apply her expected writing and analytical skills.

[51] Mr. Fraser was disappointed with the grievor's first draft, as stated in his narrative:

…

> *… Based on my assessment of her timekeeping entries, and the time taken for the task, I estimated that approximately 100 hours had already been spent on the first draft. I reviewed the document, and then met with Blandie to provide feedback. The quality and quantity [sic] the work done was unsatisfactory. There were a number of significant factual errors and many occasions where the language used was awkward or inaccurate. Finally, the document was poorly structured, and can only be described as disorganized … My overall assessment of the work is that the work should not have taken more than about 20 hours, and that the quality of the writing and analysis was unsatisfactory. I raised with Blandie my concerns about her time management and drafting and research skills. As the work was unacceptable for counsel at her level, I provided Blandie with that feedback, and suggestions for focussing her work, and improving her writing.*
>
> …
>
> *Overall, for the last three months of the 2011-2012 year, Blandie has contributed a [sic] less than expected for a 2A lawyer, and the overall quality of her work has not met the expectations of her position.*

…

[52] Mr. Fraser was also concerned by the fact that the grievor was not receptive to feedback. Like Mr. Talbot, Mr. Fraser assigned a "does not meet" grade to the grievor for her performance.

[53] The grievor reacted to the assessment in a lengthy email, giving her version of the events and stating that she had not been given any idea of the expectations for her job. She disagreed that her work was faulty, and she gave numerous examples of other

work she had done for which she had been praised. She asked that some of Mr. Fraser's and Mr. Talbot's narratives be changed. Mr. Fraser did amend his narrative, but the final result, as seen in the quoted extract, was still somewhat negative.

[54] Mr. Fraser signed the performance appraisal only in July, and the grievor refused to sign it. In June and July, she was on sick leave, as her physician recommended. She testified that working for Mr. Fraser was very stressful.

[55] As early as June 4 (the beginning of her leave), Mr. Fraser communicated by email his concern that she might not have sufficient sick leave credits to cover the absence. He offered to advance her sick leave, but she did not respond.

[56] When the grievor emailed that her physician had extended her sick leave, Mr. Fraser again raised the issue of leave credits. Based on the planned return to work date, he had calculated that she would run out of both sick leave and vacation leave credits. Again, he offered to advance her sick leave. He asked for a response from her, which never came.

[57] When the grievor returned to work in July, Mr. Fraser asked her to prepare a memo, with specific instructions as to the content. She prepared it and submitted it on time. Upon reviewing it, Mr. Fraser became convinced that it had largely been plagiarized, which he confirmed through Internet research.

[58] The grievor was informed that an administrative investigation would take place to determine if plagiarism had occurred. Specifically, she received a letter stating the following grounds for the investigation:

> *… in your work you may have:*
>
> *(a) failed to acknowledge the source of non-original ideas;*
>
> *(b) submitted work as your own when, in fact, it was written or prepared, in whole or in part, by another person(s); and/or*
>
> *(c) failed to properly cite the source of a direct or indirect quote(s).*
>
> …

[59] The letter stated that if the allegations were founded, "… administrative and /or disciplinary measures may be taken, up to and including the revocation of your security clearance and/or the termination of your employment." In fact, the

investigation concluded that the allegations were founded, and the disciplinary measure was a written reprimand that was issued to the grievor in January 2013.

[60] In an email dated July 26, 2012, Mr. Fraser asked the grievor to enter her leave for June and July by July 31. He agreed to advance her paid sick leave credits, but a balance remained that needed to be covered by vacation pay or unpaid sick leave. The request to enter her leave was repeated numerous times. He emailed her on August 2. She responded on August 3, stating that she was sick and that she would take care of the leave when she returned to work.

[61] On August 9, the grievor provided a note from her doctor that she would be absent until September 5. Mr. Fraser responded that the leave problem was becoming acute, as no paid leave credits remained. On September 6, once she had returned, he asked again that she enter her leave. On September 12, he emailed her a full accounting of all the leave she had taken (and not entered). By then, the grievor had been overpaid, and she would have to cover it. She still had not entered the leave. On September 13, she wrote him the following:

…

> *I sent an email to compensation to discuss financial implications of submitting leave without pay or other options in my particular circumstances (you were copied on that email). I'm still awaiting to speak with a compensation advisor which should happen tomorrow. I will then enter my leave into PeopleSoft.*

…

[62] Finally, on September 17, Mr. Fraser entered the leave himself and advised the grievor in the following terms:

> *Blandie, despite my many requests, and clear deadlines, as of this morning you had not accounted for your leave since June 4.*
>
> *In the circumstances, I was required to address this myself, by sending paper copies to Pay and Benefits, so that the leave could be shown in the system.*
>
> *Here is a copy of each of the forms I sent in. If you have any questions, please contact me, or your Pay and Benefits advisor.*

…

[63] The grievor reacted with a strongly worded email, denouncing the micromanagement she was being subjected to and objecting strenuously to Mr. Fraser taking over her compensation file. He offered to discuss the matter, as well as the work in her files.

[64] Reviewing her work proved difficult. Because of the ongoing administrative investigation into the allegedly plagiarized memo, the grievor was wary of sharing her work with her supervisor, as she feared it would be used against her. After meeting with her on October 4, 2012, Mr. Fraser wrote to a labor relations advisor seeking guidance. He expressed his concerns thus:

> *… I met with Blandie this afternoon … to review her work progress. It was a difficult meeting.*
>
> *Blandie confirmed that of the four tasks assigned, she has only worked on two since July 26. One is a memo on ATIP and disclosure, the other on LAC and Public repositories. Her timekeeping shows about 33 hour [sic] spent on each* since *Sept 5.*
>
> *Blandie … refused to comply with my demand that she provide me, in advance, with copies of her the [sic] current version of her work for both documents, and refused to put them on iCase [DOJ common drive]. That was her third refusal.*
>
> *At the meeting I confirmed the above, and directed Blandie to provide me with copies of her work. I informed her of why I needed to see them – she has had performance issues in her research, analysis and writing in the past, and I need to make sure she is on the right track. I also need to make sure that the work she is doing is being done efficiently – in that it warranted 33 hrs. I was clear on the need and purpose. I told her that in order to properly discharge my duties, I must see her work. She flatly refused – saying I could see them when she was done – and that it was my fault she wouldn't show me – because I initiated the Admin Investigation.*
>
> *I repeated to Blandie how serious an issue her refusal was – that she was required to provide me with the work, and that there could be serious consequences for refusing. I urged her to reconsider. She refused.…*
>
> …

[65] In that email, Mr. Fraser asked if he could respond with a serious sanction, such as a suspension without pay, until the requested documents were provided. The Labor Relations Advisor counselled him to start with a written reprimand, and if the refusal

persisted, to increase the sanctions progressively. At the hearing, Mr. Fraser recalled the meeting as "surreal". He had never before encountered an employee who refused to show his or her work to a direct supervisor.

[66] In early October 2012, Mr. Fraser was notified that the grievor had made a formal harassment complaint against him. On October 12, as a result, the grievor's assignment was ended, and she returned to her substantive position. As the TLU had ceased its operations, her section had become the Management of Class Actions and Mass Litigation Unit.

[67] In November 2012, a lawyer in the litigation branch brought to Mr. Fraser's attention a separate, incomplete memo written by the grievor, of which large parts seemed to have been taken from an opinion prepared by another lawyer. Mr. Fraser referred the memo to the director of business management for the litigation branch and had no further involvement in the matter.

[68] Mr. Fraser wrote part of the narrative for the grievor's PREA (2012-2013) to cover the period when he had been her supervisor. He wrote about the work she had done and the fact that she had become increasingly difficult to manage. He again rated her performance as "not meeting expectation [*sic*] for the period during which she was in my group." In cross-examination, the grievor asked him if he could fairly assess her, given that he was the subject of a formal harassment complaint. He replied that he had remained as professional as possible when he completed the PREA.

[69] The grievor testified that when she made the formal complaint against Mr. Fraser, she expected that the investigation he had launched would be stopped, since the harassment complaint tainted it. She explained it in the following terms to Sylvie Matteau, a senior advisor in the prevention and resolution of conflict branch at the DOJ, on October 12, 2012:

…

> *Simon* [Forthergill] *also informed me that the Administrative/disciplinary measure process that Duncan had started will be continuing with Catherine Lawrence. However, this matter is part of my harassment claim. To continue this process is to allow for further retaliation against me while the matter is under investigation.…*

…

[70] Management removed the grievor from Mr. Fraser's supervision. In another

email to Ms. Matteau on October 15, 2012, the grievor complained of having to work under Ms. Moore's supervision and gave the following reasons for her discontent:

…

> *I am happy not be working with Duncan. However, I am deeply troubled by Management's decision to have me report back to Paul Vickery and Catherine Moore. As you recall in my Harassment Claim, Catherine Moore is the person who complained to Jacques Talbot that she was offended by my dress code when she was not even present at the Informal Meeting with Madame Justice Aiken. Her comments led Jacques to call me "an embarrassment to the Department of Justice", which humiliated me in front of my colleagues. Ms. Moore's decision has and continues to cause me much personal and professional anguished. Working with Ms. Moore will not constitute a healthy work environment for me. I am deeply anguished by this turn of events.*
>
> *In addition, during the 3 years that I have reported to Paul Vickery and Catherine Moore my work mainly consisted of reviewing documents on the Ringtail Database without having any substantive work. I feel that going back to that environment where I will most likely be doing similar work, constitutes a step backwards in my career. I will therefore suffer yet again the negative effects of complaining about my manager's undesirable conducts. I would like to have a clean start and I feel that it will not be the case since I have to go back to the Class Action Unit where I will have to work with Catherine Moore who is the source of my past and current anguished.*
>
> …
>
> [*Sic* throughout]

[71] The grievor acknowledged that she had worked with Ms. Moore in the past on a litigation file and that she had been praised for her work. However, she was unhappy that Ms. Moore would be her manager, since she blamed Ms. Moore for the incident in which Mr. Talbot had reproached her for the way she was dressed at the conference with Justice Aiken.

[72] Ms. Moore testified at the hearing. At the relevant time, she was general counsel and the manager of class actions. Between 12 and 20 people reported to her, half of them lawyers, the rest paralegals and support staff. Her section's mandate was litigating high-profile class proceedings.

[73] Ms. Moore testified to a positive work experience with the grievor in the fiscal

year 2009-2010, when the grievor provided assistance with litigation conducted in Newfoundland ("the Sparks case"). Ms. Moore stated that she was present when Ms. Lunn provided the 2009-2010 PREA. Ms. Lunn, then the grievor's manager, and Ms. Moore were at the same level (general counsel). They both reported to Paul Vickery, the senior general counsel.

[74] Since Ms. Lunn came from the Nova Scotia public service, she often sought advice from Ms. Moore on the federal public service; she also asked her to attend the PREA meeting with the grievor. Although the PREA was negative (it stated, "The employee does not meet the objectives set and/or the requirements of the position."), the grievor wrote in her own narrative that she had received positive feedback from Ms. Moore on her participation in the Sparks case. At the hearing, Ms. Moore agreed that she had been satisfied with the grievor's contribution.

[75] However, Ms. Moore also recalled that one of the negative points was the grievor's attendance at work. The matter was discussed at the meeting, and Ms. Moore suggested part-time work. The grievor was not at all receptive to that suggestion. In the end, an arrangement was made with Ms. Lunn for flexible work hours, as noted earlier.

[76] When the grievor started working under Ms. Moore's management, the arrangement was maintained. Ms. Moore was aware of Ms. Lunn's October 5, 2010, letter setting out the flexible schedule, as well her November 19, 2010, letter reiterating the schedule but also noting that the hours of attendance were not being respected.

[77] On January 30, 2013, Simon Fothergill, then assistant deputy attorney general, issued a written reprimand to the grievor for plagiarism. He found that the memo prepared for Mr. Fraser contained unattributed material. He also found that the second memo that Mr. Fraser had referred did not warrant a finding of misconduct as it contained a clear disclaimer of being a draft and stated that further citations would be added.

[78] Email exchanges between Ms. Moore and the grievor in early 2013 show that the attendance issue was still a source of tension for them. Ms. Moore tried to understand why the grievor was not respecting work hours on Fridays. The grievor responded that Friday was the changeover day for the custody arrangement with her child's father. The tone became acrimonious. The grievor stated, "… I understand that DOJ managers

have perceived stereotypes about visible minorities …". Ms. Moore responded, "I am offended by your allegations of racism. I find them outrageous and I will not tolerate such unfounded allegations." The grievor then replied that she felt singled out as a black woman and single mother.

[79] Still in the same exchange in early 2013, Ms. Moore stated the following, after detailing the efforts she had made to be reasonable while ensuring that the grievor attended work:

> *My actions have been completely reasonable and every effort has been made to accommodate your needs; however, as you clearly believe that you are being treated in a discriminatory fashion based on your race and family status, I would invite you to make a formal complaint so that we may dispose of the matter. I will not tolerate endless unfounded accusations and I am not about to be intimidated or bullied into failing in my duties as manager of this unit.*

[80] The grievor responded as follows:

> …
>
> *I am extremely hurt and stressed by your allegations which has contributed to making my work environment extremely toxic. As my manager, you are in a position of power and I feel intimidated, harassed and bullied by you. Please stop your actions and provide me a safe working environment.*
>
> …

[81] The grievor commented at length on that exchange both in her cross-examination of Ms. Moore and in her own testimony. She wanted Ms. Moore to admit that she had felt bullied and intimidated, to prove the point that the work environment was toxic.

[82] Ms. Moore strenuously denied that she had felt bullied and intimidated; rather, she felt that the grievor used discrimination allegations to deflect any responsibility for her behaviour.

[83] Around that time, the grievor was asked to complete an alternative work arrangement ("AWA") form so that there would be a formal record of the arrangement negotiated with Ms. Lunn. The respondent introduced in evidence correspondence from a manager in administration services, which explains that the form was simply to ensure that the arrangement was formalized. The grievor steadfastly refused to fill it

out. At the hearing, she explained that it was not necessary since she had Ms. Lunn's October 5, 2010, letter. When she was asked in cross-examination why she would not complete and sign the form, she reiterated that she did not need to.

[84] As early as April 2013, Ms. Moore had trouble managing the grievor. An email exchange shows some back and forth about a presentation the grievor was supposed to make during a phone conference with colleagues throughout the section. Ms. Moore asked for a copy of the presentation. The grievor did not provide it. Ms. Moore wanted to ensure that the presentation gave the proper message. When the grievor did not provide it, she removed it from the agenda. The grievor was quite angry and saw it as an attack on her professionalism.

[85] The grievor was absent on sick leave from April to August 2013. Upon her return, she was presented with her 2012-2013 PREA and a letter of expectations. At the hearing, Ms. Moore explained that she had a number of concerns with the grievor's attendance and productivity that the letter was meant to address by giving the grievor the opportunity to correct her behaviour.

[86] The letter of expectations, dated August 1, 2013, sets out the following requirements of the grievor:

- completing the AWA form and abiding by its terms, "… in particular, [the grievor's] arrival at the office must permit [her] time to commence work at the agreed-upon time";
- informing Ms. Moore directly of any unplanned absence or lateness, including informing her of the reason, the return date, and any priority work;
- supporting all sick leave requests by medical certificates;
- acknowledging that any unapproved absence or lateness will be deducted from her remuneration and that late arrivals cannot be compensated by staying longer;
- requesting vacation leave five days in advance and not using it for unplanned absences or requesting it after it is taken;
- advising Ms. Moore of the start and end of each workday;

- completing assigned tasks within the deadlines, and if they cannot be met, making alternate arrangements in advance;
- carefully proofreading all work and attributing others' work to them; and
- attending scheduled meetings or providing an acceptable reason for not attending.

[87] The letter ends with the following paragraph:

> *In order to monitor your compliance with these expectations, we will schedule a follow-up meeting approximately four weeks from the date of this letter. Should you fail to meet any one of these requirements, administrative and/or disciplinary proceedings up to the termination of your employment may be instituted against you.*

[88] The 2012-2013 PREA indicated that the grievor did not meet the objectives of her position; consequently, she was denied any pay increase. The PREA included a narrative from both Mr. Fraser and Ms. Moore, since Mr. Fraser had been the grievor's supervisor for the first half of the fiscal year.

[89] The grievor reacted forcefully to the PREA and to the letter of expectations in an email addressed to Ms. Moore on August 30, 2013. She termed the use of Mr. Fraser's narrative a violation of natural justice, since her harassment complaint against him was ongoing. It seemed clear to her that depriving her of any salary increase was in fact an act of reprisal on his part. In the PREA, he described her work as mediocre and as having to be redone. He also mentioned that he "… had a hard time ensuring that she attended work, entered leave, and responded to my requests for information", which he testified at length about at the hearing.

[90] Ms. Moore flagged performance (quality of work and meeting deadlines) and attendance issues in the PREA and made the following comment:

> *Blandie has not been receptive to feedback and does not appear to be prepared to take responsibility for or modify her behaviour; instead, when confronted about, for example, her lateness, she became defensive and made unacceptable excuses and/or alleged that she was the victim of harassment and discrimination.*

[91] In her email, the grievor stated that the letter of expectations went beyond what

was reasonably expected of employees. No one else in the office had to give notice of their arrivals or departures. She emphasized that she already notified Ms. Moore of being late or absent, that her previous managers had accepted using vacation leave when she had no sick leave credits left, and that she respected deadlines. She did not understand why she had to fill out a form for an accommodation she had had since 2009.

[92] As to the comment on attributed work, she made the following comment: "[T]he Department of Justice has adopted a higher standard than what is required of the legal profession." She then explained that copying was an accepted practice for lawyers, citing and quoting from *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, in which the Supreme Court of Canada quotes from an article published in the University of Toronto Law Journal ("Copyright Originality and Judicial Originality" (2013) 63 Univ. of Toronto L.J. 385), specifically the following sentence, at page 390:

> *… It is hardly news that legal writing is embedded in a network of precedent, formulas, and boilerplate, that it reflects a general preference for the tried and true over the novel, and that it routinely depends on practices - verbatim repetition of others' words, adoption of others' prose and arguments - that might trigger infringement claims in an intellectual property dispute.*

[93] In September 2013, the grievor emailed Ms. Moore, asking for more meaningful work. She claimed that Ms. Moore had been negatively influenced by Mr. Fraser's assessment of her legal skills and the tainting of her professional reputation because of his accusation of "unattributed sources and lack of originality of a draft work product". She wrote that her professional abilities should not have been violated and made the following points:

- Mr. Fraser's allegations violated the rule of law, since under s. 12 of the *Copyright Act* (R.S.C., 1985, c. C-42), there can be no ownership of ideas or work in law departments.

- the Director General and Senior General Counsel of the Civil Litigation Branch had noted that, in an email dated December 12, 2012 (which was not produced in evidence), no rules specified including correct citations in draft documents.

- Mr. Fraser's paper, which the grievor was accused of plagiarizing, had no title, date, or names of authors; how could it be attributed?

- According to the grievor, Mr. Fraser had noticed that text had been copied because of his experience as law professor, which had tainted his judgment as a civil litigation lawyer at the DOJ. She added the following in her email: "A reasonable person may undoubtedly perceive a conflict of interest and possible violation of the DOJ Code of Conduct."

[94] The letter of expectations did not yield the expected results. Ms. Moore gave as examples emails from the grievor that did not meet her expectations. On September 11, 2013, at 4:57 p.m., the grievor emailed to state that she was leaving early for an appointment with her doctor. By email at 4:58 p.m., Ms. Moore asked at what time she would be leaving. She answered on September 13 that, "I left at 5:00." Ms. Moore then replied as follows: "Since your email was sent at 4:57, you provided me with effectively no notice of your early departure. This is simply not sufficient and does not accord with your letter of expectations."

[95] In her testimony, the grievor presented the incident as an instance of harassment. She had provided notice, since her usual departure time would have been 6:30 p.m. Therefore, she saw the notice as being an hour-and-a-half in advance, not three minutes.

[96] Ms. Moore explained that the purpose of giving notice was to ensure that no priority work was left unattended and for planning purposes as to who was available in the office for unexpected assignments, which occurred frequently in the civil litigation section.

[97] The letter of expectations indicated that the grievor was to advise Ms. Moore directly of her attendance or absences. On September 20, 2013, Ms. Moore issued a second letter of expectations, since the first one had not been complied with. The AWA form had still not been completed, the grievor was not informing Ms. Moore of her arrivals and departures, and she had missed two consecutive status meetings without notice or excuse. Thus, the conditions of the first letter were maintained.

[98] In the following months, the grievor informed Allison, Ms. Moore's assistant, of her late arrival or absences, which did not comply with the letter of expectations. At

least ten email examples were provided at the hearing. The grievor countered in her evidence that Allison had emailed everyone in the office to reiterate that she was the person to receive such notices. Ms. Moore stated that it had been made clear to the grievor that her letter of expectations superseded that directive. The grievor gave this as an example of discrimination.

[99] An exchange of emails provides a perspective on the grievor's work during that period (October 2013). It starts with an email she sent to her team, which was composed of two paralegals and a legal assistant, in which she assigned work. The Senior Paralegal answered her in the following manner:

…

> *The list of tasks you noted below seem reasonable to me but I will point out there seems to be a significant amount of work being done by myself, Allison and James with very little being done by yourself. As I understand it, James will not be working on this project so that means the work will have to be shared amongst the three of us. With that being said, the task assignments you have pointed out below need to be adjusted.*
>
> *I understand the need to have this work completed by the end of the month so to accomplish that I suggest that all three of us work to get the updates done and not just Allison. Allison has the updates and can split it up three ways. Allison, can you start flipping updates to us tomorrow so we can get started?*

…

[100] The Senior Paralegal then suggested further task assignments and ended her email with the following comment: "In light of the above, you might find it useful to get ringtail training from the LSC specifically tailored to our database to assist you with printing reports, inputting data into fields, searching and linking."

[101] In her answer, the grievor reiterated the work distribution method, in which she assigned the work and the others carried it out. She copied Ms. Moore, who sent the following brief email on the next day: "Blandie – there is a culture in this unit of everyone pitching in to meet deadlines and this is a large part of our success as a team. Accordingly, I expect your full cooperation on this project."

[102] The grievor reacted by stating that she was supposed to do LA-2A work, not paralegal work. She ended her email with the following sentence: "I am requesting to

do work of counsel on this issue as lay out in the emails below. If that is not the case, I am requesting to be remove of this project and be provided with substantive work at the LA 2A counsel level [*sic* throughout]."

[103] Forty minutes later, she wrote the following to Ms. Moore:

…

> *I have set up a meeting at 10:15 am to discuss this project and both Tonia and Allison did not show up. They just advise [sic] me that you have removed me from this project without giving me prior notice this is unacceptable. Again, this shows a tremendous lack of respect for me as a professional.*

…

[104] Ms. Moore answered with the following: "As you indicated you wish to be removed from the project, I have done so. I am sorry if the message was not communicated to you in a timely way; however, I have been tied up on a call for most of the morning."

[105] Ms. Moore testified that the vast amount of work to be done in her unit meant that the hierarchical lines were often blurred, and that she, despite being the manager and general counsel, often pitched in to help with document processing.

[106] In October 2013, the grievor wrote to Ms. Matteau, the director of informal conflict resolution at the DOJ, to complain about Ms. Moore's harassment. Geoffrey Bickert, the assistant deputy attorney general (and Ms. Moore's manager), was informed.

[107] Mr. Bickert testified that he attempted informal conflict resolution with the grievor to see how she could be helped. She had requested a transfer into another DOJ unit. Before agreeing to it, Mr. Bickert wanted to better understand her interests and difficulties, both for her sake and that of the section to which she could be transferred. He was aware that she had changed units twice within two years and that she had made harassment complaints against her last two supervisors. He was also aware of her extended absences. He thought that something deeper might be occurring and that an informal conflict resolution process would offer some hope of sorting out the situation. He met with her twice along with a member of the informal conflict resolution team. Nothing came of it. According to Mr. Bickert, the grievor never articulated what she wanted to do or where she wanted to go in the DOJ. Rather, she

was intent on denouncing the harassment that she felt subjected to.

[108] In January 2014, the grievor wrote to Ms. Moore, complaining of her work conditions and stating that she had made a formal complaint against Ms. Moore and that Ms. Moore was retaliating against her for it by moving her office. In fact, Ms. Moore testified that she had moved the grievor's office to watch her more closely, as she was still not providing her arrival and departure notices. The grievor wrote to Ms. Moore, copying Ms. Matteau and stating as follows: "You have now admitted to constantly monitor me [*sic*], this aspect is part of my formal harassment complaint which was made on Friday, October 11, 2013 to Ms. Sylvie Matteau."

[109] Ms. Matteau wrote to both the grievor and Ms. Moore, separately, on the same day. To the grievor, she wrote the following:

…

> *You copied me on an email to your manager today, found below. To clarify the current status of your file with this Office this is to confirm that your complaint is still considered to be informal and is in abeyance, pending the results of the resolution process that you are currently engaged in.*
>
> *I will contact you once I am informed that the informal process is completed. Hopefully, this process will be successful and provide you with the kind of solution that works for you. If your complaint is not resolved through the informal process, I will ask you to provide the required information to determine next steps. I refer you to my email of October 21, 2013*:
>
> "please complete the attached form to provide me with the details of your complaints (incidents, time, documents, witnesses – as appropriate). This will allow me to review your complaint thoroughly to determine if it falls under the harassment prevention policy"

…

[110] Ms. Matteau wrote to Ms. Moore to clarify that the complaint was still considered informal. The grievor never completed the required information to move it to the review stage.

[111] Ms. Moore spoke of a memo the grievor had drafted that was brought to her attention by Travis Henderson, who also testified at the hearing. It concerned confidentiality orders in a medical marihuana class action taking place in Nova Scotia. Mr. Henderson testified the memo could have been useful, as he was working on a

similar case in British Columbia in which a confidentiality order had also been requested.

[112] The memo appeared to be final. Nothing indicated that it was a draft. The citations appeared complete. It included conclusions and no "draft" watermark. When a memo was still incomplete or preliminary, its author would use the draft watermark or indicate at the start that it was still incomplete.

[113] Mr. Henderson hoped that the memo would help him, since he had only three days to respond to the application. In the memo, he found a rather surprising statement that would support the application, apparently taken from an Ontario Superior Court of Justice judgment. The citation appeared in a footnote, but when Mr. Henderson sought to locate the case, it proved impossible to find. When he Googled it, he found another paper, to which I will give the summary title "Who wins", on confidentiality.

[114] He thought that that paper could be helpful to identify the case in which the statement was made. He soon realized that large portions of the paper had been used verbatim or near-verbatim in the grievor's memo. He also found that the statement that had started his research was also in that paper. It was a misconstruction of what the judge had said. It seemed to Mr. Henderson that the grievor had simply adopted the conclusion and that she had not read the case.

[115] In the end, Mr. Henderson chose not to use the grievor's memo and carried out his own research. He brought the memo to Ms. Moore's attention when she returned to the office the following week. At Ms. Moore's request, he highlighted in the document what he thought had been copied. He had no further involvement in the disciplinary investigation.

[116] The memo had been submitted on December 2, 2013. The grievor was absent from mid-January to mid-June 2014. On July 3, 2014, Ms. Moore emailed her, asking for her comments on the similarity, without attribution, between the memo and the "Who wins" paper. The grievor responded that the request was harassment and a reprisal for her harassment claim against Ms. Moore. She also repeated her argument based on *Cojocaru* that in legal writing, copying does not constitute plagiarism.

[117] The matter was raised with Mr. Bickert. He wrote to the grievor to organize a meeting to discuss the reprisal matter. She responded by linking Ms. Moore's questions

on the memo to the harassment claim against Mr. Fraser and by providing examples of what she considered reprisal actions on Mr. Fraser's part, who had provided a negative performance appraisal in 2013, while the harassment complaint investigation was underway.

[118] Mr. Bickert responded in part as follows:

> *… I confess that I cannot find in your remarks below any evidence that would support a plausible connection between your current manager's review of a substantial component of unsourced material in your legal opinion, on the one hand, and a harassment complaint long ago made against a different manager in a different group and dismissed as without foundation, on the other hand. I will take your email as declining my offer to meet you to discuss any such connection, beyond your bare assertion.*

[119] Ms. Moore analyzed the two documents and concluded that the grievor had plagiarized the "Who wins" paper to produce her memo on confidentiality orders. Her concern was not only with the plagiarism but also with the fact that using a document found on the Internet that did not come from an authoritative source (the document had no author) rendered the memo useless for court proceedings.

[120] The two documents were extensively compared at the hearing during the grievor's cross-examination; she consistently denied copying anything. Rather, she stated that the similarities could be explained by the fact that legal conclusions just tend to be similar on a given case.

[121] I have no difficulty finding that the grievor did in fact copy parts of the "Who wins" paper to produce her own memo, without any attribution. Some sentences are nearly identical. She pointed to punctuation changes or different word choices, but that was insufficient to change the glaring obviousness of having copied text. One example (of many) will suffice to illustrate this point:

> [From the memo:]
>
> …
>
> *Sierra Club has since been employed by parties wishing to either commence proceedings under a pseudonym or through the use of initials. As well, parties filing affidavits have also sought to keep their identity a secret out of public disapproval or embarrassment.…*
>
> … *In* Adult Entertainment Association of Canada v. Ottawa

> (City), *the City of Ottawa enacted a by-law prohibiting contact between dancers and customers. 45 adult entertainers sought to file affidavits supporting the by-law challenge under pseudonyms. One of the plaintiffs identified herself as C.D., the others by their stage names ("Jasmine", "Roxy", etc.). The contents of the affidavits filed were virtually identical and C.D. was the only plaintiff who expressed any need to protect her identity, citing social stigma and the threat of harm…*
>
> …
>
> [From the "Who wins" paper:]
>
> …
>
> *Several cases have involved parties wishing to either commence proceedings under a pseudonym or through the use of initials. Parties filing affidavits have also sought to keep their identity secret out of public disapproval or embarrassment.*
>
> Adult Entertainment Association of Canada v. Ottawa (City) *involved a challenge to a by-law enacted by the City of Ottawa governing adult entertainment: specifically, a prohibition on contact between dancers and customers, and that all entertainment be provided in an open and designated area. 45 adult entertainers sought to file affidavits supporting the by-law challenge under pseudonyms: the first identified herself as C.D., the remainder by their stage names ("Jasmine", "Roxy", etc.). The affidavits filed were virtually identical in their content and only that of C.D expressed any need for the protection, citing social stigma and the threat of harm.*
>
> …

[122] The other indicator of copying is the fact that for five of the decisions discussed in the memo and in the "Who wins" paper, the vocabulary used for some points is the same in both but is different from the vocabulary used by the judge in the relevant decision. That occurs too many times to be coincidental.

[123] In September 2014, Mr. Bickert met with the grievor, together with a bargaining agent representative, a support person, and a representative of the respondent's labour relations section. They met to discuss her harassment complaint against Ms. Moore. After the meeting, Mr. Bickert wrote to Ms. Matteau and stated the following:

> *I met with Blandie Samson on August 12, to follow up on her complaint of harassment. In attendance with Blandie were an*

> *AJC representative named Antonia Aphantitis and a support person named Marie-Jude Etienne, a public servant who indicated she had considerable experience with informal conflict resolution in the workplace. Also in attendance was Max Baier from Justice Labour relations. Blandie expressed disappointment that you were not in attendance but seems only to have invited you at the last minute. I offered to postpone the meeting to see if you would attend or for Blandie to speak to you. Blandie indicated that she wished to proceed. She had a very thick file with her but ultimately did not refer to it. After she had spoken at length I opined that it seemed she wanted to revisit a long list of matters long past – including a complaint made a few years ago with another manager in another unit (Duncan Fraser) which had been resolved as being without merit. I said that my purpose in meeting was to look into a current complaint apparently made in the summer when her manager was pursuing performance management. Blandie insisted all matters were all connected and all part of a continuing pattern. I indicated that I very much wanted her to feel respected in the workplace, to have work which was meaningful and to look forward to coming in each day. I said that I could see clearly that she did not feel that she had any of those things but that I worried her approach was contributing to the problem. After Blandie had spoken again for some time her support worker interrupted her and asked Blandie if she was clearly listening to me, that if she did she thought there was an openness to try to resolve matters and that Blandie should take me up on that openness. Blandie did not directly respond to her support worker but at one point seemed to complain that AJC had not supported her.*
>
> *I indicated in the course of the discussion that I had not heard anything new that I felt I could or ought to act upon as the manager supervising her supervisor. In the end, I said I would always be prepared to meet with her with whomever else she wanted to bring (union rep, support worker, you, etc.)*
>
> …

[124] On October 7, 2014, Ms. Moore imposed a one-day suspension for plagiarism on the grievor, to be served the next day. The grievor did not attend the disciplinary meeting. She responded to the invitation for the meeting by email, stating the plagiarism accusation was "… the same accusation made by Mr. Duncan Fraser which was under investigation as part of my harassment claim…". She added, "It seems to have been entrapment where a work was assigned to me for the sole purpose of imposing disciplinary measures against me."

[125] The grievor responded immediately to Ms. Moore's suspension email in the following terms:

> *Catharine,*
>
> *As I mentioned to you previously, your actions constitute retaliation for the harassment claim made against you which has yet to be dealt with … As such, I do not accept your suspension and will be showing up for tomorrow.*

[126] Ms. Moore and the grievor both testified to the events that followed that exchange. According to Ms. Moore, as she was walking by the grievor's office for a coffee, she distinctly heard the grievor say, "bitch". About 20 or 30 minutes later, when she returned, she again distinctly heard the same comment. At the hearing, Ms. Moore stated that once would have been understandable but that twice was unacceptable behaviour.

[127] Ms. Moore then went to her office, closed the door, and called Security to have the grievor's access card suspended for the next day. While she was on the phone, the grievor knocked loudly on her door, to the point that the person from Security, on the phone, asked Ms. Moore if she wanted a commissionaire to come to the floor; she accepted the offer.

[128] In her testimony, the grievor strongly denied ever saying "bitch" when Ms. Moore walked by. According to the grievor, doing so would be contrary to her values and upbringing. She also denied knocking on Ms. Moore's door; on the contrary, she pointed to an email that stated that she did not want to speak to Ms. Moore. However, it was in response to an earlier email from Ms. Moore that stated, "Given your hostile attitude, I am not prepared to meet with you today." In response, the grievor wrote, "I have no intention of meeting with you either…". In the grievor's testimony, the refusal to meet had been her initiative.

[129] Ms. Moore imposed a two-day suspension on October 15, 2014, essentially for the grievor not complying with the letters of expectations of August and September 2013. The grievor was still failing to inform Ms. Moore of her arrivals and departures, she had been absent without a leave request or medical certificate on 10 days (the dates were listed), she arrived late or left early on 11 days (which were listed), and she missed status meetings without prior notice or explanation.

[130] In the suspension letter, Ms. Moore noted that the grievor had not provided notice of her absences and had not specified her anticipated return dates and whether any priority work was outstanding. Ms. Moore reiterated the expectations, which were advising Ms. Moore of unplanned absences prior to the start of the work day with the

anticipated return date and any priority work, providing medical certificates for absences attributed to illness, advising Ms. Moore of her daily arrivals and departures, and attending all scheduled meetings unless an acceptable reason for not attending was given in advance.

[131] At one point in her testimony, Ms. Moore was asked about the work skills the grievor contributed to her section. She answered that the grievor's fluency in French was a huge asset, since class proceedings had started in Quebec before occurring in the common law provinces. Also, the grievor often had a different approach, which offered a fresh perspective; a different view is always useful.

[132] However, the relationship continued to deteriorate. After the two-day suspension, a five-day suspension was imposed, because the grievor was not respecting the very clear terms of the letters of expectations, which had been reiterated in the two-day suspension letter, including informing Ms. Moore directly of her arrivals and departures. Mr. Bickert signed the five-day suspension letter. It stated the following grounds for the suspension:

> *1. that you have consistently and deliberately refused to comply with the expectations first set for you fully fifteen month [sic] ago and confirmed periodically in the intervening period;*
>
> *2. that even when confronted by an investigatory email, your refusal to co-operate continues and, to date, you have failed to provide notice of your arrivals and departures*;
>
> *3. that, when confronted with your actions, you refused to take any responsibility for your behaviour and, instead, accused your manager of exercising reprisal against you and other improper motivation; and,*
>
> *4. that you were previously disciplined on October 7, 2014 and October 15, 2014.*

[133] Mr. Bickert testified that he felt that a five-day suspension was appropriate. In all the communication he had received from the grievor, both written and oral, she had never acknowledged any wrongdoing on her part, whether it was plagiarism or missed work hours. Everything turned on her claim of harassment and reprisal.

[134] Mr. Bickert imposed a 10-day suspension on January 28, 2015, mainly for the grievor's aggressive demeanour on October 7, 2014, when she refused to serve the one-day suspension and then allegedly called Ms. Moore a bitch. Mr. Bickert weighed both

versions of the events and concluded that he preferred Ms. Moore's version, notably because the grievor's aggressive reaction to the one-day suspension was confirmed by the email she sent to Ms. Moore.

[135] When he was asked at the hearing how he decided between the two versions, which was essentially a "she said, she said" situation, Mr. Bickert answered that it was a matter of deciding whom to believe. It was unlikely that a manager would make such an allegation, given the trouble it would cause; the employee had every reason to deny it. He found as aggravating factors the grievor's failure to comply with a disciplinary suspension, the burden it imposed on the DOJ to ensure that security measures were taken, and the fact that she failed to recognize the inappropriateness of her actions.

[136] The grievor's problematic attendance behaviour continued into 2015. In May 2015 (the letter is undated, but the suspension was to be served starting on May 11, 2015), Mr. Bickert imposed a 20-day suspension. Beginning in March 2015, the grievor had started to comply with the requirement of sending an email to signal her arrival. However, on a number of occasions, she was observed arriving at her office some 10 minutes after sending the message stating that she had arrived. In an earlier exchange, when Ms. Moore had asked the grievor the time at which she had arrived, the grievor repeatedly answered by giving her scheduled hours, as opposed to her arrival time. In addition, tardiness continued to be a problem, as noted with specific dates.

[137] The 20-day suspension was based on the following grounds; the suspension letter took into account the grievor's justification for her behaviour:

> …
>
> ***A. Until March 10, 2015, you continued to fail to report your arrival at and departure from the office to your manager, Ms. Moore*** …
>
> …
>
> ***B. After March 10, 2015, you provided emails indicating when you arrived and left the office; however, on several occasions you were observed arriving at your office after the time indicated on the email*** …
>
> …
>
> [Emphasis in the original]

[138] The grievor would send an email as soon as she was in the building, but not yet

at her desk: "***C. Your excessive tardiness continues*** … [emphasis in the original]".

[139] Specific dates were provided, as follows:

…

> ***D. Despite Ms. Moore's specific requests, you failed to copy Ms. Moore with emails regarding attendance during her absence from December 19, 2014 to January 5, 2015 and, in addition, failed to email your arrival and departure times to Mr. Henderson, who was acting for Ms. Moore in her absence from March 9, 2015 to March 20, 2015***….
>
> …
>
> [Emphasis in the original]

[140] The grievor did not deny the allegation. She did not follow the specific directions that she had received. Moreover, she felt insulted that Mr. Henderson would supervise her as they were at the same substantive level. The suspension letter continued as follows: "**E. On January 26, 2015, you provided confidential/privileged materials to the AJC. When Ms. Moore asked that the material be deleted by the recipients, you re-circulated the same sensitive information** … [emphasis in the original]".

[141] The grievor raised as a defence that any claim of privilege had been waived, in accordance with *Lipson v. Cassels Brock & Blackwell LLP*, 2014 ONSC 6106. She thought that she needed to show her work to her bargaining agent, to protect herself. Mr. Bickert stated in response that the cited case considered a client waiving privilege when he made misconduct allegations against his lawyer, to the extent necessary for the lawyer to defend himself or herself. He said that that does not apply when a manager raises concerns about work.

[142] The grievor had been reminded of her confidentiality obligations, which she saw as an obstacle to defending herself. Mr. Bickert wrote as follows: "**F. On March 10, 2015, you refused to do assigned work; specifically, a request for research on the *Jones* litigation** … [emphasis in the original]". He stated that he found the refusal unjustified and unreasonable, given that all work in litigation files contained some material that was of a sensitive nature and so was not to be shared outside the DOJ.

[143] The suspension letter continued as follows: "**G. Between March 17 2015 and 19 2015, you engaged in an exchange of emails with Mr. Henderson relating to an**

unauthorized absence from the office with sarcasm and accusations of discrimination [emphasis in the original]**."**

[144] The grievor responded with allegations of discrimination based on family status and stated that she did not use foul language. At the hearing, the following statement that the grievor had emailed to Mr. Henderson was discussed at length: "Please Travis, no need to tell me, I know, you are so very sorry to ask Compensation to withhold three hours from my pay." The grievor asked Mr. Bickert in cross-examination to explain why the statement was inappropriate or sarcastic. She maintained that it was polite. In the end, after trying to explain why the tone was inappropriate, Mr. Bickert just shrugged.

[145] The letter concluded with Mr. Bickert noting several aggravating factors, including the following: "You take no responsibility for your actions and you give no indication that you are prepared to modify your behaviour", despite a number of previous disciplinary measures imposed on her for often similar behaviour.

[146] Ms. Moore gave examples of the grievor's unsatisfactory work. She asked the grievor for an update on the class action related to the Lac-Mégantic rail disaster. The grievor forwarded to her the email she had received in answer to her enquiry from the federal government lawyer working on the file. Ms. Moore said that it was unacceptable and that she wanted a proper memo. The grievor summarized her research in a memo and added information about an imminent settlement. She copied the memo to her bargaining agent. Ms. Moore wrote to the bargaining agent, requesting that it delete the memo, given that it was confidential. Ms. Moore testified that she received confirmation from the bargaining agent that it had been deleted.

[147] In another example, Ms. Moore left instructions for a memo to be prepared while Mr. Henderson would act in her stead. The grievor simply refused to work on it, since she believed it would be used against her, as her previous memos had been.

[148] In April 2015, Ms. Moore tasked the grievor with reviewing documents that had been coded "court documents", to determine which ones were true pleadings. The task required knowledge of civil litigation and Quebec court documents. The grievor balked at the directions, considering that the work was not at her level. After some back and forth, Ms. Moore wrote the following email to her:

> *I am really at a loss as to how to further explain the task to you and we are at a point in time where I hoped this work*

> *would be finished.*
>
> *I am specifically directing you to advise me whether you are refusing the work. If that is the case, I will assign it to someone else.*
>
> …

[149] In the end, the grievor did not do the work. When she was asked who had done it, Ms. Moore answered that she had done it herself.

[150] In October 2015, the class action unit's reporting structure was modified. The grievor would no longer report to Ms. Moore but to another manager, Catherine Lawrence. As part of the new structure, the grievor was to report her arrival and departure times to Mr. Henderson. She emailed Mr. Bickert on October 22, 2015, stating that she would not comply with this requirement.

[151] Mr. Henderson has been a senior counsel at the DOJ since February 2018. For the two years before that, he acted at that level. In 2013, he joined the management of the class actions unit as counsel. He knew the grievor when she worked at the TLU, since the class action unit had been involved in the tobacco litigation.

[152] In March 2015, Ms. Moore went on leave for several weeks, and Mr. Henderson acted in her place. In this capacity, he supervised a team of approximately 12 composed of counsel, paralegals, and assistants. The grievor was part of that team. She returned to work from a leave of absence, and Mr. Henderson supervised her for two weeks.

[153] The grievor testified at the hearing that she found it difficult to be supervised by Mr. Henderson, as their substantive positions were the same. She found it unfair that he was asked to act for the supervisor, yet she never had that opportunity.

[154] At the hearing, Mr. Henderson recalled that it had been extremely difficult to supervise the grievor for those two weeks. She did not attend work at her scheduled time; she arrived late and was frequently absent. She refused to perform the tasks that Ms. Moore had assigned to her. She refused to do the work, according to an email she sent to Ms. Moore. She repeated the refusal in an email to Mr. Henderson, which was worded as follows:

> …
>
> *After looking more closely at my rights as a complaining [sic]*

> *in a grievance procedure, I am sorry to tell you that I will not be doing any work in the Medical Marihuana Mailout file which is the subject of an upcoming grievance. Mrs. Moore's instructions not to disclose my work product are an attempt to denial [sic] my right to make full disclosure in order to defend myself against her allegations…*
>
> …

[155] The grievor continued by invoking the grievance procedure that was in her words "established by Parliament", the Law Society of Upper Canada (LSUC) *Rules of Professional Conduct*, and again in her words, "federal legislation/regulation". She ended her email with the following sentence: "Your threats of disciplinary measures constitute reprisal for making the grievance and I refuse to let myself intimidated [*sic*]."

[156] Mr. Henderson explained that the assignment in March, 2015 had nothing to do with the confidentiality memo's subject matter. Ms. Moore had reminded the grievor that work done for the DOJ was confidential and was not to be shared outside the section. The grievor took this as an infringement on her right to defend herself against accusations of unsatisfactory or plagiarized work.

[157] Mr. Henderson was also witness to the grievor sending an email stating that she had arrived when in fact she was not yet in her office.

[158] Mr. Henderson and the grievor had a conflict about her early departure on March 16, 2015, for a medical appointment. She produced a medical note dated March 16 that stated only that she had been on sick leave on March 9, 2015. Mr. Henderson refused to grant her three hours of paid leave, despite her argument that she was entitled to it. In this respect, Mr. Henderson wrote her the following:

> …
>
> *I am sorry you feel that my actions are discriminatory and an attempt to violate your privacy rights. I assure you that I am only attempting to apply the Directive in accordance with Labour Relations and Human Resource standards…*
>
> *Unfortunately, if you do not submit a PeopleSoft request and apply sick leave credits or if you do not have any sick leave credits available, I will have to contact Compensation to withhold three hours from your pay.*
>
> …

[159] The grievor answered that she found that position unfair, given that "… others simply ask to attend sporadic Dr's appointment without having to use their sick leave. I am definitely being discriminated against and singled out". She then added the following comment, discussed earlier in this decision: "Please Travis, no need to tell me, I know, you are so very sorry to ask Compensation to withhold three hours from my pay."

[160] Mr. Henderson spoke of an incident in which the grievor had consulted colleagues on a task she had been given dealing with a class action related to the disclosure of the personal information of student loan beneficiaries. Some of the members of the class were employed at the DOJ, and consequently, measures had been taken to ensure that they had no access to the file. Before working on the file, employees had to verify that they were not members of the class.

[161] The grievor had been cleared to work on the file, as she had undergone the verification process. In her consultations with colleagues, she had sent confidential material to one who was a member of the class, which quite upset Mr. Henderson. In the end, the disclosure was contained. The recipient who was a member of the class deleted the material.

[162] Mr. Henderson was upset that the grievor did not seem to take the breach seriously. She claimed that she was not aware of who was in or out of the class and suggested that the team should have been better informed.

[163] At the hearing, Mr. Henderson explained that repeated reminders of privacy and confidentiality issues related to this matter had been sent. Since she had been cleared to work on the file, the grievor should have been aware of its sensitive nature, and she could have verified who was also cleared to receive information. She had not taken that step, and once informed, she did not acknowledge her mistake but rather blamed the system for not informing her.

[164] Mr. Henderson spoke of another professional conflict with the grievor when he again acted in a supervisory role. Ms. Moore had assigned some research to the grievor on the new *Consumer Rights Act 2015* enacted by the United Kingdom. The grievor and Mr. Henderson disagreed on the scope and content of the research. As he put it at the hearing, "My attempts at guidance were met with some hostility." He would have expected someone to whom he gave direction to say, "Thank you, I'll refocus", rather than to give her response, which was, essentially, "I disagree with your position".

[165] At the hearing, Mr. Bickert explained the circumstances that led to the termination letter. According to him, it was impossible to continue with the grievor in the workplace. Given her difficulties with three separate managers, and given the fact that she had never expressed any positive interest in any area of the DOJ except to leave the unit she was in, he felt that in good conscience, he could not recommend her to another manager. There were too many obstacles to continuing her DOJ employment.

[166] In 2015, Mr. Bickert was aware of the medical notes dated June 10, 2013, and October 23, 2013, which recommended a change of workplace for the grievor. At the time, he had not been made aware of the notes, but the grievor's manifest unhappiness had been one of the reasons he had initially met with her to explore how to make her work more satisfying. However, she never expressed any interest in any other area of the DOJ. She stated only that she wanted to leave her current workplace.

[167] He was also aware of a medical note dated October 8, 2015, in which the grievor's physician reiterated his recommendation that she should change workplaces, in the following terms: "This short note will confirm that I still consider that Ms. Blandie Samson must be extracted from her hostile and toxic workplace environment. If she is to improve, she must be transferred to another unit."

[168] The grievor's family doctor, Dr. Patrice Barnabé, testified at the hearing. His medical notes from 2012 to 2015 were introduced into evidence. They have been ordered sealed to protect her privacy.

[169] Dr. Barnabé spoke of the grievor telling him that her workplace was toxic and that management had harassed her. He noted many symptoms in her that confirmed that she was under stress. For that reason, he wrote the medical notes recommending that she be moved into another workplace.

[170] Dr. Barnabé conceded in cross-examination that he knew nothing about the grievor's work environment except what she had reported to him. He also conceded that management's expectations of attendance and productivity were not necessarily unreasonable or conducive to a toxic work environment. I take from his evidence that the grievor was under stress, which manifested in physical symptoms. One of those symptoms caused a need for more frequent bathroom breaks, which according to the grievor explained why she might be away from her desk.

[171] Despite the recommendation that the grievor be moved, Mr. Bickert felt unable to recommend her to any other unit. She had made harassment complaints against her last three managers. She refused to comply with directions, and every criticism was met with a barrage of attacks.

[172] The culminating incident came with two emails sent on April 16, 2015, and October 22, 2015, in which the grievor explicitly refused to provide notifications of her arrival and departure times. According to her, doing so was demeaning and degrading, and it was imposed on her as retaliation for her complaints against her managers.

[173] In the April 16 email, she disputed Mr. Bickert's confirmation of plagiarism in the confidentiality memo, in both fact and law. She argued procedural fairness (the chart comparing her memo to in her words "the undated document with no author" was prepared three months after the allegation was made). Also, she stated that she believed that the *Cojocaru* decision "upholds the idea that plagiarism in legal writing does not exist."

[174] In the October 22 email, she argued that all measures taken against her are retaliatory. She mentioned another employee involved in a harassment case who was moved into another section, and she asked why she could not be treated the same way.

[175] Before her termination, the grievor emailed Mr. Bickert on October 26, 2015, stating that the disciplinary measures against her were in fact retaliation for her harassment claims. She claimed that Ms. Moore had in fact confirmed as much, as follows:

…

> *… Mrs. Moore noted in an email sent on April 24, 2015 at 5:38 PM that "Attempts at managing your performance and attitude on my part have been met with extreme hostility, allegations of bias, refusals to carry out assignments, allegations of reprisal for you having made harassment complaints against me or Duncan Fraser and of discrimination based on your race and family status.* ***The result has been the necessity of having to resort to the discipline process."*** *She further noted in the 2014-2015 PREA that my attitude towards management is disrespectful as evidenced by the harassment, reprisal and discrimination claim that I made. Why have the harassment policy in place but engage in retaliation when an employee uses it?*

…

[Emphasis in the original]

[176] The termination letter states that refusing to comply with her letters of expectations to indicate arrival and departure times was an act of insubordination that constituted the culminating incident. The grounds for termination are worded as follows:

> *In arriving at my decision with respect to the appropriate disciplinary measure I have taken into account the following aggravating factors:*
>
> *1) your discipline history which consists of the following:*
>
> - *January 30, 2013 – written reprimand*
> - *October 7, 2014 – one (1) day suspension*
> - *October 15, 2014 – two (2) day suspension*
> - *November 28, 2014 – five (5) day suspension*
> - *January 28, 2015 – ten (10) day suspension*
> - *May 7, 2015 – twenty (20) day suspension*
>
> *2) that the majority of the discipline that has been imposed on you is a result of insubordination and that you have been disciplined in the past for failure to comply with the reporting requirement;*
>
> *3) that you expressly refused to comply with the Letters of Expectations on two occasions, April 16, 2015, and again on October 22, 2015; and*
>
> *4) that you have not demonstrated any remorse nor accepted responsibility for your conduct. On the contrary, you insist that these allegations are a result of reprisal and retaliation for having made harassment complaints against Duncan Fraser and Catherine Moore.*
>
> *I am not aware of any mitigating factors in this instance.*
>
> *Given all of the circumstances, I view this instance of insubordination as the culminating incident in a long history of unprofessional and insubordinate behaviour. Consequently, I am forced to conclude that the appropriate disciplinary measure in this case is the termination of your employment.*
>
> …

[177] The letter is dated November 17, 2015. The grievor had been invited to a meeting, but she did not attend work on that day. She received the letter by email but did not open the attachment immediately. The next day, Mr. Bickert sent a brief email to her section stating that she had left the DOJ and wishing her well.

[178] At the hearing, both in her cross-examination of Mr. Bickert and in her testimony, the grievor expressed how the email announcing her departure had dismayed her. She said that it was a lie, since she had not left the DOJ but had been fired. According to her, it would have been better not to say anything. She insisted that it was highly disrespectful to say that she had left when in fact she had been terminated.

[179] The grievor also emphasized that upon learning she had been terminated, she sent a very polite and respectful email to Mr. Bickert, which ended in the following manner:

…

> *Lastly, it is certainly not the way I imagined ending my time at Justice. Since working as a student and later counsel in 2007, I have had the pleasure of working with some truly exceptional individuals. I am eternally grateful for your professional generosity and your kindness. To you, I say cheers not goodbye!*

[180] According to her, that email showed that she was in fact respectful, contrary to the way the respondent had depicted her.

III. Summary of the arguments

A. For the respondent

[181] The grievor alleged that she was a victim of discrimination based on her race, ethnic origin, gender, and family status. However, she produced no evidence to show that those grounds were factors in the measures the managers took to deal with her attendance and performance issues.

[182] The grievor felt singled out, and her managers testified that indeed she was treated differently, but it was because of her poor attendance and refusal to follow directions. She stated that refusing to move her to another workplace was also harassment. However, she also stated categorically that no disability was involved. There was no accommodation issue, since no claim was made that work could not be

performed for medical reasons.

[183] The respondent did receive the medical notes recommending a change of workplace. Mr. Bickert testified that as early as fall 2013, he was willing to help the grievor. However, despite his best efforts, she provided no input as to where she wanted to go or what she wanted to do. Her discourse was entirely based on harassment, discrimination, and reprisal.

[184] In 2015, the unit in which the grievor was working was reorganized; she would no longer be reporting to Ms. Moore, which met her long-standing demand but apparently was not sufficient.

[185] All the managers who testified before the Board commented on the difficulty of managing the grievor. When a manager brought up her attendance, lack of productivity, or lack of quality in her work, her reaction was invariably that she was being harassed and discriminated against. Contrary to her allegations, the managers did not conspire against her. Their testimony was clearly that each had independently concluded that her work was unsatisfactory, that her attitude left much to be desired, and that her attendance was a constant problem.

[186] Mr. Bickert started the relationship with the best of intentions. He understood that the grievor might want another challenge or opportunity to work in another section. Yet no proposal was ever made, and she insisted on claiming that she suffered harassment, discrimination, and reprisal. Faced with concrete evidence of misconduct, it was difficult for Mr. Bickert to conclude that the discipline had been based on harassment or discrimination.

[187] Reasonable demands were made of the grievor, such as filling out an AWA form to confirm the flexible arrangement. She steadfastly refused to, for incomprehensible reasons. The policy is clear that both parties must sign the agreement. She maintained that Ms. Lunn's letter was sufficient. She simply could not accept that in fact, according to the policy she invoked, it was not in fact sufficient.

[188] All the disciplinary measures leading up to the termination were justified.

[189] The evidence presented at the hearing showed that the grievor had indeed copied a document from the Internet to produce a memo, without acknowledging the source. This was problematic on two levels, as plagiarism is a breach of integrity, and she presented unauthoritative material as her own, which meant that research that was

to be used for court purposes had no guarantee of quality. She never took ownership of her behaviour and argued instead a defence based on a misinterpretation of Supreme Court of Canada decisions.

[190] The two-day suspension was imposed because the grievor did not comply with the letters of expectations dated August 1 and September 20, 2013. She did not inform Ms. Moore of her arrivals and departures, did not provide medical certificates for sick leave, had been absent from the office without any leave request for 10 days, and had arrived early or left late on 11 days. She also failed to provide notice of absences, anticipated return dates, or any priority outstanding work.

[191] Further discipline was imposed because the grievor continued to fail to comply with the letters of expectations. The suspensions grew as she continued to not take direction, arrive late at work, and not give notice of her absences. Moreover, she refused to do work under the pretext that it would be used against her.

[192] The culminating incident came with the grievor stating explicitly that she would not comply with a clear direction that had been given to her. According to Mr. Bickert, she did not recognize at any time that she needed to change her behaviour or at least try to understand the employer's concerns. Therefore, the relationship was no longer viable.

[193] In the respondent's submissions, a number of authorities were discussed. I will come back to the ones I found useful in my analysis.

B. For the grievor

[194] The grievor presented her interpretation of the facts. She also asked that the submissions she sent to the Board when she referred the grievance to adjudication be part of her final submissions. The respondent did not object, subject to conclusions of fact from the hearing. I have taken the submissions into account, with that limitation.

[195] The grievor submitted that there was no cause for her termination. The respondent imposed excessive discipline on her that was unfounded in fact and law.

[196] The grievor believes that she was disciplined because she made two harassment

complaints. The respondent showed that it did not know how to deal with those complaints. According to the Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, the employer is responsible for the acts of its employees and must take positive steps to protect harassment victims.

[197] The grievor started out well in the public service, as attested by her positive PREA in 2007. Ms. Lunn mentioned positive things such as her promotion from LA-1 to LA-2 in the 2009-2010 PREA, but things had already begun to go wrong as Ms. Moore remarked to Ms. Lunn about missing hours in Ringtail.

[198] The grievor disputed calling Ms. Moore a bitch, as doing so is not part of her personality.

[199] She mentioned the fact that her medical certificates had been disputed until Ms. Lunn was advised to drop it as it could be seen as harassment.

[200] In her evidence, the grievor showed her difficulties with the Ringtail system, yet this was not taken into account in her PREA. She provided examples of emails in which she informed people that she would be late; she introduced other emails to show that she made up the time, as they were sent later than her scheduled departure times.

[201] The managers used the PREAs to get back at her. For instance, Mr. Talbot had presented the possibility of working with Mr. Fraser as an opportunity. In fact, he wrote in the PREA for 2011-2012 that "problems" with the grievor had been solved by moving her to another section. Mr. Bickert saw negative PREAs as an obstacle to a transfer. Therefore, the PREAs were used to punish her.

[202] The respondent was aware of her physician's recommendation that she be transferred because the workplace environment was toxic. Yet, it did not act on that recommendation, contrary to what *Robichaud* spells out, which is that given deplorable working conditions, the employer has the duty to separate parties in a harassment situation. Instead of acting, the respondent imposed discipline.

[203] The grievor asserted that she was unfairly disciplined for what the respondent termed plagiarism. In fact, punishing an employee for plagiarism is problematic for a number of reasons.

[204] First, there is no clear rule at the DOJ. The respondent cannot apply discipline when no clear rule exists. Second, in the first instance of plagiarism, the memo she

wrote for Mr. Fraser, he had provided a document to be used. There was no title or author to cite. Third, the Supreme Court of Canada stated clearly in *Cojocaru* that plagiarism does not exist in legal writing and that copying is quite acceptable. Moreover, the grievor was treated unfairly. Instead of being given the opportunity to correct a draft, she was immediately charged with an offence.

[205] Management never listened to the grievor, as shown by Mr. Bickert's reactions to her harassment and reprisal claim. Her arguments were never taken into account.

[206] The workplace was harassing and controlling, disciplinary measures were excessive, and no one cared about the grievor's progress. It was not a matter of providing feedback; it was always a matter of punishing. Even Ms. Matteau, whose mandate was to help people facing harassment and discrimination, threatened discipline if harassment complaints were discussed with anyone outside her office.

[207] The grievor felt that she was treated differently, forced to provide notice of her every movement, and made to feel like a second-class citizen. No matter the efforts she made, they were never sufficient. She was told to report when arriving at work, yet work was a moving target. She had to be inside her office to notify of her arrival, yet when she was hurt in an elevator, it was considered a "work" injury.

[208] She had had to work on Saturdays, yet she never claimed overtime. In the case of the confidentiality memo, time was so short she had to work on a Saturday.

[209] The grievor's arguments continued with the unfairness and harassment themes. She spoke of the fact that the employment relationship is no longer characterized by the "master-servant" paradigm; rather, it should be a relationship of respect, with both sides listening. She submitted a number of cases to support her arguments. I will review the relevant ones in my reasons.

IV. Analysis

[210] I must begin my analysis by expressing strong misgivings about the grievor's credibility. Where her account and those of the respondent's witnesses differ, I believe those witnesses. The grievor's testimony was entirely geared to showing that she had been the victim of harassment and reprisal. At no point did she concede that her attendance or attitude might have been problematic. She denied copying the "Who wins" paper, despite overwhelming contradictory evidence. She organized facts to prove her points but sometimes omitted important surrounding facts. As an example,

she found that Mr. Fraser harassed her when he entered the leave for her prolonged absence. She omitted the fact that he had been asking her to do it for over three months and that his concern was the overpayment she would owe the employer.

[211] There is no doubt that the grievor is qualified and capable. However, her behaviour gets in the way, as does her constant barrage of reacting to criticism without listening and automatically answering that she is being harassed and discriminated against.

[212] I have to disclose that at one point during the hearing, the grievor stated that she had a reasonable apprehension of bias on my part, as she perceived that I was not treating her the same way as I was treating the respondent's counsel. She did not make a request for recusal, and the matter was not brought up again.

[213] For the record, I will state that indeed I did not treat her as I did the respondent's counsel. I made considerable allowance for the grievor both for presenting her evidence and for argument because I recognized that it is very difficult to represent oneself at a hearing and play the three roles of grievor, witness, and counsel.

[214] I had to intervene or respond to objections on a number of occasions to remind the grievor that as counsel, in cross-examination for example, she could not act as a witness or a grievor or get into an argument with a witness to try to convince that witness of her point of view. The respondent's counsel did not have the hurdle of the triple role and did not need to be reminded of rules of evidence. I made no special allowance for her.

[215] For a long time, the respondent tried to manage the grievor, because as an employee, she is gifted and does have a lot to offer. However, in the end, her behaviour and attitude were her undoing. An employer cannot be expected to retain an employee who just will not listen or do the work he or she is asked to do.

A. Discrimination and reprisal claims

[216] The grievor's position is that all the discipline imposed was either discrimination or harassment, because she is part of a visible minority and a single mother, or that it was reprisal for exercising her right to complain about harassment. She made an important point when she argued that Ms. Moore seemed to impose discipline because of the harassment complaints, referring to the email quoted earlier

in the evidence, where Ms. Moore wrote the following:

> *Attempts at managing your performance and attitude on my part have been met with extreme hostility, allegations of bias, refusals to carry out assignments, allegations of reprisal for you having made harassment complaints against me or Duncan Fraser and of discrimination based on your race and family status. The result has been the necessity of having to resort to the discipline process.*

[217] However, the reprisal claim does not withstand scrutiny. I take Ms. Moore's point to be that the grievor seemed unable to accept any responsibility for wrongdoing and that she shielded herself with harassment accusations. Her harassment complaints were acted upon, via a formal investigation in the case of Mr. Duncan, an informal process in the case of Mr. Talbot, and an attempt by Mr. Bickert to solve the conflict with Ms. Moore through discussions.

[218] Throughout, the grievor refused to do her part, namely, recognize that the "toxic work environment", as she described it repeatedly, was in part her doing. She was often late; she notified the respondent of her absences often without providing reasons for them or her expected return dates, and she did not mention ongoing work. She refused to follow directions. She plagiarized and reacted when it was noted by her managers, claiming that finding plagiarism in her work was harassment or reprisal. Finally, she refused to do work, claiming that it could be used to accuse her further. The solution of arriving on time, working her full hours, and doing her work properly seemed to escape her. Therefore, based on the evidence before me, I cannot find that she was a victim of reprisal. She simply ceased being an employable employee.

[219] The grievor's solution to her conflicts with her managers was to have the respondent move her into another position. Mr. Bickert's reluctance to move her was based on an objective assessment of the situation. When a harassment complaint is made, the two parties involved should be separated. That happened with Mr. Fraser, as a formal complaint had been made.

[220] No formal complaint was ever made against Ms. Moore. The grievor did complain. However, when she was asked to provide the necessary details, she did not follow through. At the hearing, she claimed that the complaint had been made informal and that it then transformed into a reprisal complaint, which Mr. Bickert dismissed.

[221] The complaint was not made informal; it had always been informal. Mr. Bickert

met with the grievor to assess it, at which point she insisted that all her manager's actions had in fact been reprisal measures. Mr. Bickert studied the situation carefully and concluded that there had been no reprisal. Ms. Moore's disciplinary actions had in fact been grounded in the grievor's misconduct, which was a proper managerial response.

[222] The grievor sought to support the harassment claim with the words of others. When Ms. Lunn wrote to her superior, Mr. Vickery, stating that she had been advised to not dispute a medical certificate so as to not risk being accused of harassment, the grievor saw that as supporting her view that she was indeed being harassed. It never seemed to occur to her that the advice was intended for Ms. Lunn to avoid being accused of harassment, an accusation that the grievor would promptly fire off whenever her behaviour was found wanting.

[223] The grievor kept insisting that she should be taken out of her toxic workplace, but she offered no suggestion as to where she should go. Mr. Bickert testified that he had tried to explore possibilities with her but that she just insisted on her harassment and reprisal claims. He thought that he would have difficulty recommending her to another manager. The fact is, every time she received a negative evaluation, she made a harassment claim. After the formal complaint was made against Mr. Duncan, in her mind, further discipline became reprisal for making that complaint. At no point did she acknowledge that the PREA might have some truth. The toxicity was of her own making.

[224] In the course of her arguments, the grievor argued that she had been treated unfairly because the respondent did not recognize her efforts to comply with her notification obligations. She gave as an example an email exchange, which I will reproduce here in chronological order. Again, I have serious misgivings as to her credibility.

[225] At 10:30 a.m. on August 6, 2014, Jeff Anderson, who acted for Ms. Moore for that week, emailed the following to the grievor:

> *Hello Blandie,*
>
> *I gather from Allison that you have not arrived for work today and that you had to take yesterday off due to a family emergency; I hope everything is ok.*
>
> *As you know, I am acting for Catharine this week; can you*

> *please send me and [sic] e-mail or call me on the phone to advise, in advance if possible, if you are not going to be able to attend work during your regular hours along with the reason for the same. Also, please send any leave requests to me this week.*
>
> …

[226] At 10:42 a.m., the grievor sent the following email to the administrative assistant:

> *Hi Allison,*
>
> *Please note I will be arriving late this morning due to a morning appointment.*
>
> …

[227] At 10.55 a.m., the grievor emailed the following to Mr. Anderson:

> *Thank you Jeff for your message and for letting me know that you are acting for Catharine this week. As always, prior to the start of my work, I sent an email to Allison advising her that I will be arriving late this morning with the motives of my absence. Due to problems with the Blackberry, the message was only delivered at 10:42 am. Normally the email would be addressed to Catharine cc Allison. I will send any future notification to you cc Allison.*
>
> …

[228] I note that the 10:42 email was not addressed to Ms. Moore, only to "Allison". The email provided no indication of the time the grievor expected to be at work.

[229] I do not find the claims of reprisal or harassment to be founded. As for discrimination, the grievor claimed as prohibited grounds of discrimination race and family status.

[230] Proving discrimination starts with the complainant establishing a *prima facie* case of discrimination. The respondent must then answer it and show why there are reasons to conclude that there was in fact no discrimination. The test for *prima facie* discrimination is well-known: membership in a group characterized by one of the prohibited grounds of discrimination, an adverse effect suffered by a member of such a group, and a nexus between the group membership and the adverse effect. There is no need to establish causality, but rather, that the membership in a protected group was a factor in the adverse effect. (*Ontario Human Rights Commission v. Simpsons-*

Sears, [1985] 2 S.C.R. 536)

[231] I find that the grievor has not established a *prima facie* case of discrimination, as I do not see a nexus between her race, ethnicity or family status and the disciplinary measures.

[232] I saw no evidence that race or ethnicity had played a role in the way she was treated. She was hired by DOJ as an LA-1 in 2007, and obtained a promotion in early 2009 to LA-2. Her managers encouraged her, recognized her talent, sought to engage her. Obstacles arose not because stereotypical notions were imposed on the situation, but because she failed to comply with the rules. The Board needs to listen attentively to such claims, as overt discrimination is rare. However, as the CHRT has stated, "an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough". (See *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, at para. 41; application for judicial review dismissed: 2006 FC 785).

[233] I also do not find that the grievor's family status was a factor in the way she was treated by the respondent. Her family obligations were taken into account and she was provided with the flexible work arrangement she requested. The late arrivals and early departures remained unexplained, and there was no claim made at the hearing that they were linked to specific family obligations. When Ms. Moore sought an explanation on an early departure on a Friday, it was a legitimate enquiry, not discrimination based on family status, as no one, including the grievor, had informed her of a change of schedule on Fridays.

[234] All the actions by the respondent were attempts to manage the grievor, because of her misconduct and poor performance. The grievor has not shown that her race, colour, national or ethnic origin or family status were factors in how she was treated. Nor has she established that disciplinary measures, including the termination, were reprisal actions for bringing harassment claims against her managers.

B. Disciplinary measures

[235] The letter of termination lists a series of progressive disciplinary measures that together add up to justify the final disciplinary measure, the termination. An adjudicator's role is to decide whether misconduct occurred and whether the discipline was warranted and proportionate. If not, the adjudicator must decide what other measure would be appropriate. Since all the disciplinary measures were used as

stepping stones to the final measure of termination, I have considered each one in light of those questions.

1. The written reprimand

[236] The first disciplinary measure was the written reprimand for plagiarism. The grievor argued that it was unfair because she had not been told of any rule against plagiarism. Moreover, the memo she handed to Mr. Fraser was a first draft that she expected to modify after he reviewed it, and indeed, he did ask her to work on it again, even after he gave her a letter stating that the memo would lead to an investigation.

[237] The grievor's position on plagiarism is an important component of her behaviour, even though that misconduct gave rise to only minor discipline, the written reprimand, and later, the one-day suspension. Her defence was that plagiarism does not exist in the legal world. Several arguments were used to prove that point, supported mainly by two authorities, *Cojocaru* and *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 ("*CCH*"), both decisions of the Supreme Court of Canada.

[238] In *Cojocaru*, the British Columbia Court of Appeal had overturned a decision of the Supreme Court of British Columbia because the judge's reasons had largely reproduced the plaintiff's written submissions, without acknowledging it.

[239] The Supreme Court of Canada allowed the appeal, stating that judicial economy justified such a shortcut. The issue in *Cojocaru* is not plagiarism but rather whether the judge turned his mind to the problem at hand. By endorsing the plaintiff's position, the Supreme Court of Canada said that he did and that taking his reasons directly from the submissions, if he agreed with the reasoning, was not wrong.

[240] When she argued with Ms. Moore about plagiarism, the grievor quoted from *Cojocaru* an extract of the University of Toronto Law Journal article noted earlier in this decision. It states that legal work is not characterized by originality, but rather that legal authors tend to repeat each other. In that same article, the author also discusses cases in which a judge copies from another decision, without attribution. The author makes the following comment (at page 413):

> *In conveying the false impression that she has studied the precedents carefully, the author looks less like the judge who copies from the pleadings and more like the plagiarist who seeks to take credit for another's work.* ***Though she is not***

> ***seeking acclaim as an innovator or a creative thinker, this kind of judicial copyist is claiming credit for diligence, if nothing else, on the basis of others' work. The legal analysis may be unassailable, but in passing it off as her own rather than attributing it, the author implies that she has taken the time and effort to examine the material herself.*** *The strategy is one familiar to academic researchers who copy others' footnotes without actually consulting the sources they document. Whereas the judge who reproduces the pleadings without acknowledgement cannot expect to conceal her copying from the parties, the judge who uses another's decision is presumably hoping to do just that.* ***This form of copying*** *- at least when confined to the legal analysis - therefore raises little concern about sufficiency or fairness, even as it* ***raises ethical questions about the judge's personal integrity that may justify censure****.*
>
> [Emphasis added]

[241] The integrity aspect is at issue in this case.

[242] In *CCH*, publishers of legal reports and other legal texts claimed copyright infringement against the LSUC for allowing their materials to be photocopied without copyright fees. The issue was the application of s. 29 of the *Copyright Act*, R.S.C., 1985, c. C-42, which defines "copyright" as follows at s. 3(1):

> ***3 (1)*** *For the purposes of this Act,* **copyright***, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right ….*
>
> [Emphasis in the original]

[243] Section 27 defines "infringement of copyright" as follows:

> ***27 (1)*** *It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.*

[244] Section 29 creates the exception of fair dealing to infringement and reads as follows: "**29** Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright."

[245] The case was concerned with whether copyright fees had to be paid for photocopying. The Supreme Court ruled that as long as the materials were used for

research or study purposes, no fees were owed the publishers.

[246] From that, the grievor somehow extrapolated that the Supreme Court of Canada allowed copying in the context of providing advice. She did not seem to understand that photocopying has nothing to do with providing a memo for which the employer pays an employee to make a legal analysis.

[247] The grievor argued before me that all the respondent's decision makers had largely ignored her arguments about plagiarism, namely, Mr. Fothergill (who imposed the written reprimand), Ms. Moore (who imposed the one-day suspension), Mr. Bickert (who imposed further suspensions and the termination), and Johanne Bernard, the assistant deputy minister and chief financial officer (who wrote the final-level responses for all the grievances).

[248] On the contrary, I find that those decision makers did indeed consider the grievor's arguments but found that they had no basis in law. I agree.

[249] The issue in plagiarism is not the act of copying per se. The issue is taking credit for work that one has not done. The grievor does not seem to understand the importance of a lawyer providing her own opinion, after doing her own research, and indicating clearly that she or he is not the author of ideas borrowed from someone else.

[250] The grievor insisted on the fact that there is no written rule anywhere prohibiting plagiarism. She did not seem to think that integrity, one of the values promoted by the DOJ's *Code of Ethics and Values*, includes being honest about one's work. Instead, she argued forcefully that the Treasury Board's *Code of Discipline* requires rules to be clear and spelled out; if they are not, then employees will not know they are breaching them.

[251] The grievor argued that the respondent's position on proper attribution and citation was incoherent, and therefore, discipline could not be imposed. She illustrated the incoherence as follows. In the written reprimand, Mr. Fothergill stated that the second memo, marked as a draft and indicating that parts had been borrowed from colleagues to be properly attributed before the final version, did not warrant a reprimand. In the final decision on the grievance for the one-day suspension imposed for plagiarizing the "Who wins" paper, Ms. Bernard wrote that all citations were to be included, even if the document was in draft format.

[252] This partial reading of Ms. Bernard's decision is the source of confusion, not the respondent's position. Ms. Bernard wrote the following:

…

> *When a document is completed and provided to management for review (even if it is in draft format), it is expected that all citations will be included at that time, as the sources used must also be reviewed and assessed to determine the validity of the legal conclusions.*
>
> *I agree with management's conclusion that you did not intend to add further citations to the document.*

…

[253] Indeed, nothing in the confidentiality memo resembled the careful disclaimer of the second memo, which Mr. Fothergill considered. He wrote the following in his letter of reprimand:

…

> *With respect to [the second memo], I note that the document was marked "DRAFT" and included the following disclaimer: "Please note that some of my findings have been drawn from memos prepared by justice colleagues who have provided legal opinions on the same subject. Their names will be mentioned at the end of the document (this is still a draft; I will add citations where appropriate)." While I have reservations about the manner in which you prepared this document, I am not satisfied that it merits a finding of misconduct.*

…

[254] I find no discrepancy in the respondent's position condemning plagiarism.

[255] I find it curious that in cross-examination, the grievor strenuously denied copying the "Who wins" paper for the purposes of her confidentiality memo. After all, the gist of her arguments to the respondent, to the Board in the submissions filed with the grievance, and again in her oral argument, had been that plagiarism no longer exists and that both the Supreme Court of Canada and the *Copyright Act* allow for it, as explained earlier.

[256] As stated by the respondent through the grievor's managers, plagiarism does exist, and it is wrong. Stealing is wrong. Taking credit for another's work, without proper attribution, is wrong. Providing legal analysis as one's own, when it has been

copied from an unidentified (and unverified) source, is wrong. With a degree in law, after six years of university studies, the grievor should know that.

[257] The written reprimand was warranted, to sanction the misconduct.

2. The one-day suspension

[258] The one-day suspension imposed by Ms. Moore because of the second plagiarism incident was met with considerable anger on the part of the grievor. I cannot see how she could argue at this point that there was no rule against plagiarism. Mr. Fothergill's written reprimand and Ms. Moore's letters of expectations both provided clear directions. Apparently, the grievor did not recognize any wrongdoing on her part. At the hearing, she denied copying others' work. She argued *Cojocaru* and *CCH* with Ms. Moore. And before me, she insisted that Ms. Moore's investigation and sanction were clear examples of harassment and reprisal because she had started a complaint process against Ms. Moore and had made a formal complaint against Mr. Fraser.

[259] Investigating and punishing plagiarism, after a first warning has already been given, is not harassment. It is part of management. The grievor had received fair warning that any copied material had to be sourced. Imposing discipline for the second plagiarized memo was not a reprisal; it punished behaviour that had already been clearly marked as unacceptable.

[260] One of the grievor's arguments on the unfairness of the suspension had to do with the delay between the date on which she submitted the memo (December 2, 2013) and the date of the discipline measure (October 7, 2014). In her submissions, she omitted the fact that she was away on leave from January 14 to June 16, 2014. Ms. Moore first gave her notice that the memo seemed defective in early July 2014. The grievor refused to cooperate in the investigation. She also refused to attend the disciplinary meeting, which she was invited to attend with a representative of her choice.

[261] I find the one-day suspension was warranted. I made a factual finding that the misconduct occurred, and since this was the second occurrence, a one-day suspension was reasonable.

3. The two-day suspension

[262] The two-day suspension was imposed for the grievor's lack of compliance with

the letters of expectations. In the letter of suspension, Ms. Moore lists the expectations that have not been met: being absent without a leave request or a medical certificate, late arrivals, and not providing proper notice of her absences or indicating the anticipated return times or dates.

[263] The grievor provided some examples of her notifications, but they served only to confirm the respondent's position. When she did notify that she would be absent, it was often done just a few minutes before her starting time. She did not present evidence contrary to the several dates that the respondent listed on which she had been absent. Her main response was that the monitoring constituted harassment.

[264] I find that the respondent had reason to impose discipline in an effort to impress on the grievor the seriousness of the letters of expectations. I find the two-day suspension was reasonable.

4. The five-day suspension

[265] Mr. Bickert imposed the five-day suspension because despite the earlier suspension, the grievor was still not complying with the letters of expectations and was still not advising Ms. Moore of her arrivals and departures. He noted that the grievor consistently refused to take any responsibility for her actions, instead blaming her manager for harassment and reprisal.

[266] The grievor still responded that the expectations constituted continued harassment.

[267] At this point, it seems that the respondent was trying to get through to the grievor that her behaviour needed to change. It did not. In an attempt to signify management's disapproval, a disciplinary measure was warranted. Given the continuation of the problematic behaviour, the five-day suspension was not excessive.

5. The 10-day suspension

[268] Mr. Bickert imposed this sanction after considering the grievor's behaviour when she was notified of her one-day suspension for plagiarism in October 2014. Two elements were striking: the allegation that the grievor called Ms. Moore a bitch, and the fact that the grievor sent an email stating she had no intention of complying with the one-day suspension.

[269] On a balance of probabilities, Mr. Bickert found Ms. Moore's version, of twice

hearing the grievor say "bitch" as Ms. Moore was walking by her office, more credible than the grievor's denial. The refusal to serve the suspension was undeniable, as the grievor emailed it to Ms. Moore and sent it within two minutes of receiving notice of the suspension.

[270] I agree with Mr. Bickert's assessment of the situation, for the following reasons.

[271] It was completely unacceptable for the grievor to refuse the suspension. It was not for her to decide whether to serve it; it was a direct order, and not obeying it was insubordination. She could certainly have grieved it and referred it to an impartial decision maker. She could not decide on her own that it was unfair and that it was not to be served. At no point did she concede that she had been wrong to send that email. On the contrary, she blamed Ms. Moore for calling Security to ensure that she would not have access to the office the next day.

[272] This insubordinate attitude colours my appreciation of whether the grievor did indeed twice say "bitch" as Ms. Moore walked by. She denied it completely at the hearing. Ms. Moore maintained that she did hear it. The grievor's reaction was to say there were no witnesses. That was a fair point of evidence, but it is irrelevant to whether or not it happened. I have no reason to doubt Ms. Moore's credibility and much reason to doubt the grievor's. On a balance of probabilities, I find that both disrespectful acts occurred. Given the profound insubordination underlying a refusal to accept a penalty imposed by one's employer, as opposed to grieving the disciplinary measure, as well as the manifest disrespect in insulting Ms. Moore, I find the 10-day suspension was warranted.

6. The 20-day suspension

[273] By this time, it is understandable that the grievor felt victimized. In her words, nothing satisfied the respondent; she could do nothing right, and management seemed bent on ending her employment.

[274] The perception is understandable; however, the explanation for the respondent's behaviour is not harassment based on one or more prohibited grounds of discrimination or reprisal because of the harassment complaints. Rather, the respondent was growing increasingly frustrated by an employee who could not accept being told what to do, as numerous examples attested to in the evidence.

[275] The letter provided several dates of late arrivals, which the grievor did not

specifically deny. She would signal her arrival before she had entered her office. She stated that arriving at work was arriving in the building.

[276] When Mr. Henderson acted for Ms. Moore, the grievor refused to provide notice of her arrivals and departures, which she did not deny. She felt insulted that Mr. Henderson would supervise her, since they were at the same substantive level. The suspension also dealt with the disrespectful tone she used with Mr. Henderson. At the hearing, she continued to insist that her tone had not been disrespectful.

[277] More important to my mind is the fact that the grievor was refusing work. She was given assignments that she simply would not do. At the time, and again at the hearing, her defence was that the assignments might be used against her. Other times, she refused to do work that she considered was below her qualifications. Ms. Moore had told her that her work was confidential and that it should not be shared outside the office. According to the grievor, that prevented her from informing her bargaining agent as to how she was being harassed.

[278] The grievor's argument to defend her right not to work is unsustainable. It is understandable that work within the DOJ is confidential and is not to be shared unless management allows it. A fear of unfair assessments could certainly have been shared with her bargaining agent and discussed at a tripartite meeting. There was no need to share confidential information with the bargaining agent to protect her rights.

[279] The refusal to do work was incomprehensible, given that she often complained that she did not have enough work. It is also clear insubordination to refuse to do work that the employer asks for that is part of the unit's work and that is expected of team members.

[280] The respondent cited a number of decisions to support its exercise of discipline (*Riche v. Treasury Board (Department of National Defence)*, 2013 PSLRB 35; *Bétournay v. Canada Revenue Agency*, 2012 PSLRB 128; and *Charinos v. Deputy Head (Statistics Canada)*, 2016 PLSREB 74). I agree with the reasoning in those decisions. The facts in this case speak to insubordination, disrespect, and a complete unwillingness to modify problematic behaviour.

[281] The grievor did not honour her time obligations, did not comply with stated expectations, refused work, and was disrespectful. The respondent continued imposing increasing measures of discipline to signal how serious the situation was. At

no point did the grievor ever express that she understood the respondent's concerns, both during her employment and at the hearing.

[282] The grievor submitted that the master-servant employment relationship is no longer current. The employer-employee relationship is much more egalitarian, according to her, and should be marked by mutual respect.

[283] To a certain extent, I agree. I also agree that the respondent's micromanagement of her attendance, especially in 2015, must have felt rather unpleasant. That said, she was the author of her own misfortune. She created the attendance problem that the respondent attempted to solve. She refused direct orders, without good reason.

[284] She refused work on the pretext that it could be used against her. It would have been had it been plagiarized again. The solution was simple: avoid plagiarism. That does not seem to have crossed her mind.

[285] How can an employment relationship continue if the employee refuses to follow directions? I see the 20-day suspension as a final warning. The respondent still sought to impress the importance of complying with its expectations and was forced to resort to increased discipline. Given the difficulty in having the grievor account for her time and her absences, given her refusal to carry out tasks that were assigned to her, given the amount of previous discipline already imposed that had failed to change her behaviour, I find the suspension was reasonable.

7. Termination

[286] This brings me to the termination letter. Its immediate cause is what the respondent terms the culminating incident – the grievor simply refusing to conform to the directives in the letters of expectations. This refusal is communicated to the respondent twice, by way of emails dated April 16 and October 22, 2015.

[287] The letter states: "Given all the circumstances, I view this instance of insubordination as the culminating incident in a long history of unprofessional and insubordinate behaviour". It concludes that termination is an appropriate disciplinary measure.

[288] "Insubordination" is defined clearly in *Cavanagh v. Canada Revenue Agency*, 2015 PSLREB 7, in which the Adjudicator writes the following at paragraph 239:

[239] A finding of insubordination requires proof of four

> *things: that the employer gave an order; that the order was clearly communicated to the employee; that the person giving the order had the proper authority to do so; and that the grievor did not comply on at least one occasion….*

[289] All those conditions are met in this case. The letters of expectations spelled out clearly what was expected of the grievor, and as the direct manager, Ms. Moore had the authority to impose them. It was established that the grievor did not comply with the requirement to inform Ms. Moore of her arrivals and departures and that she refused to in two emails. Although the grievor argued that she did try to comply but to no avail, the evidence shows that very often she gave notice of her absences a few minutes before or after her scheduled arrival time, did not state when she would return, and failed to request leave, all of which were stated conditions in her letters of expectations. Her argument was that no one else had to comply with such directions, with which Ms. Moore agreed. The conditions had been imposed after unsatisfactory attendance, tardy arrivals, and unauthorized leave.

[290] The other question to be asked is whether the termination is a proportionate penalty for the misconduct.

[291] The termination did not arise from a single incident. It truly was the culmination of an increasingly difficult relationship with the grievor. Progressive discipline was imposed to signal to her that her behaviour needed to change. It was not only lateness and attendance; it was also refusing to do assigned tasks.

[292] The grievor simply refused to comply with the directions she was given. She was insubordinate to the point of being unmanageable. I find that the termination was warranted.

V. Conclusion

[293] I find that the respondent established the misconduct underlying all the disciplinary measures, up to and including the termination. The grievor ended her employment with the DOJ by refusing to work and to obey direct orders, without any discernable good reason.

[294] The grievor's main argument against the discipline and her termination was that it was entirely motivated by discrimination, because she is a black Haitian woman, and by reprisal, because she made complaints against her managers. According to her, the PREAs were unsatisfactory not because of her performance but because of

discrimination, harassment, and reprisal.

[295] Throughout the hearing and in her submissions, the grievor never addressed her lateness issues or absences without leave. She clearly did not understand the issue of plagiarism, despite clear direction. She did not acknowledge that refusing to do work caused a problem for her employer. She never stopped to wonder what the deficiency in her performance might be, as stated by her managers. She saw management as being bent on harassing and discriminating against her.

[296] The evidence showed otherwise. In painstaking detail, it showed that the grievor's performance was not up to par, that she had problems respecting her hours of work, that she became increasingly insubordinate in refusing work assignments, and that she simply refused to listen to anyone, including those who sought to help her, such as Mr. Bickert and Ms. Matteau. There were objective reasons for the discipline and the termination that had to do with an employee not meeting clear expectations.

[297] As of her termination, the grievor had not requested accommodation based on disability, and there is no allegation of discrimination on the basis of disability before me. There was no formal harassment complaint, as she had not completed the necessary information. She wanted another position, but presented little evidence of her efforts to secure employment elsewhere in the public service. In the absence of a disability requirement for accommodation, and in the absence of a formal harassment complaint, the respondent had no obligation to seek other employment for her.

[298] As of the termination, the grievor no longer reported to Ms. Moore, the focus of a large part of her harassment complaints. Yet, she insisted on her right to not follow directions.

[299] In the end, the respondent had every right to conclude that the employment relationship was no longer viable.

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

(The Order appears on the next page)

VI. Order

[301] The grievance is dismissed.

[302] Exhibit G-29 is sealed.

April 08, 2019.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board