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Citation: 2019 FPSLREB 46

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

JO ANNE ST-DENIS

Grievor

and

DEPUTY HEAD
(Department of Public Works and Government Services)

Respondent

Indexed as
St-Denis v. Deputy Head (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: George Walker, counsel

For the Respondent: Marc Seguin, counsel

Heard at Ottawa, Ontario,
February 25 to 28, 2019.

Background

[1] Jo Anne St-Denis ("the grievor") joined the federal public service in 1998 as an occupational health and safety coordinator. She was still with the Occupational Health and Safety directorate of Public Services and Procurement Canada ("PSPC", or "the employer") when she went on sick leave without pay on October 17, 2012. She has never returned to work.

[2] A medical certificate dated May 16, 2013, indicated to the employer that the grievor would not return to work in the foreseeable future. Accordingly, on June 25, 2013, it sent her a letter outlining her options, namely, seeking approval from Health Canada for medical retirement or resigning from the public service.

[3] On September 30, 2013, the grievor's psychiatrist submitted a letter to the employer indicating the grievor would be able to return to work within six months. In response, the employer approved her sick leave without pay until March 30, 2014, and requested a fitness-to-work evaluation (FTWE) in preparation for her return to work.

[4] On April 2, 2014, the employer again extended the grievor's authorized sick leave, to September 30, 2014.

[5] On September 18, 2014, the employer sent a letter seeking additional information on the grievor's medical situation, asking her to return to work, seek medical retirement, or resign.

[6] On October 2, 2014, the grievor's legal counsel advised that the grievor's physician was in the process of issuing an updated medical certificate. When nothing had been received by October 23, 2014, the employer sent another request for a medical certificate. The grievor's legal counsel replied the same day with a medical report dated September 10, 2014, from the grievor's physician, indicating that there was "… no plan for return to work in the foreseeable future."

[7] On November 7, 2014, the employer sent another letter outlining the options available to the grievor. Since a return to work was not forthcoming, she was reminded of her option to either resign or seek medical retirement. In the letter, she was advised if a response was not received by December 1, 2014, her employment could be terminated.

[8] On March 26, 2015, the employer sent a follow-up letter, reminding the grievor of

her options and stating again that a failure to act could result in termination.

[9] The grievor did not choose an option available to her. On April 22, 2016, the Deputy Head of PSPC ("the respondent") terminated her employment for incapacity, pursuant to s. 12(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*).

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

Grievance

[11] On May 3, 2016, the grievor's grievance was received by PSPC. She claimed that she was ill as a result of being bullied, harassed, and discriminated against by the employer. She stated that the decision to terminate her employment for incapacity while she was on sick leave without pay was unfair.

[12] According to the grievor, the employer's communications with her from the time she went on sick leave without pay as of October 17, 2012, to her termination on April 22, 2016, amounted to bullying, harassment, and discrimination.

[13] The grievance was heard at the final level of the grievance process on June 15, 2016, and on July 25, 2016, the Acting Assistant Deputy Minister, Human Resources Branch, PSPC, denied her grievance.

[14] The matter was referred to the Board for adjudication and was heard before me in Ottawa, Ontario, from February 25 to 28, 2019.

Summary of the evidence

[15] The vast majority of the evidence tendered at the hearing consisted of correspondence between the employer and the grievor. The employer's primary point of contact was Tiffany Hong, the acting manager of occupational health and safety.

[16] Ms. Hong testified to having been the grievor's supervisor for only a few weeks

before the grievor left the workplace on sick leave on October 12, 2012.

[17] When the grievor did not show up for work on Monday, October 15, 2012, Ms. Hong telephoned her and learned she was unwell, had an appointment with a doctor, and would not be in to work that day. In fact, she did not return to work at all. She had sufficient sick leave to see her through to October 16, and on October 17, 2012, she began a period of sick leave without pay.

[18] On October 26, 2012, the grievor received an email in her home account from her employer about the nature of disability benefits and the duties and responsibilities of both managers and employees during extended sick leave.

[19] On November 2, 2012, Ms. Hong emailed the grievor at her home email address, acknowledging receipt of a medical certificate from her personal physician, Dr. Bidari. That certificate is dated October 25, 2012, and it reads as follows:

> *I strongly recommend for* [the grievor] *to have a* ***long*** *break from work, she shouldn't be harassed continuously on the phone or by e-mail. Any communication about* [the grievor]*'s health should be sent to my attention.*
>
> *This is to certify that I assessed* [the grievor] *a 2nd time today. A first assessment was done on the 15th of October 2012 and I did put* [the grievor] *on sick leave for 03 weeks. On today's assessment,* [the grievor]*'s health deteriorated a lot, she suffers from a major depression and the harassment from work is making it worse.*
>
> [Emphasis in the original]

[20] Ms. Hong testified to being mystified by the phrase "harassment from work". She did not know what the doctor was referring to.

[21] In her November 2 email to the grievor, Ms. Hong advised, "… as your Acting Manager, I do need to maintain a certain level of contact with you while you are on leave." Ms. Hong added, "since you were put on LWOP [sick leave without pay], you may be eligible for employment insurance sickness benefits through Service Canada." Ms. Hong also included the name and contact information for the grievor's compensation advisor for the purposes of providing information on disability insurance benefits.

[22] On November 23, 2012, Ms. Hong again emailed the grievor at her home account. She opened with, "Hope you are doing better." She advised the grievor she

would be away from the office and provided contact information for the person taking her place. She closed with, "Should your absence be extended, please ensure that a new medical certificate is provided."

[23] The grievor sent Ms. Hong a medical certificate from Dr. Bidari dated May 16, 2013, which reads as follows:

> *Please communicate only with me (Dr. Bidari),* [the grievor]*'s Family physician, for any update about her health condition or plan for return to work. please don't communicate directly with* [the grievor].
>
> *This is to certify that* [the grievor] *will not be working in the foreseeable future. Her medical condition is not improved, she is followed regularly at Montfort Hospital with a psychiatrist Dr. Tempier. She will remain on term leave.*

[24] On June 25, 2013, Ms. Hong sent a letter addressed to the grievor to Dr. Bidari's office. It was a reply to the medical certificate, which stated the grievor would not return to work in the foreseeable future. Ms. Hong included some information on the "Employee and Organizational Assistance Program" as well as contact information for a compensation specialist. She went on to write, in part, the following:

> *The Directive on Leave and Special Working Arrangements indicates that if it is clear that a person will not be able to return to duty within the foreseeable future, the person with the delegated authority is to consider granting such leave without pay for a period sufficient to enable the person to make the necessary personal adjustments and preparations for separation from the core public administration on medical grounds.*
>
> *In light of the above, I ask that you consider the following options available to you.*
>
> *You may seek Health Canada's approval for a medical retirement or alternatively, submit your resignation.…*

[25] Ms. Hong instructed the grievor to communicate her decision, in writing, no later than July 31, 2013.

[26] Ms. Hong did not hear from the grievor, so she sent a follow-up letter to Dr. Bidari on August 22, 2013, stating, "[n]o response was received …". She advised Dr. Bidari of the following:

> …
>
> *Please note that management must be able to communicate with an employee on work related matters. The letter was*

> *sent to you because you requested that the employee not be contacted directly. Therefore, I am writing to inform you that if no response is received by* ***September 13, 2013,*** *I will be sending correspondences directly to the employee …*
>
> …
>
> [Emphasis in the original]

[27] By mid-September, Ms. Hong had still heard nothing from either the grievor or Dr. Bidari, so by registered mail, she sent a letter to the grievor dated September 16, 2013, which began as follows:

> *This letter is sent as a follow-up letter to the attached letters sent to you through your physician's office. No response was received to the attached letters. Your physician had asked that the employer communicate with you through her. Given that the employer is receiving no response to correspondence, I'm left with no choice but to contact you directly. Please note that during an employee's lengthy absence, an employer must be able to communicate with the employee on work related matters.*
>
> …

[28] In that letter, Ms. Hong restated the information she had previously provided concerning LWOP and medical benefits. She added the following:

> *If your medical condition has improved and you will be able to return in the foreseeable future, please have your physician certify when you will be fit to return to work and any functional limitations requiring accommodation in the work place [sic]. This new medical certificate, if applicable, must be provided to me by* ***October 10, 2013.***
>
> [Emphasis in the original]

[29] In closing, Ms. Hong repeated the grievor's option to resign or seek medical retirement if she could not return to work. She also repeated the contact information previously provided for the Public Service Pension Centre, the Employee and Organizational Assistance Program, and the compensation specialist.

[30] On September 19, 2013, the grievor emailed Ms. Hong, acknowledging receipt of the September 16, 2013, letter and adding, "I am researching the options."

[31] Ms. Hong's emailed reply was brief: "Thank you for advising me that you have received the letter. Please feel free to contact me if you have any further questions."

[32] Ms. Hong testified to receiving a letter from Dr. Imen Ben Cheikh, a psychiatrist with the Montfort Hospital in Ottawa, about the grievor. The letter, dated September

30, 2013, advises of the grievor's possible return to work within six months and suggests a change to the location of her workplace due to stress related to the work environment.

[33] On October 4, 2013, Ms. Hong sent a letter to the grievor at her home address, acknowledging the contents of Dr. Ben Cheikh's medical certificate suggesting a return to work in six months' time. As a result, Ms. Hong advised the grievor that her sick leave without pay had been extended to March 30, 2014. In the letter, Ms. Hong requested that the grievor undergo an FTWE with Health Canada, to clarify her functional limitations. In particular, Ms. Hong stated that she needed clarification on the suggestion that the grievor return to work in another "department". Ms. Hong testified to the employer's inability to accommodate the grievor without a clear indication of the functional limitations, and the FTWE was to provide that clarity.

[34] On October 10, 2013, Danielle Perron-Roach, a social worker with the Montfort Hospital, wrote to Ms. Hong, confirming the possibility of the grievor's return to work in six months. However, the letter stated as follows:

…

> *… we do not recommend that she consent to undergo your Fitness to Work Evaluation with Health Canada. The results of such an evaluation would not be deemed representative of her full capacities and could not be an effective predictor of her functional capacity at the time of her return to employment.*

…

[35] Ms. Hong replied a week later. On October 17, 2013, she wrote Ms. Perron-Roach about the FTWE, advising that several months can pass between the time the appointment is requested and the final results are received, which can delay a return to work. She explained the rationale behind the FTWE as follows:

> *… Health Canada evaluations are conducted by qualified physicians employed by Health Canada hence the communication of medical information is done between health care professionals. In the end, the employer only receives an assessment of fitness to work (yes or no) and functional limitations.…*

[36] In that letter, Ms. Hong again included a consent form for an FTWE. She repeated that the grievor's sick leave had been extended to March 30, 2014, and stated, "It is expected that she will provide an updated prognosis for return to work before this date."

[37] On February 6, 2014, Ms. Hong wrote to the grievor, again by way of registered mail to her home address, reminding her that her sick leave without pay was authorized only to March 30, 2014. She stated, "… it is important that you provide us an update regarding your fitness to work before **March 14, 2014** [emphasis in the original]." Ms. Hong again described the FTWE as a means of clarifying the grievor's functional limitations, stating, "Clarification of your functional limitations will be critical if you are unable to return to your substantive position." Included again was a consent form to undergo an FTWE. In closing, Ms. Hong referred the grievor to the departmental Employee Assistance Program and to the grievor's bargaining agent as possible sources of assistance or support.

[38] The next item of correspondence in the series of events is a letter dated March 14, 2014, from a lawyer, Ronald J. Boivin, LL.B., to Ms. Hong and to Ruth Rancy, the director of occupational health and safety.

[39] The letter accuses both Ms. Rancy and Ms. Hong of a relentless program of bullying and harassment of the grievor while she was on sick leave. It accuses Ms. Rancy of having "aggressively persecuted [the grievor] with a litany of Machiavellian machinations all with a view to eliminating what she perceives as threats to her own career path and the little empire she is building."

[40] The letter questions Ms. Hong's experience and qualifications and suggests as follows:

> … [that she] *was elevated to her current acting position largely as a result of Ruth's scheming. Tiffany's youth, inexperience and willingness to please management made her a perfect stooge to act upon Ruth's directives and allowing Ruth to camouflage her malicious actions.*

[41] Mr. Boivin's letter continues in that manner for five single-spaced pages. On page two, it states as follows:

> *Tiffany Hong, at Ruth's behest, has maliciously subverted her role as acting Area Manager to perpetuate a course of unrestrained harassment and bullying of* [the grievor]*.The intent of these actions appears to be maliciously motivated and quite deliberate an effort to further injure* [the grievor]*'s health, prevent her from recovering from her illness, to harass her to the point where she offs her own career, to set her up for a termination or disadvantageous job change by documenting a file with false or misleading information. It is clear to all including the health professionals involved in this case that the government's policies and procedures relating to illness and disability are being put to an improper purpose*

> *and used as a club to beat up upon an innocent victim at the time when she is most vulnerable.*
>
> …
>
> *The abuse is being perpetrated under the guise of carrying out policies related to sick leave and disability. It comes in the form of a wide variety of demands for repeated certificates, demands for fitness to work evaluations ….*

[42] Mr. Boivin insisted upon being the point of contact from that point on for communications involving the grievor.

[43] Ms. Hong testified to being shocked at the contents of Mr. Boivin's letter because she felt that her interactions with the grievor had always been respectful and positive. She did not view her behaviour as amounting to harassment and did not take the harassment accusations seriously. Her reaction was to involve Annick Ravary, counsel with the employer's legal services unit. Ms. Hong knew that she had to continue to engage the grievor in employment-related discussions because issues were still unresolved. Ms. Hong asserted the tone of the letter and the accusations it contained did not affect her approach to the matter; the only difference was that Ms. Ravary would be involved.

[44] Ms. Ravary, who did not testify at the hearing, wrote a reply to Mr. Boivin. Her letter, dated March 19, 2014, restated the purpose of Ms. Hong's February 6, 2014, letter, namely, to determine an expected return-to-work date for the grievor, and if so, the need to address the accommodation issue. Ms. Ravary added the following:

> *If your client is still incapacitated, my clients require that she provide a medical certificate to substantiate her absence from the workplace after March 31, 2014.*
>
> *If the department obtains satisfactory information, there will be no need at this point in time to request that your client undergo a Health Canada assessment.*
>
> …

[45] With respect to the harassment and bullying issues that had been raised, Ms. Ravary wrote as follows:

> *The department takes seriously allegations of harassment and discrimination. Should your client wish to address issues relating to harassment or discrimination, or any other type of lack of respect in the workplace, formal and informal resolution options are available for her. In order to obtain more information on these options, your client may contact* [Mr. A.P.]*, Manager, Labour Relations and National*

Harassment Prevention Coordinator ….

[46] Ms. Ravary indicated at the bottom of her letter that Mr. A.P., the manager of labour relations and the national harassment prevention coordinator, had been copied on it.

[47] Mr. Boivin replied to Ms. Ravary's letter requesting a medical certificate on March 28, 2014. Attached to his letter was a medical certificate from Dr. Bidari stating that the grievor would be absent from work for medical reasons from March 31 to September 30, 2014.

[48] Consequently, the employer approved another extension of the grievor's sick leave without pay to September 30, 2014. In the letter to Mr. Boivin advising him of the extension, Ms. Ravary stated as follows:

…

> *Please be advised that prior to September 30, 2014, my clients will seek medical information to either extend your client's absence from the workplace or obtain confirmation that she can return to work. To that effect, could you please advise if my clients should communicate with Dr. Bidari or yourself?*
>
> *On a last note, you make reference to Dr. Cheikh's medical note of September 30, 2013. If accommodation is required upon* [the grievor]*'s return to work in October, my clients will need clarification of your client's limitations.*

…

[49] Mr. Boivin responded on May 20, 2014, to the accommodation issue. He stated as follows:

…

> *The accommodation* [the grievor] *needs is as follows:*
>
> *Immediate permanent transfer to a Federal Government Department (not private agency, no possibility of transfer back to Public Works) in her proper position with similar job description* [*sic*] *as she currently has. The location has to be agreeable. Some possibilities may be Environment, Labour.*

…

[50] On June 9, 2014, Ms. Ravary replied as follows:

> *Thank you for your letter of May 20, 2014. While we appreciate Dr. Imen Ben Cheikh's recommendation of September 30, 2013, in order for PWGSC to be able to accommodate* [the grievor], *the first step is to know her*

> *functional abilities, limitations or restrictions vis-à-vis the physical and cognitive demands of her work. PWGSC will also need her prognosis, i.e. whether any restrictions or limitations identified are considered temporary or permanent. Once this information is obtained, PWGSC will be in a position to determine, along with* [the grievor], *how these limitations and/or restrictions can be accommodated. As you know, the duty to accommodate is a shared responsibility and PWGSC will work closely with your client, her treating medical professional(s) and the insurance's return to work coordinator.*
>
> *You have also indicated in your letter that PWGSC made no effort to accommodate your client once it received Dr. Cheikh's letter of September 30, 2013. The letter indicated «Je recommande un changement de milieu de travail comme un transfert vers un autre* département, *pour minimiser les risques de décompensation lors du retour au travail ». First, this is not a medical limitation or restriction but rather an accommodation measure. Second, "département" in French does not have the same meaning as in English. If the recommendation was a transfer to another department, the note should have read "vers un autre ministère". Another "department" for my clients means another section of PWGSC.*
>
> *In addition, while PWGSC has the duty to accommodate your client's functional limitations/restrictions, this obligation does not necessarily expand to the entire public service….*
>
> …

[51] Ms. Ravary cited the case of *Fontaine v. Deputy Head (Department of Fisheries and Oceans)*, 2012 PSLRB 91, for the proposition that "[d]emanding that a department appoint one of its employees to a new position in another department is not only excessive but also clearly contrary to the *PSEA*."

[52] Ms. Ravary added that a Health Canada assessment may yet be required to assess the grievor's accommodation issues.

[53] Finally, Ms. Ravary repeated the need to bring up harassment allegations as soon as possible. She provided specific instructions as to how to do it and again included the name and contact information for Mr. A.P.

[54] On September 18, 2014, a couple of weeks before the grievor's authorized sick leave was due to expire, Ms. Ravary sent another letter to Mr. Boivin because nothing had been heard. She stated as follows:

> *… While sick leave without pay is granted in order to provide continuity of employment during an extended period of sick*

> *leave, it cannot be granted indefinitely. As you may already know, the Treasury Board's* Directive on Leave and Special Working Arrangements *requires that the employer re-examine all cases of leave without pay due to illness or injury in the workplace to ensure that continuation of leave without pay is warranted by current medical evidence. The* Directive *also provides that these situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances. Your client has been on leave without pay since October 15, 2012.*
>
> …

[55] Finally, Ms. Ravary restated the options open to the grievor should her period of absence extend beyond October 15, 2014, including returning to work, retiring on medical grounds, or resigning from the public service.

[56] Mr. Boivin responded to Ms. Ravary's letter on October 2, 2014, stating Dr. Bidari was in the process of sending a medical certificate. He added, in part, as follows:

> *I view most of your correspondence so far as an effort by the employer to derogate from its duty to accommodate this employee.*
>
> *Our correspondence has made it very clear that* [the grievor]*'s serious illness (depression) was the direct result of workplace harassment, bullying and discrimination inflicted upon* [the grievor] *by supervisory, management and other personnel. Not only was it precipitated by it but the harassment and bullying continued while* [the grievor] *was gravely ill to the point that medical personnel felt they had to intervene and comment on the inappropriateness of the actions against* [the grievor].
>
> *It would be a complete travesty for the employer to now try to dump the employee to try to avoid its responsibilities.*

[57] Ms. Ravary replied to Mr. Boivin on October 23, 2014, stating the employer had not yet received a new medical certificate to cover the grievor's absence from the workplace beyond September 30, 2014, and asking him to please forward a copy of the most recent medical certificate.

[58] Mr. Boivin responded that same day with a copy of a report signed and dated by Dr. Bidari on September 10, 2014. On the second page, Dr. Bidari wrote, "With regards to going back to work, the low energy level combined with the problems of cognitive functioning place significant limitations on her ability to return to work. There is no plan for return to work in the foreseeable future."

[59] On November 7, 2014, Ms. Ravary replied, noting Dr. Bidari's prognosis that there was no plan for a return to work in the foreseeable future. She noted that the insurer Sun Life had advised the employer that the grievor met the definition of "total disability" and as a result was placed on long-term permanent disability. Given her inability to return to work, her options were once again provided, namely, to resign from the public service or seek the possibility of medical retirement, subject to approval by Health Canada. Ms. Ravary requested a response to these options by December 1, 2014, and added the following:

> …
>
> *I must inform you that failure from your client to pursue this process and provide the department with her decision could lead to the consideration for a recommendation that her employment be terminated in accordance with the relevant provisions of the* Financial Administration Act.
>
> …

[60] On December 19, 2014, Mr. Boivin replied, stating the grievor "would consider the possibility of medical retirement", conditional upon receiving a retroactive upgrade of her position to the AS-06 group and level with adjustments to her compensation and pension benefits. Additionally, she wanted to buy back her pension for the time she was on maternity leave and on periods of leave without pay.

[61] Ms. Ravary responded January 8, 2015. She stated, "My client will not appoint your client to an AS-06 or entertain any settlement package outside of the parameters set in my letter of November 7, 2014." She referred the grievor to the Pension Centre for her pension concerns and closed by adding, "Although my letter of November 7, 2014 had asked for a decision on the available options before December 1, 2014, my client has agreed to extend this period to February 1, 2015."

[62] Mr. Boivin replied on January 30, 2015, with a letter repeating the bullying, harassment, and discrimination allegations. He stated, in part, as follows:

> *… My client has asked for accommodation and assistance to allow for a return to work and all requests have been denied. All you have done is repeatedly pointed to the exit and in that you have completed* [*sic*] *failed in your responsibilities to this employee.*
>
> *My client has still not made a decision.…*

[63] On March 26, 2015, Ms. Ravary acknowledged receiving that letter. Once again, she steered the grievor to the Pension Centre to deal with her pension issues. Ms. Ravary added the following:

> *I must inform you that in the absence of a decision with respect to options presented to your client in my letter of November 7, 2014, my clients will make a recommendation to the appropriate departmental authority for a termination of employment in accordance with the relevant provisions of the Financial Administration Act.*

[64] At no time did the grievor exercise any of the options open to her.

[65] Almost a year later, on February 11, 2016, the Abilities Case Manager for Sun Life advised Ms. Hong of the following:

> …
>
> [The grievor's] *medically supported restrictions are severe for her to be capable of returning to her own occupation or an alternate occupation.*
>
> …
>
> *We will not be pursing a return to work for* [the grievor] *… Based on the medical information on file we do not anticipate her condition to improve to the point where she will be capable of returning to any occupation.…*
>
> …
>
> [*Sic* throughout]

[66] In a letter sent to the grievor's home address, the employer noted her failure to choose any of the options open to her and terminated her employment for incapacity, effective April 22, 2016.

[67] In a letter dated April 20, 2016, Mr. Boivin noted that "… physician's orders prohibiting the employer from directly communicating with [the grievor] have yet again been disregarded." He added, in part, as follows:

> *The various communications that have been issued to* [the grievor] *including multiple requests that she either return to work or in some manner, resign or accept medical retirement all accompanied by a heavy handed threat of termination of her employment if she didn't. This is intimidation and discrimination based on disability and has been going on from literally the moment* [the grievor] *became ill. And just for the record,* [the grievor] *became ill as a direct consequence of being mercilessly bullied, harassed and discriminated upon* [*sic*] *by her supervisors and co-workers….*

[68] André Latreille, Acting Assistant Deputy Minister, Human Resources Branch, PSPC, testified to being the designated authority for the grievor's termination. He signed the termination-for-incapacity letter. He was aware of the bullying, harassment, and discrimination allegations repeatedly referred to by Mr. Boivin. He testified to

being unaware of any complaint ever having been filed to that effect. He testified to being satisfied that the grievor's case had not been handled any differently than any other similar case of long-term disability had been and that he was satisfied that the matter had been handled within the parameters of law and policy.

[69] Mr. A.P. did not testify, but all the witnesses, including the grievor, confirmed that no formal harassment, bullying, or discrimination complaint was ever brought to his attention.

[70] Ms. Hong and Ms. Ravary both testified to the handling of the grievor's file as having been consistent with what they knew and what they were told was the existing law and policy with respect to long-term disability cases. They both testified that the grievor's case was handled no differently than any other similar case.

[71] The grievor admitted that the tone and content of the employer's correspondence had not been disrespectful or threatening. She agreed that the communications were consistently professional in their tone and content. However, they had been upsetting to her because they had come from what she referred to as a "toxic work environment".

[72] The grievor testified to an incident in a dispute-resolution setting that occurred before she went on sick leave that had been particularly upsetting to her. Ms. Rancy supposedly witnessed it but testified to having no recollection of it.

Submissions of the employer

[73] Counsel for the employer focused on the simplicity of the issue at hand. Was it reasonable for it to terminate the grievor's employment for incapacity, given that there was no possibility of her returning to work in the foreseeable future?

[74] It is settled law that once an employee produces evidence of a disability, the employer has a duty to accommodate the employee, to the point of undue hardship. The following is from the Supreme Court of Canada's case of *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)* (*Hydro-Québec*), 2008 SCC 43 at para. 19:

> *[19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is*

> *no longer able to fulfill [sic] the basic obligations associated with the employment relationship for the foreseeable future.*

[75] The question for the employer then becomes, what does the "foreseeable future" mean? Counsel for the employer turned to the case of *Maher v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 93, in which, at paragraph 46, the Board Member cites page 32 of *McCormick v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26274 (19950918), [1995] C.P.S.S.R.B. No. 92 (QL), as follows:

> *[46]* … The "foreseeable future" must be defined in keeping with the circumstances of each case and may vary depending on the area of law concerned… I am of the opinion that, after close to two years of absence a six-month period could reasonably constitute the foreseeable future….

[76] Counsel for the employer submitted that applied to the facts of this case, the question becomes whether the employer acted reasonably when it was presented with the information supplied by the grievor's doctors.

[77] When, on May 17, 2014, the grievor's personal physician wrote that there was no plan for a return to work in the foreseeable future, the employer's approach was reasonable. As soon as that prognosis seemed to change, in September 2013, when Dr. Ben Cheikh suggested the possibility of a return to work in six months' time, the employer again acted reasonably by extending the grievor's period of sick leave without pay and seeking information on her functional abilities and limitations, to assist in the accommodation process.

[78] The employer sought clarity in determining the grievor's functional limitations. It specifically referred to accommodation issues that her lawyer had mentioned. The employer asked for an FTWE three times, to assist in the accommodation process. All were flatly rejected.

[79] Then, on October 23, 2014, when the grievor's lawyer submitted a medical certificate from the grievor's physician that again stated that there was no plan for a return to work in the foreseeable future, the employer reacted reasonably. Despite making multiple requests for the grievor to exercise her options, and despite providing clear warnings about the possibility of termination should she make no choice, the grievor did not exercise any of the options open to her.

[80] Counsel for the employer submitted that under the circumstances, it was reasonable for the employer to terminate the grievor's employment for incapacity

reasons.

[81] Far from being examples of harassment, the employer's numerous items of correspondence were administrative and professional in tone and content and were designed to help the grievor make difficult decisions.

[82] Counsel for the employer emphasized the importance of a multi-party inquiry into an accommodation. The Supreme Court of Canada's case of *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, under the heading "Duty of Complainant" on page 994 as follows, is clear authority for that proposition:

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

[83] Counsel for the employer repeated the grievor's failure to even attempt to address the employer's legitimate questions about her functional limitations. In the absence of an FTWE, her physicians could have engaged in meaningful dialogue about functional limitations, but no such dialogue was forthcoming.

[84] Counsel for the employer concluded his submissions by referring to cases that stand for the proposition that the duty to accommodate does not imply indefinite retention. If no return to work is forecast in the reasonably foreseeable future, keeping the position open amounts to undue hardship; see *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24 at para. 95, as follows:

> *[95] The duty of accommodation does not require that employers keep employees who are permanently incapable of performing their jobs on their workforce indefinitely* (Desormeaux v. Ottawa (City), *2005 FCA 311, at para 21).*

> *The grievor has provided no evidence to contradict the conclusion that she is incapable of performing her duties for the "foreseeable future"* (McCormick) *nor any evidence that she is able to return to work "within a reasonable time"* (McGill University Health Centre). *In my view, "foreseeable future" and "reasonable period of time" amount to the same standard. Accordingly, I conclude that the employer has reached the point of undue hardship and the termination of the grievor's employment for incapacity was justified in the circumstances.*

[85] Similarly, *Gauthier v. Treasury Board (Canadian Forces Grievance Board)*, 2012 PSLRB 102 at para. 42, states in part as follows: "If the employer shows that the employee cannot work for the reasonably foreseeable future, it establishes undue hardship."

[86] Counsel for the employer concluded that thus, the grievance should be dismissed.

Submissions of counsel for the grievor

[87] This case is not as straightforward as the employer made it out to be for the simple reason that the grievor became permanently disabled because of its actions. Counsel for the grievor submitted that it effectively hounded her into permanent disability.

[88] Medical professionals expressed concern that the grievor's ability to heal would be jeopardized were she not given time and space to heal properly. Ms. Hong deliberately ignored that concern and contacted the grievor directly.

[89] Despite the employer's admission that an FTWE was not mandatory, one was insisted upon. The employer did not mention that the grievor's medical professionals could provide information on functional limitations.

[90] Dr. Ben Cheikh's letter of September 30, 2013, recommended a transfer to another department as a precondition to the grievor's return to work. Instead of following up on that recommendation, the employer chose to squabble over the English translation of the word "département".

[91] Even though the grievor faced obvious difficulties with her work environment, no effort was made to transfer her to another one. As a result, her health deteriorated even further, as both Dr. Bidari and Dr. Ben Cheikh had predicted.

[92] The employer acknowledged that the role of its disability management advisor is to help employees, but Ms. M.A., who was that advisor, did not contact the grievor at any point.

[93] Counsel for the grievor submitted that it was unreasonable to wait a mere eight months before obliging the grievor to choose between medical retirement or resigning when the employer's guidelines mention a two-year period.

[94] The only way that behaviour makes sense is to view it as part of a pattern of bullying and harassment. The employer's refusal to accommodate the grievor was unfair and unreasonable.

[95] Counsel for the grievor argued that the case of *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3, is instructive. In it, 3 years' pay and $38 000 in damages were awarded after a finding was made that the employer had made no real effort to accommodate the grievor's disabilities and that it willfully and recklessly engaged in discriminatory practices. In fact, the Adjudicator's finding at paragraph 146 is particularly relevant to the present circumstances. It reads in part, "The delay frustrated his return to work, exacerbated his situation, and resulted in his health deteriorating while he worried about a return to work and his increasingly desperate financial circumstances."

[96] Counsel for the grievor submitted that *Nicol* mirrors the present circumstances. The employer offered nothing whatsoever to the grievor. Therefore, to the extent possible, she should be made whole. She should receive $20 000 for pain and suffering and $20 000 for special compensation, as per ss. 53(2)(e) and 53(3) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

Decision and reasons

[97] I wholeheartedly disagree with the grievor's characterization of the facts of this case. I agree with the employer's submissions and the case law submitted in support of them.

[98] This grievance is denied in its entirety for the following reasons.

[99] The grievor alleges discrimination on the basis of disability. The employer does not deny that the greivor had a disability, but the evidence demonstrates the grievor was treated no differently from any other employee in similar circumstances, namely,

on extended sick leave with no return to work in the foreseeable future. There is no evidence of the employer's having acted outside the parameters of its policies or of the *FAA*.

[100] The Treasury Board's *Directive on Leave and Special Working Arrangements* contains a specific section entitled, "Management of Specific Leave without Pay Situations". Section 2, entitled "Illness or Injury in the Workplace", reads, in part, as follows:

> *Persons with the delegated authority are to regularly re-examine all cases of leave without pay due to illness or injury in the workplace to ensure that continuation of leave without pay is warranted by current medical evidence. Such leave without pay situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances.*

[101] I have no difficulty in finding a *prima facie* case of discrimination has been established. The grievor's disability is a characteristic protected from discrimination under section 25 of the *Canadian Human Rights Act*, and there is no question she experienced an adverse impact with respect to her employment – she was terminated. Finally, since she was terminated for incapacity, it logically follows that her disability was a factor in her termination.

[102] Having found a *prima facie* case of discrimination on the basis of disability, the analysis now shifts to whether accommodating the grievor's disability would impose an undue hardship on the employer. As the Supreme Court of Canada explained in *Hydro-Québec* at para. 12, the employer is required to prove undue hardship, "which can take as many forms as there are circumstances."

[103] The three-part "Mieorin" test pertaining to the duty to accommodate arises out of the Supreme Court of Canada case of *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union* [1999] 3 SCR 3, [1999] SCC 48. At paragraph 54:

> *Having considered the various alternatives, I propose the following three-step test for determining whether a* prima facie *discriminatory standard is a* [bona fide occupational requirement]. *An employer may justify the impugned standard by establishing on the balance of probabilities:*
>
> 1) *That the employer adopted the standard for a purpose rationally connected to the job;*

> 2) *That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, and*
>
> 3) *That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without undue hardship on the employer.*

[104] The Supreme Court of Canada, in the case of *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hopital général de Montréal*, [2007] SCC 4, stated at paragraph 15:

> *15 The factors which support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility…Since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate.*

[105] At paragraphs 14, 15, 16, 17, and 19, of *Hydro-Québec,* the Supreme Court ruled,

> *[14] … The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.*
>
> *[15] However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration…*
>
> *[16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics.*
>
> *The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.*
>
> *[17] … However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.*

…

> *[19] … The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.*

[106] The medical note dated September 10, 2014, makes it clear, "there is no plan for return to work in the foreseeable future". Then, on February 11, 2016, Sun Life provides the definitive pronouncement that the grievor was totally disabled, and the insurer would not be pursuing a return to work.

[107] I agree with counsel for the employer that the facts of *Nicol* are easily distinguished from this matter. To begin with, *Nicol* was about "… an employee who tried to return to work from sick leave and whom the employer did not accommodate," (see paragraph 1). This case is about an employee who is unable to return to work due to medical issues.

[108] In *Nicol*, at para. 143, the employer was found to have "… differentiated the grievor from other similar employees when it refused to implement the reclassification …". That paragraph also states (at i.) as follows:

> *[143] … The employer maintained a reckless approach of ignoring that the positions it offered to the grievor were not even consistent with its own independent medical opinion. The employer chose to do what it did in the face of the employer's own independent medical specialist's recommendation about what the grievor could and could not do.…*

[109] The last sentence of this paragraph from *Nicol* is a major departure from the present circumstances. At many different junctures, the employer sought clarification on the grievor's functional limitations, which would have opened the door to meaningful dialogue on accommodation. Given the grievor's continued refusal to provide the employer with any meaningful medical information as to her functional limitations and restrictions, one cannot help but ask how the employer could possibly have initiated the accommodation process. The medical evidence makes it clear that the grievor's medical condition was too debilitating for her to return to work.

[110] The employer in *Nicol* was found to have "… failed to proceed in a more transparent way," (at paragraph 145). I find that in the present circumstances, the employer was open, helpful, and transparent at every stage of the grievor's extended sick leave.

[111] Paragraph 143 of *Nicol* also describes in detail some of the threatening correspondence issued by the employer in that case: "Each letter contained a very short response date and a stated termination date if he did not respond. Each letter was more forceful in its content and tone, for example, by being titled 'Second Notice' or 'Final Notice'."

[112] I found no such threats in the present circumstances. On the contrary, every item of correspondence the employer issued was respectful and professional in its tone and content. Although the options presented (resignation, medical retirement, or return to work) undoubtedly triggered a considerable degree of anxiety in the grievor, the manner in which they were communicated was neither threatening nor abusive.

[113] The evidence confirms that the employer did not arbitrarily invoke the Directive at the two year period. The employer's willingness to entertain the idea of a possibility of a return to the workplace is evident each time the deadline for expiry of the grievor's sick leave benefits was extended. Clearly, the employer was continuously reevaluating the grievor's case on the basis of her individual circumstances, as new information came to light.

[114] I find, on the basis of all of the evidence, that the employer has discharged its burden of proof and established undue hardship. The employer did not discriminate against the grievor.

[115] The grievor also contended that the employer ignored directives to refrain from direct communication with her. First, Dr. Bidari's note explicitly referred to communications about **medical** issues. All the employer's correspondence pertained to administrative rather than medical issues, but nonetheless, I find that the employer acted in good faith in this respect. True, it did resort to direct communication with the grievor, but only after correspondence directed to both Dr. Bidari and Mr. Boivin failed to generate a response.

[116] Mr. Boivin at least offered some form of excuse for failing to meet a deadline. In his correspondence dated December 19, 2014, he wrote, "I apologize for my delay. My trial schedule has been quite heavy this fall. It is also a challenge for [the grievor] given her illness to make the difficult decisions demanded of her and instruct counsel."

[117] Dr. Bidari provided no such explanation.

[118] Accordingly, I find that the employer's direct communications with the grievor

were justified under the circumstances and that therefore they were not abusive. The direct communications were certainly not indicative of a pattern of bullying or harassment.

[119] In her testimony, the grievor referred to employment-related documents being personally served to her at her residence. She found it very unpleasant and somewhat frightening. There is a good chance that the employer would not have had to resort to doing so had reliable lines of communication been established.

[120] The thrust of the grievor's case was bullying and harassment at her employer's hands. As an example of what she characterized as harassment, she produced an email dated Friday, January 4, 2013, from the Director of the Occupational Health and Safety Directorate. The message reads as follows:

…

> *I would like to let you know that I'm replacing Ruth Rancy as the OSHD Director while she is on maternity leave.*
>
> *I was made aware of your situation and would like to know if you are coming back soon or not. In order to plan for the coming months, I would appreciate if you could provide us with a medical note indicating the estimated time of your return if you are not coming back on January 7, 2013. We don't need a specific date but I would like to know if it will be in 2 weeks, a month or two.*
>
> *Do not hesitate to contact me or Tiffany if you wish to discuss further.*
>
> *Hope to see you soon.*

[121] The grievor circled the date on the message, January 7, 2013, and put the following portion of text on the printout of the email, in her handwriting:

> *Jan. 4th*
>
> *received Friday 3 PM*
>
> ***need note** Monday Jan 7*
>
> *they want me in on Monday?*
>
> *they require Another (6th in all) note!*

[Emphasis in the original]

[122] It is possible the grievor's disability may have affected her judgement, but in

any case, she misinterpreted the significance of the date indicated in the email. The author simply wanted to know whether she would come to work on Monday, January 7, 2013, and if not, to obtain a medical note giving some idea of her return date. In her testimony, however, the grievor could not be shaken from her strong conviction that the email demanded that she somehow obtain the medical note over the weekend.

[123] The employer repeatedly encouraged the grievor to bring forward her bullying and harassment allegations and provided her detailed information about how to do it. Mr. Boivin even acknowledged as much in his letter dated May 20, 2014, as follows: "You have suggested that I contact [Mr. A.P.] and we will be doing so now and we do have extensive material we can share with him."

[124] Despite that promise, no contact was ever made, and no formal harassment complaint was ever filed by the grievor against anyone at PSPC.

[125] When the possibility of a return to work became apparent, the employer's reaction was reasonable. It wanted to learn the extent of the grievor's functional abilities and limitations and to begin the accommodation process. When no return to work was possible in the foreseeable future, the employer's approach was once again reasonable. The grievor was told to either resign or seek medical retirement. The employer was also reasonable in extending her sick leave without pay (for a significant period of time). The grievor was not "hounded", as has been suggested. Rather, the employer sent timely reminders about deadlines, which were routinely ignored.

[126] I conclude that the respondent properly terminated the grievor's employment because she was incapable of a return to work in the reasonably foreseeable future. The grievor's allegations of discrimination, harassment and bullying are unfounded.

[127] Accordingly, the termination of employment under paragraph 12(1)(e) of the *FAA* is upheld.

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

(The Order appears on the next page)

Order

[129] The grievance is dismissed.

April 18, 2019.

James Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board