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File: 566-02-11529

Citation: 2020 FPSLREB 2

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

AMANDA BITAR

Grievor

and

TREASURY BOARD
(Statistics Canada)

Employer

Indexed as
Bitar v. Treasury Board (Statistics Canada)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

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

For the Employer: Caroline Engmann, counsel

Heard at Halifax, Nova Scotia,
November 26 and 27, 2019.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Amanda Bitar, alleged that the employer, Statistics Canada, discriminated against her and harassed her on the basis of her religious affiliations, in violation of article 19 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Program and Administrative Services Group (all employees), which expired on June 20, 2014 ("the collective agreement"). She filed a Form 24, a "Notice to the Canadian Human Rights Commission" (CHRC), which in response filed a Form 25 notifying the Board of its intention not to attend or participate in the hearing. In addition to being made whole under the terms of the collective agreement, the grievor sought compensation for pain and suffering and special compensation under the provisions of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

II. Summary of the evidence

[2] The grievor is a devout Jehovah's Witness. According to the doctrines of her faith, she does not celebrate Christmas or Valentine's Day. She explained that both of them are derived from pagan celebrations that Christianity adopted. Historically, her co-workers' celebrations of them in the workplace did not cause her problems while she worked as the assistant to the district manager, George Singer, because he allowed her to be absent for them. However, his retirement in June 2014 changed her circumstances.

[3] In December 2014 at a staff meeting, Mr. Singer's replacement, Eileen Wilson, asked the grievor if she would attend the Christmas lunch with her co-workers if they changed it to a holiday lunch and agreed not to discuss Christmas while she was there. This made her very uncomfortable, according to her testimony. Just because they would rename the lunch and there would be no discussions about Christmas, it was still to be held during the Christmas period, and in her opinion, it was still to celebrate Christmas. Ms. Wilson's attempts to have her attend the workplace function were harassment, in her opinion.

[4] The grievor testified that she felt pressured by Ms. Wilson to attend, in front of her co-workers. According to her, had she gone to the lunch as proposed by Ms. Wilson, the entire situation would have been very awkward, and it would have stopped

others from celebrating something they believed in, which she did not want. She advised Ms. Wilson that she would not attend. Ms. Wilson's response was that if she did not attend, she was expected to stay at her workstation and work while the others attended, or alternatively, she would have to use her banked leave to take the time off.

[5] As it turned out, the grievor was not scheduled to work the day on which the lunch was held, so there was no need for her to remain at her workstation during the meal. However, on that day, she took issue with the luncheon attendees being allowed to go home directly from the restaurant, meaning that they were essentially granted 1 hour and 45 minutes of paid leave that they did not have to deduct from their leave banks. She considered it discrimination because but for the fact that she was a Jehovah's Witness, she would have been granted the same benefit. She testified that she was entitled to it regardless of the fact that she did not work the day of the luncheon.

[6] Ms. Wilson's next incident of discrimination against the grievor was related to the employer's "Employee Appreciation Day" (EAD) celebrations in February 2015. In 2006, the grievor had been involved in EAD events as part of the planning committee, at Mr. Singer's request. At that time, she had been part of it for five months when she read a newsletter that explained why the employer had chosen Valentine's Day as the date for the EAD celebrations. Once she became aware that the EAD celebrations were linked to Valentine's Day, she told Mr. Singer that she had to resign from the committee because of her religious beliefs. For the next eight years, she made a point of not working on the day on which the EAD celebrations were scheduled.

[7] The EAD events were scheduled for Friday, February 13, 2015, a day on which the grievor would not normally have been at work. However, due to a storm forecasted to hit the area of Halifax, Nova Scotia, on that day, the employer decided to reschedule the events to Thursday, February 12, a day on which she was scheduled to work. She was not aware of the sudden change until she arrived at work on February 12, so she could not have planned to take leave that day, to avoid the celebrations. Furthermore, at approximately noon that day, she was told that her desk was to be used for one of the EAD activities between 13:30 and 14:30.

[8] Since it was impossible for the grievor to remain at her desk and work discreetly, given the circumstances, she asked Ms. Wilson if she could go to the Scotia

Square Mall between 13:30 and 14:30, according to her evidence. She explained to Ms. Wilson the connection between the EAD and Valentine's Day and how as a Jehovah's Witness, it was against her religion to celebrate Valentine's Day. According to her, Ms. Wilson did not understand why she wanted to leave for the hour; nor did Ms. Wilson understand the link between the EAD and Valentine's Day, even though the grievor had clearly established that the EAD was always held around February 14 each year and that chocolate hearts were always given out. Despite this, according to the grievor, Ms. Wilson became irritated and was unwilling to discuss the matter.

[9] The meeting with Ms. Wilson occurred at approximately noon on February 12, following her EAD address to the staff. The grievor testified that she then returned to her desk and worked until 13:30, at which point she left the premises and combined her two 15-minute breaks and her 30-minute lunch hour to make up the hour she needed to be absent from her desk to avoid the EAD activities. She returned to her desk once the activity concluded.

[10] On cross-examination, the grievor conceded that she did not ask Ms. Wilson for permission to combine her breaks so that she could be away from her desk while it was being used; nor did she ask to be allowed to work elsewhere. She did ask for the same leave that the others would receive for participating in the events, which was between 12:00 and 16:00. When it was denied, she then combined her lunch break with her morning and afternoon breaks to make up the hour she was out of the office.

[11] Following this incident, the grievor sent an email on March 26, 2015, with a newsletter attached, which in her mind clearly established the link between Valentine's Day and the EAD celebrations (Exhibit 2, tab 2). Ms. Wilson responded in a way that the grievor felt disrespected her, and she felt discriminated against. According to her testimony, she merely tried to explain the truth to Ms. Wilson, who was not willing to listen. Despite Ms. Wilson's unwillingness to accept the truth, the employer's numerous newsletters clearly proved the connection between the EAD, because of the dates of the EAD celebrations over the years, and the pictures of Valentine's Day decorations and references to chocolate hearts being given out
(Exhibit 2, tabs 3 to 18, inclusive).

[12] In her email (Exhibit 2, tab 2), the grievor also took the opportunity to clarify that Ms. Wilson was mistaken as to what the grievor had requested on February 12.

While Ms. Wilson had apparently understood that the grievor had intended to leave for the day when she spoke to Ms. Wilson on February 12, her intention was to be away from the office only for the hour during which her desk was being used for EAD activities.

[13] The next time the grievor heard about her requests not to be included in Christmas and EAD celebrations at the office was during her annual performance review, when her supervisor, Linda Ritchie, advised her that Ms. Wilson wanted her to know that her request to go home on the day of the EAD celebrations was inappropriate. Furthermore, according to the grievor, Ms. Ritchie was to record it in the grievor's performance review document, which Ms. Ritchie refused to do, despite Ms. Wilson's directions. Regardless, Ms. Ritchie told the grievor that her requests to be excluded from workplace situations due to religious reasons were a concern for Ms. Wilson. The grievor considered this a violation of her collective agreement and human rights, so on April 12, 2015, she filed her grievance.

[14] According to the grievor, at the performance review meeting, Ms. Ritchie told her that in the future, when workplace events occurred on days that she was scheduled to work, and she did not wish to participate in them, she would either have to take accumulated leave or remain at her desk and work. She was not entitled to simply leave the workplace. The grievor testified that she indicated to Ms. Ritchie that she had no issues with remaining at her desk and working. But on Valentine's Day, doing that had been impossible, since her workstation was being used as part of the event, and she had been told to clear her desk for the activities that were to begin at 13:30 on that day.

[15] The grievor asked Ms. Ritchie to request that Ms. Wilson look at the newsletter she had emailed that established the link between the EAD and Valentine's Day, but she refused to. The grievor testified that she was treated like a problem employee who used her religion to try to get out of work. The performance review was completed after this discussion, and she was very upset by what she perceived was a poor review. In cross-examination, she was referred to the performance review document (Exhibit 3, tab 6), to where it was noted that she had successfully met all expectations for that year. She testified that based on the conversation with Ms. Ritchie about her attending workplace events, she had not met the employer's expectations, even though that was not noted in the performance review document.

[16] After the performance review and her alleged mistreatment by Ms. Wilson, the grievor, who had a history of anxiety and depression, began to dread going to work. She became irritable and anxious about going to work. She could not understand why she could not please Ms. Wilson. Together with the stress of the grievance process, it eventually led to a relapse of her anxiety and depression. Her physician put her on medical leave from March 31, 2015, to June 1, 2015.

[17] The grievor was able to return to work only through a workplace accommodation that removed her from Ms. Wilson's reporting structure. She returned in September 2015 and was assigned to the Regional Census Centre in Halifax, where she remained until Ms. Wilson retired in June 2016. She returned to the Halifax Regional Office, her regular workplace, in September 2016, and stayed there until June 2018, when she again went off work due to illness related to stress as a result of significant family issues (Exhibit 5).

[18] Dr. Elena Swift has been the grievor's family physician for more than 10 years, including the period relevant to this grievance. She had determined in March 2015 that the grievor should go on sick leave due to her psychological health and had recommended that the grievor could not return to the workplace if she reported to Ms. Wilson.

[19] Dr. Swift based this conclusion on the grievor's report that she felt harassed by Ms. Wilson and on the fact that in Dr. Swift's assessment, the feeling was affecting the grievor's mental health. She suffered from diminished concentration and focus and from heightened anxiety. She reported that she did not feel that the work environment was safe for her. According to Dr. Swift's testimony, and given the grievor's history of anxiety and obsessive-compulsive disorders, which had been exacerbated over several months before the grievor consulted her in March 2015, she concluded that interacting with Ms. Wilson caused the grievor severe anxiety symptoms and that it was best for her to have no contact with Ms. Wilson.

[20] The grievor had complained about workplace stress for a couple of years before this incident, according to Dr. Swift. But by that point, she was very anxious, worried excessively, and could not focus, and Dr. Swift described her as "just not herself". Dr. Swift's diagnosis was that in March 2015, the grievor was suffering from significant anxiety and depression symptoms because of the poor performance evaluation that

she felt was unwarranted and because she felt harassed by Ms. Wilson. Dr. Swift was aware that the grievor had felt the relapse building for some time and that she mentioned something about an incident that had taken place around Christmas.

[21] Dr. Swift testified that her role as a physician was to protect the grievor and to keep her safe; keeping the grievor away from someone she felt unsafe with was within Dr. Swift's scope of practice. Dr. Swift admitted that when treating a patient with mental illness, any visit is very one-sided; the physician does not obtain an objective report of the workings of the workplace. Regardless, the physician's role is to advocate for the patient. According to Dr. Swift, validating information received from a patient is inconsistent with that role.

[22] Dr. Swift always tries to determine if her patients are contributing to workplace toxicity, because it may impact the accuracy of her diagnosis. She testified that she has some continuing-education-type expertise in human resources, discrimination, and harassment but that she is not an expert. She does not always assume that the information her patients provide is accurate. In the grievor's case, she did not accept the grievor's version of workplace events as accurate from the start, but the grievor brought emails that Ms. Wilson had sent her as evidence that she was being harassed. The emails were not retained in the medical file. When she was shown the email in which the employer's expectations were set out (Exhibit 2, tab 2), she noted the comment about miscommunication and agreed that it was not harassing. When she was shown the performance review document, she conceded that it was positive. The grievor had never shown her those documents.

[23] Dr. Swift was unaware that the grievor did not report directly to Ms. Wilson or that two levels of supervision were between them. Dr. Swift did not recall if she ever asked the grievor how often she interacted with Ms. Wilson. Despite this, and based on the fact that the grievor wanted to return to work, Dr. Swift wrote the medical note identifying the need for accommodation.

[24] Ms. Wilson took over as the employer's district manager, data collection, Atlantic Canada, in the fall of 2014, when Mr. Singer retired. She was responsible for three work areas, one being the clerical section where the grievor worked. Each section had a director and a supervisor responsible for its employees who reported to Ms. Wilson. When she took over from Mr. Singer, she was not provided with any

information about an accommodation for religious reasons that was in place for the grievor.

[25] In late 2014, the grievor called Ms. Wilson and complained that Ms. Ritchie had been disrespectful to her on the phone. Ms. Wilson had heard other complaints about the clerical section, in that people there were being disrespectful and that it had problems. As a result, for a while in late 2014 and early 2015, she took a much more active role in managing it.

[26] Ms. Wilson held staff meetings every two weeks to deal with the behaviours that the grievor had identified during her call. At one of them, the group discussed dates for the Christmas luncheon. Ms. Wilson testified that she raised the issue of calling it by another name because otherwise, the group was excluding the grievor. She intended to be inclusive. She testified that she suggested that they call it a holiday lunch and that they agree not to discuss Christmas. The group agreed and encouraged the grievor to attend. She agreed to consider it but declined on the next day.

[27] The lunch was held on a day on which the grievor was not scheduled to work. According to Ms. Wilson, at no time did the grievor or anyone else tell her what the practice had been during Mr. Singer's tenure. As far as she knew, the normal government-wide practices applied.

[28] The EAD was scheduled for February 13, 2015, a day on which the grievor was not scheduled to work. Due to the forecasted severe winter storm, the celebrations were moved to February 12, which was her normally scheduled workday (she worked two days per week).

[29] The first time Ms. Wilson became aware that the grievor did not celebrate Valentine's Day was on February 12, when the grievor came to her door to speak to her. The grievor told her that she was leaving for the day. Normally, the grievor would have spoken to Ms. Ritchie, but as she was absent that day, she spoke to Ms. Wilson. Initially, Ms. Wilson thought that the grievor was ill, but the grievor responded that the EAD was a celebration of Valentine's Day, which her religion did not celebrate, so she was leaving for the day. Ms. Wilson testified that she responded to the contrary, stating that the EAD was for everyone, which the grievor refused to accept.

[30] The grievor was adamant that it was a Valentine's Day celebration, which, as a Jehovah's Witness, she did not celebrate. She insisted that clearly, the employer's headquarters in Ottawa, Ontario, had linked the EAD and Valentine's Day. Ms. Wilson responded that they were not linked in Halifax, even if they were linked in Ottawa. As proof, she reminded the grievor of the speech she had just given, which the grievor had just heard. It did not refer to Valentine's Day. If they were linked, Ms. Wilson assured the grievor that she would have wished everyone a happy Valentine's Day, which she had not done.

[31] Ms. Wilson testified that she pointed out to the grievor that there were no decorations or candy of any kind in the office that would indicate to anyone that her workplace was celebrating Valentine's Day. The grievor told Ms. Wilson that she had once been on the EAD fundraising committee and that she had resigned because of its link to Valentine's Day, so Ms. Wilson was wrong. It was clear to Ms. Wilson that the discussion would have no resolution. The entire interaction took less than five minutes, as Ms. Wilson recalled. As was her habit when she thought things might escalate, she wrote a note to file concerning the incident (Exhibit 3, tab 7).

[32] Ms. Wilson dealt with the grievor's request to go home that day only because Ms. Ritchie was not in the office. Otherwise, the grievor would have taken her request to Ms. Ritchie. In her absence, Ms. Wilson was the next in line of supervision. When Ms. Ritchie returned, Ms. Wilson asked her to meet with the grievor and obtain a list of days on which she felt uncomfortable being at work due to religious reasons. Ms. Wilson knew about Christmas but wanted to be fully informed as to the days on which the grievor would seek religious accommodation. Ms. Ritchie was to talk to the grievor and inform her of the employer's expectations on those days on which she did not want to participate in workplace events; she was to either take leave or show up for work and remain there. The grievor was not entitled to simply go home; she was required to comply with the same rules as do all public servants.

[33] Approximately a week after the EAD, Ms. Wilson asked Ms. Ritchie if she had spoken to the grievor. She replied that she had not. She indicated that she intended to do it when the two met to complete the grievor's annual performance review. According to Ms. Wilson's testimony, she gave explicit directions to Ms. Ritchie that she could do that, but Ms. Ritchie was to make it clear that it was not part of the performance review, and it was not to be put in the evaluation document.

[34] Ms. Wilson was not aware that the grievor had made complaints about her. She had no idea that the grievor was upset with her or how she dealt with the grievor's requests to absent herself for religious reasons. The grievor never talked to her, according to the testimony. Had she known that she was causing the grievor pain, she would have worked diligently to resolve things.

[35] Ms. Wilson testified that those who attended the Christmas luncheon in December 2014 were allowed 1 hour and 45 minutes of leave that they did not have to account for via their leave banks. The reason was that it was not possible for them to go to a restaurant, be served, and eat within their limited amount of meal-break time. Christmas is the exception to the rule, according to Ms. Wilson, in that employees who attend an event do not have to take leave but are paid for their time. When she was asked if the employees had to put in for leave with pay for other reasons under clause 52.01 of the collective agreement, Ms. Wilson testified that she did not know. In any event, she could not approve such leave; she could only recommend that it be approved, which, had the employees requested it, she would have done, but it did not arise.

[36] This exception to the rule does not apply to employees who do not attend a Christmas luncheon, according to Ms. Wilson. They must either be at work for the full day or take leave for any part of the day for which they are not at work. This was so for her 35 years of public-service employment.

[37] Ms. Wilson testified that she was blindsided by the grievor's insistence that the EAD was a celebration of Valentine's Day. Ms. Wilson had never heard anyone make that link on any management calls discussing EAD plans. There were no decorations in the workplace indicating that the EAD was a celebration of Valentine's Day. Despite the newsletters that the grievor had sent her, Ms. Wilson was adamant that the theme for the EAD in Halifax was not Valentine's Day. Statistics Canada senior management had chosen a significant date to honour its employees, but that did not make it a Valentine's Day celebration. The employer's regions choose the EAD date.

[38] Since the grievor did not participate in the EAD events of February 12, 2015, she was entitled only to her usual lunch and two breaks. Had she wanted more time off, she would have had to take leave. She was not entitled to take four hours off, which was the duration of the EAD events, without putting in a leave request. Had she told

Ms. Wilson that her workspace was being used for EAD activities, Ms. Wilson would have found her another workspace away from the EAD celebrations, where she could have worked undisturbed and where other employees were working who did not participate. The grievor did not do so, according to Ms. Wilson. She told Ms. Wilson that she wanted to go home because of the link between the EAD and Valentine's Day.

[39] Ms. Wilson denied that she directed Ms. Ritchie to address the grievor's attendance at workplace events as part of her annual performance review. Rather, following the EAD issue, she asked Ms. Ritchie to ask the grievor for a list of holidays that conflicted with the grievor's religion or other dates on which she would seek religious accommodation. Ms. Wilson also directed Ms. Ritchie to advise the grievor that if an event that conflicted with her religious beliefs was to occur on a day on which she was scheduled to work, in the future, she would be required to reschedule her day, put in a request for leave for the day, or stay at work while others participated.

[40] The problem was that Ms. Ritchie did not do as Ms. Wilson requested when she requested it. The next opportunity to do it was during the grievor's performance review. Ms. Wilson testified that she agreed to it being done then as long as the discussion was not recorded as part of the review. Such a review is about the performance of work duties and not about the need to be accommodated.

III. Summary of the arguments

A. For the grievor

[41] The grievor, in her grievance, alleged that article 19 (entitled "No Discrimination") of the collective agreement and all related articles were violated. The employer said that article 31 (entitled "Religious Observance") applied. She also relied on article 52 (entitled "Leave With or Without Pay for Other Reasons"), which applied when circumstances not directly attributed to her, as with the EAD, prevented her from working. The employer's unreasonable denial to grant leave under clause 52.01 was discrimination based on religion.

[42] The employer's response to the grievor's email (Exhibit 2, tab 2) concerning her attendance at work while absenting herself from certain workplace celebrations due to religious reasons offered her the following two options: she could take leave, or she could stay at work while the others around her participated in the celebration.

Responding for the employer, Ms. Wilson completely ignored the third option, the possibility of leave under article 52. Doing so was arbitrary and unreasonable.

[43] The email came on the heels of the EAD celebrations in February 2015, when the celebration date was changed without notice due to impending bad weather. The grievor could not have asked for leave in advance as she did not know until she arrived that the celebrations were scheduled for the day on which she was to work. She could not have avoided the EAD, and using article 52 would have been appropriate.

[44] Ms. Wilson told those employees participating in the EAD celebrations that it was a time to step away from their regular duties. The events that day lasted 4 hours, including the 30-minute lunch break and the 15-minute afternoon break to which each employee was entitled. This meant that those who participated were off work for 3.25 hours, which the grievor was expected to work because her religion prohibited her from participating.

[45] Likewise, following the Christmas celebration in December 2014, the participating employees were granted 1.75 hours of free time that they did not have to account for. The grievor, who did not attend the event because of her religious beliefs, should have been entitled to similar consideration. Since only those employees who attended the event were granted the free time, it was discriminatory.

[46] The practice going forward that Ms. Wilson set out, which was to either take accumulated leave or stay at work, has caused the grievor great stress. Ms. Wilson's dismissal of her belief that the EAD was a celebration of Valentine's Day was unacceptable behaviour. Ms. Wilson could have accepted her view but chose to impose her own on someone who she knew felt uncomfortable violating her religious beliefs, based on previous occurrences.

[47] Allowing Ms. Ritchie to discuss the grievor's attendance at workplace events and directing her to outline to the grievor the employer's expectations when the grievor chose not to attend such events was another example of the bad faith with which Ms. Wilson treated the grievor. It was an act of disguised harassment and discrimination. Ms. Wilson used Ms. Ritchie to carry out her acts of harassment and discrimination. Directing Ms. Ritchie not to put the discussion in writing did not change the fact that it was brought up during the performance review and that it was clearly viewed negatively, vis-à-vis the grievor's overall performance. The fact that the grievor did not

request leave before exiting the office to avoid EAD celebrations was raised in the grievor's performance review as a matter of concern.

[48] When viewed together, the denial of leave at Christmas that would have been consistent with what her co-workers received, the refusal to recognize that the EAD and Valentine's Day were linked, and the events that ensued and the discussions related to attending workplace events during the grievor's performance review greatly impacted her. It all aggravated her pre-existing condition to the point that she could no longer face the thought of going into work. She suffered increased anxiety and depression symptoms, to the point that Dr. Swift put her on medical leave from March to September 2015. Eventually, she returned to the workplace, but only in an accommodated position and on the condition that she no longer have contact with Ms. Wilson.

[49] According to Dr. Swift, the grievor's pre-existing condition was exacerbated by the treatment she received in the workplace. On a balance of probabilities, the events of March 2015 amounted to discrimination based on the employer's policy concerning the leave that employees were to take. That policy, as explained by Ms. Wilson, was discriminatory. The EAD incident was discriminatory because the grievor was denied leave with pay under article 52.

[50] Ms. Wilson behaved recklessly when she ignored the collective agreement benefits available to the grievor. She was reckless and wilful by not taking the time to review the newsletter that the grievor had sent her and to properly consider the grievor's argument that the EAD was a celebration of Valentine's Day. While in cross-examination, she acknowledged the link in all the newsletters, she still refused to deny that such a link existed in Halifax. If she did not know of it, she ought to have known.

[51] Finally, it was harassment to set up the performance review meeting to address her concerns with the grievor's use of leave related to her religious beliefs. Ms. Wilson knew not to put it in writing and was able to hide it, but that does not excuse it or negate the impact of her actions.

[52] Ms. Wilson's testimony was compelling when she stated that she had no idea that Jehovah's Witnesses do not celebrate Valentine's Day and that she found out only when the grievor asked to leave rather than participate in the EAD. Not credible was her assertion that there was no link between the EAD and Valentine's Day. Regardless,

intent to discriminate is irrelevant (see *LaBranche v. Treasury Board (Department of Foreign Affairs and International Trade*), 2010 PSLRB 65).

[53] To establish a case of discrimination, the grievor first had to establish that she possesses a characteristic protected by the *CHRA*. In this case, she did; it was religion. The second requirement is a connection between the employer's action and the prohibited ground. Ms. Wilson denied the grievor the right to respect her religious beliefs about Valentine's Day and refused to compensate her at the rate of leave equivalent to her co-workers as a result of her Christmas beliefs. The adverse impact was the sick leave that the grievor took as the result of her dealings with Ms. Wilson.

[54] Since the violation of the *CHRA* was established on a balance of probabilities, the grievor is entitled to damages under the *CHRA*'s categories. Unless the employer exercised due diligence to prevent the acts of its employee, those acts are deemed the employer's acts under s. 65 of the *CHRA*. The employer had to establish on a balance of probabilities that it did not consent to the acts and that it acted with due diligence, along with the steps it took to mitigate its employee's actions (see *Doro v. Canada Revenue Agency*, 2019 FPSLREB 6).

[55] In this case, the grievor asked to be removed from the EAD celebrations; she asked to be allowed to leave while her desk was being used for the festivities. She had no choice; EAD activities were forced upon her. Her request should have been granted as leave with pay, which would not have been unreasonable when all those participating were granted it to absent themselves from their duties.

[56] Ms. Wilson showed no due diligence in verifying the grievor's request to be allowed to leave the EAD activities. She could have easily verified the link between the EAD and Valentine's Day by consulting the newsletter. She could have asked other managers. She could have trusted the grievor. She did not have to accept the grievor's opinion but could have considered the impact on the grievor of ignoring her opinion. She did not consider the grievor's opinion or her beliefs, which challenged the grievor's religious conscience.

[57] Nothing was done to mitigate the impact of Ms. Wilson's actions. No reasonable steps were taken to mitigate the harm. Instead, she encouraged Ms. Ritchie to discuss the matter during the grievor's annual performance review, which exacerbated everything. The email that Ms. Wilson sent explaining her opinion of the EAD

circumstances (Exhibit 2, tab 2) imposed her opinion on the grievor. When the grievor filed her grievance, the employer did nothing to try to resolve it. Finally, she went on sick leave. Based on this reckless approach and disregard for her religious beliefs, she is entitled to maximum damages.

[58] The policy that Ms. Wilson set out in her email, which was that the grievor had to either work or take leave when she wished to be absent for religious reasons, was discriminatory in its effect. The policy did not cover the entire context or recognize that other employees who did not raise religious objections were granted leave at the employer's discretion. Only the grievor was denied leave, because she chose not to participate due to her religious beliefs.

[59] On the balance of probabilities, the grievor established discrimination based on religion. She seeks a declaration to be made whole, along with compensation for pain and suffering and special compensation because of Ms. Wilson's reckless and wilful behaviour, pursuant to the *CHRA*. As the grievor has been on sick leave without pay since June 2018 because of the effect of the employer's discriminatory policy (Exhibit 3, tab 21), she seeks to have her leave changed to leave with pay retroactive to the date on which it commenced.

B. For the employer

[60] The controlling section relevant to this grievance is article 31 (Religious Observance). The employer and the bargaining agent turned their minds to the fact that employees may need leave to attend to religious observances. Article 6 (entitled "Management Rights") has been restricted to this extent, but it cannot otherwise be ignored. Management retains the discretion to manage its workplace, except as otherwise restricted, including the right to direct its employees to comply with the leave requirements in the collective agreement.

[61] In December 2014, Ms. Wilson held a meeting at which staff members discussed dates for their group lunch. It was originally planned for a Friday, a day on which the grievor did not work. Ms. Wilson suggested changes to the plan in hopes of making it a more inclusive event that the grievor would be willing to attend. The group agreed, but the grievor declined to participate, and the original plan was retained.

[62] On the day of the luncheon, the grievor did not work. Those who attended were allowed to stay an extra 1 hour and 45 minutes past their usual half-hour lunch break because it was impossible for everyone to be served and to eat in that limited amount of time. The bargaining agent has not established that those who attended were granted paid leave under article 52. No leave records were submitted as proof. There was no *viva voce* evidence to support this allegation.

[63] There is nothing to support the grievor's claim of differential treatment. In fact, she was not in the workplace on the day at issue, so it is impossible for her to have been treated differently. Allowing those who attended the luncheon to leave without returning to the office was an exercise of managerial discretion under article 6, which is not subject to review by the Board.

[64] The fact that the grievor was asked to attend the luncheon and that her colleagues were willing to make changes to accommodate her does not support a harassment claim. Nor does the fact that she felt pressured to participate. She was not ordered to attend, and when she declined to, nothing more was said.

[65] The parties did not dispute that the EAD events were originally scheduled for February 13, 2015, a Friday on which the grievor was not scheduled to work. On February 10 and 11, notices were sent to those in the office that the date was changed, but the grievor worked only Mondays and Thursdays, at which point it was too late to change her schedule. The salient point is determining the communications made on that day.

[66] The grievor testified that she asked for one hour so she could go to Scotia Square Mall. Ms. Wilson testified that the grievor said she was going home for the day because she did not celebrate Valentine's Day. Whether the EAD was connected to Valentine's Day is not relevant; rather, the salient point is the question that was asked. Ms. Wilson's version is consistent with the documents submitted as exhibits. The grievor's version was based on what Mr. Singer had allowed her to do.

[67] In her email (Exhibit 2, tab 2), the grievor admitted that Ms. Wilson misunderstood her request that day. Clearly, she asked to go home for the rest of the day; it was not a leave request for one hour. The grievor's representative faulted Ms. Wilson for not reviewing the newsletter she had provided to prove that the EAD was a celebration of Valentine's Day, but the only evidence, including the grievor's testimony,

was that the link to the newsletters was emailed on March 26, 2015, not on February 12, 2015, as argued.

[68] Ms. Wilson admitted that she asked Ms. Ritchie to speak to the grievor after the EAD events about the employer's expectations when absenting herself for religious reasons and to ask for a list of dates of Jehovah's Witnesses religious observances. Ms. Wilson assumed it was done, but when she found out otherwise, Ms. Ritchie told her that she intended to do it at the performance review meeting, which was the next opportunity for her to meet with the grievor.

[69] It is only hearsay that Ms. Ritchie was directed to include the discussion in the performance review document as a performance problem and that Ms. Ritchie chose to ignore it. Ms. Wilson explained why this is inaccurate. There is no clear, cogent, or compelling evidence that Ms. Wilson ordered Ms. Ritchie to put that information into the performance review document. There is no evidence of bad faith. There is clear evidence of what Ms. Wilson told Ms. Ritchie to convey to the grievor and how Exhibit 2, tab 2, contains an explanation of the employer's policy going forward.

[70] The essence of Ms. Wilson's response to the grievor's email was to clarify that what had happened under Mr. Singer would no longer be accepted, which was consistent with article 31. The grievor could use annual leave, compensatory time, or leave without pay or she could exchange her shift to meet her religious obligations. She might also have been granted paid time off at the employer's discretion, which would have been capped at six hours, and she would have had to make it up within six months.

[71] The bargaining agent had the burden of proof of showing that on a balance of probabilities, what was alleged actually occurred. It is not for the adjudicator to speculate (see *Arsenault v. Parks Canada Agency*, 2008 PSLRB 17; and *F.H. v. McDougall*, 2008 SCC 53). The burden is the civil burden of proof. The question must be answered on a balance of probabilities based on clear, cogent, and convincing evidence.

[72] When determining the events surrounding the performance review meeting, there is Ms. Wilson's clear evidence of versus the grievor's hearsay. The grievor could have called Ms. Ritchie, but she did not. She could have produced an email she sent to Ms. Wilson documenting her denied request to leave for an hour to go to Scotia Square

Mall, but she did not. She did produce an email in which she stated that Ms. Wilson had misunderstood her.

[73] The employer submitted that the grievor would not have been entitled to leave under article 52 as the parties set out earlier in the collective agreement exactly what she was entitled to for religious observances. Pursuant to the rules of collective agreement interpretation, the parties are assumed to have intended what they have agreed to. The words they used are to be given their ordinary meanings (see Brown and Beatty, *Canadian Labour Arbitration*, 5th edition, at 4:2100 and 4:2110). When there is no ambiguity in meaning, effect must be given to the wording of the collective agreement (see *Communications, Energy and Paperworkers, Local 30 v. Irving Pulp & Paper*, 2002 NBCA 30).

[74] Section 229 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) prohibits an adjudicator from issuing a decision the effect of which is to modify a collective agreement (see *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112). Article 31 is clear as to when the grievor was entitled to paid leave for a religious observance. Article 52 does not apply. In *Andres v. Canada Revenue Agency*, 2014 PSLRB 86, the adjudicator dealt with language similar to that in article 31. The adjudicator held that the burden of proof was on the grievor in that case to prove on a balance of probabilities that the employer had breached the collective agreement.

[75] Article 31 discharged the employer's burden to accommodate the grievor's religious obligations by providing a menu of options as to how it could accommodate them, which met the undue hardship test. That was the bargain the parties struck (see *Andres*, at para. 82). If article 31 is no longer a good deal for the bargaining agent's members, the place to change the deal is at the bargaining table, not at adjudication.

[76] Ms. Wilson asked for a list of religious observances from the grievor so that she could be prepared to meet her requests. Since the grievor worked only two days per week, her schedule could be modified to accommodate her observances, which was consistent with article 31. Even Dr. Swift agreed that communicating the employer's expectations, in her opinion, was not harassment. The grievor's medical leave in 2018 was related to family issues and not, as the grievor's representative argued, to her

treatment in the workplace in 2015, according to the medical note she provided to the employer.

[77] According to the Supreme Court of Canada, discrimination may be described as a distinction, whether or not intentional, based on grounds relating to the personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on that individual or group not imposed on others or that withholds or limits access to opportunities or benefits and advantages available to others (see *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143). All the circumstances in which, because of her religious beliefs, the grievor would be unable to participate in the workplace have been fully accounted for in article 31. Her treatment did not meet the definition of discrimination as identified by the Supreme Court of Canada.

[78] Accommodating religious observances may take many forms. The duty to accommodate must coexist with the fundamental features of the employment relationship. The parties to the collective agreement have identified an appropriate accommodation in the circumstances, and an adjudicator must respect what the parties have agreed to (see *Canadian Union of Public Employees, Local 4400, Unit B v. Toronto District School Board*, [2008] O.L.A.A. No. 692 (QL)). Unpaid time off for a religious observance is not discriminatory; nor is offering a menu of options undue hardship on an employee. Employees are not entitled to equality of outcome (see *Casey v. Anishnawbe Health Toronto*, 2013 HRTO 1244; *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.J. No. 75 (QL); and *Markovic v. Autocom Manufacturing Ltd.*, 2008 HRTO 64).

[79] The test for harassment is objective. Would a reasonable person feel harassed in the situation? In this case, the question is whether a reasonable person would feel harassed when asked if he or she would attend lunch with a group of co-workers. Ms. Wilson testified that she was shocked to learn while she was on the stand at the hearing that the grievor believed that Ms. Wilson had harassed her for six months; the grievor never said anything to her. She could not have reasonably have anticipated that the grievor would have felt harassed by her attempts at inclusivity. If the grievor felt harassed, the situation was quickly resolved when she declined to participate and the matter was dropped.

[80] The grievor has not established that the employees who participated in EAD activities were provided with four hours of paid leave. In fact, the amount of time they were involved in the EAD activities depended on their individual schedules. The EAD was an employer event held in the workplace. Just because employees did not carry out their regularly assigned tasks and participated in employer-sanctioned activities did not mean that they were not at work. They could not leave the workplace, and if they chose not to participate, they were required to work, as was expected of the grievor.

[81] *LaBranche* is distinguishable factually from this case. The interaction between the grievor and Ms. Wilson does not mirror that in *LaBranche*, in which a third party interfered with an existing accommodation. There is no evidence or proof of what Mr. Singer agreed to or what was done. Even if the Board accepts that an agreement existed, there is no evidence as to its extent or nature. Estoppel ends when notice is given, which happened with Ms. Wilson's March 26 email. It set out the requirements of the collective agreement.

[82] There is no evidence of reckless behaviour of the like identified in *Doro*. In summary, the grievor has not established on a balance of probabilities that she was discriminated against, contrary to article 19.

IV. Reasons

[83] This grievance was filed as a discrimination grievance alleging a violation of article 19, which provides that there shall be no discrimination or harassment exercised or practiced with respect to an employee by reason of religious affiliation, amongst other grounds.

[84] To demonstrate that an employer engaged in a discriminatory practice, such that it violated article 19, a grievor must first establish a *prima facie* case of discrimination, which is one that covers the allegations made and that if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour, in the absence of an answer from the respondent (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 28). An employer faced with a *prima facie* case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows that its actions were in fact not discriminatory or

by establishing a statutory defence that justifies the discrimination (see *A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13).

[85] I find that the grievor has not established adverse differential treatment based on religion, and as a result, she has not established a *prima facie* case of discrimination. Employees participating in workplace events, sponsored by the employer, during work hours are considered working. Therefore, the grievor had to account for her time if she would not be at work as did all the others, regardless of their reason for not participating.

[86] With respect to the Christmas luncheon, the grievor was not even in the workplace that day and was not entitled to receive a salary. The grievor did not prove that anyone who attended the luncheon received leave under article 52, the provision providing for leave with or without pay for other reasons (discretionary or personal leave), or any article for that matter, or that anyone who remained in the workplace received leave on that day that was not accounted for. Consequently, the grievor has not established, even on a *prima facie* basis, that she was treated in an adverse differential manner that day. Her argument with respect to this part of her grievance is entirely hypothetical.

[87] In contrast, with respect to the EAD issue, the grievor was in the workplace on that particular day. I believe that she did ask to go home after Ms. Wilson's speech as it is the version most consistent with her email of March 26, 2015 (Exhibit 2, tab 2), and it explains her comment about a misunderstanding. Regardless of whether Ms. Wilson believed that there was a link between the EAD and Valentine's Day, the point was that the grievor did believe it, and to observe her religious convictions, she used her time to absent herself from the workplace while the festivities were being held at her desk. She returned to her desk afterward and worked out the rest of her day. This is entirely consistent with article 31, which provides at clause 31.03 that time off may be granted to the employee in order to fulfill her religious obligations, but the number of hours with pay so granted must be made up hour for hour.

[88] The grievor's representative argued that the proper article under which she should have been granted leave was article 52, which covered what is commonly known as leave for other reasons. This would have meant that she would not have

needed to make up the hours that she was away from work fulfilling her religious obligations.

[89] However, article 52 was generally used in circumstances such as snowstorms, earthquakes, or active volcanoes. If a specific article deals with the subject matter at issue, the rules of interpretation require that I apply that article first. The rule against pyramiding precludes me from then looking at more general articles. In my opinion, the purpose of article 52 is to cover situations that the parties have not specifically turned their minds to, which is not the situation in this case. Here, the parties have turned their minds to how employees can fulfill their religious obligations, and that is by way of the provisions in article 31.

[90] Both the bargaining agent and the employer agreed that accommodation requests for religious observances should be met under the terms of article 31, which is sufficient to avoid an adverse finding and to show that its actions were not discriminatory (see *A.B.* and *Andres*).

[91] The grievor has therefore not established on a *prima facie* basis that she was discriminated against in the course of her employment on the basis of her religious affiliation.

[92] Having found that there was no discrimination on the part of the employer, there remains the question of whether Ms. Wilson harassed the grievor, contrary to article 19, which encompasses harassment based on the prohibited grounds it outlines, including religious affiliation. Harassment is defined in Treasury Board policy as improper conduct by an individual that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm (see the *Policy on Harassment Prevention and Resolution*).

[93] This case requires a nexus between the alleged improper conduct and the grievor's observance of her religion, based on how the grievance was filed. The conduct that she identified as harassment included the pressure she felt to attend the Christmas luncheon, Ms. Wilson's refusal to accept her statement that the EAD and Valentine's Day were linked, and the negative performance review based on her choice not to participate in certain workplace events, on religious grounds.

[94] Ms. Wilson's testimony was candid and heartfelt when she testified that she was unaware that the grievor had been offended by her conduct. At no time did the grievor ever tell her that her behaviour was unacceptable. The first time she heard anything about the impact of her interactions with the grievor, keeping in mind that the grievor did not report directly to her, was at the hearing.

[95] Ms. Wilson's attempts to include the grievor in the Christmas luncheon were aimed at inclusivity. When the grievor declined, nothing more was said. Ms. Wilson admitted that she was aware that as a Jehovah's Witness, the grievor did not celebrate Christmas. That was why she suggested that the luncheon be a group gathering, which the grievor could attend. At no time did she pressure or insist that the grievor had to attend or do anything that would have compromised her beliefs. This does not equate to harassment, particularly since the grievor never expressed to anyone in the workplace that she felt pressured to attend. I do not find that Ms. Wilson knew or ought to have known that her conduct would cause offence or harm to the grievor.

[96] Likewise, the EAD situation did not meet the definition of harassment. Firstly, Ms. Wilson was not aware that Jehovah's Witnesses do not celebrate Valentine's Day. Essentially, in my opinion, the crux of this issue is a difference of opinion as to the origins of the EAD, which in and of itself is not harassment. The grievor was not forced to participate in the EAD events and used an option identified in article 31 to avoid participating, which I noted was an agreed method of accommodating an employee's need for a religious observance.

[97] I accept Ms. Wilson's version of the events surrounding the performance review discussion as it is consistent with the performance review document and the *viva voce* evidence. In my opinion, if anyone was responsible for the negative impact of this discussion, it was Ms. Ritchie, who did not carry it out when she was directed to. That resulted in it taking place during the performance review.

[98] A discussion of expectations, including those on attendance, is appropriate during performance review meetings when the discussion clarifies expectations for the future. Ms. Wilson could not reasonably have anticipated how the grievor would have interpreted the discussion, which she was not involved in, and its alleged impact.

[99] Even when Dr. Swift was shown the email (Exhibit 2, tab 2) and the performance review that noted that the grievor had successfully met her expectations for the year,

Dr. Swift saw nothing that she considered offensive. I conclude that the source of the grievor's dissatisfaction in the workplace was the impact of Mr. Singer's retirement, which brought with it the imposition of government-wide rules on the expectations of those who chose not to attend workplace functions.

[100] For all these reasons, the grievance is dismissed. The employer asked that Exhibit 4 be sealed as it contains photocopied excerpts from Dr. Swift's medical treatment file. As stated in the Board's "Policy on Openness and Privacy", the open court principle is significant to our legal system. In accordance with that constitutionally protected principle, the Board conducts its hearings in public, except in exceptional circumstances.

[101] The Board maintains an open justice policy to foster transparency in its processes, accountability, and fairness in its proceedings. In exceptional circumstances, it may depart from its open justice principles and grant requests to maintain the confidentiality of specific evidence. In this case, it would be appropriate to seal the exhibit. I am satisfied that the grievor's privacy rights can be sufficiently protected by sealing it; I heard no argument to the contrary. I will make an order to that effect at the end of this decision.

[102] The parties provided me with numerous cases to support their arguments. While I have read each one, I have referred only to those of primary significance.

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

(The Order appears on the next page)

V. Order

[104] The grievance is dismissed.

[105] Exhibit 4 is to be sealed.

January 7, 2020.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board