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Federal Public Sector Labour Relations and Employment Board Act, *Federal Public Sector Labour Relations Act* and *Canada Labour Code*

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

BETWEEN

DENIS LAPOINTE

Complainant and Grievor

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Lapointe v. Canada Revenue Agency

In the matter of a complaint made under section 133 of the *Canada Labour Code* and of an individual grievance referred to adjudication

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

For the Complainant and Grievor: Hugh Scher, counsel

For the Respondent: John Craig and Alexandre Toso, counsel

Heard at Ottawa, Ontario,
May 13 to 17 and November 25 to 29, 2019.

REASONS FOR DECISION

I. Complaint and grievance before the Board

[1] On November 1, 2014, the Public Service Labour Relations Board (PSLRB) became the Public Service Labour Relations and Employment Board. On June 19, 2017, it was renamed the Federal Public Sector Labour Relations and Employment Board ("the Board"), and the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) became the *Federal Public Sector Labour Relations Act* ("the *Act*").

[2] On October 31, 2013, Denis Lapointe, the grievor, referred to adjudication a grievance against his termination. The grievor worked as an electrician for the Canada Revenue Agency (CRA or "the employer"). He was terminated on August 5, 2011. The grievance was against the termination, which according to the grievor was retaliation for the fact that he had defended his right to a safe workplace. In the grievance, he lists the dangerous factors in his workplace (chemicals in the lunchroom, asbestos in a wall that he drilled through, and lack of personal protective equipment) and mentions the employer's systematic refusal to provide information about the workplace.

[3] The grievor asks that a full investigation be opened, that CRA representatives be held accountable, that he and his family receive an apology, and that he be made whole.

[4] The employer objects to the referral of the grievance to adjudication and states that the Board does not have jurisdiction over it. The grievor referred it under s. 209(1)(b) of the *Act* as being a disciplinary action that resulted in his termination. The employer denies any disciplinary action in the termination, as the grievor was terminated for medical incapacity.

[5] Since the CRA is a separate agency and as of the grievance's filing was not a designated agency under s. 209(1)(d) of the *Act*, the only recourse to challenge the termination, according to the employer, was a mechanism offered to CRA employees (an independent third-party review), notably for grievances not linked to discipline that were rejected at the final level.

[6] The grievor also filed a complaint under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2) on October 21, 2011, which was worded as follows:

> *My employer has terminated my employment contrary to section 133/147 of the Canada Labour Code. My termination letter was a willfull [sic] and deliberately constructed retaliation against me for having sought my rights and protections under the Canada Labour Code.*

[7] The Canadian Human Rights Commission (CHRC) was notified of the grievor's intent to raise arguments under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). In the notice he sent to the CHRC, the grievor said that his human rights had been denied as the employer had not properly monitored his health, had caused him medical injury, and had not provided a proper vocational and rehabilitation program, which would have allowed his physician to identify the grievor's limitations and restrictions. The CHRC did not make any submissions.

[8] The Board held the complaint and grievance in abeyance from 2012 to 2018, due to the grievor's health issues. They were scheduled to be heard in 2018 but had to be postponed at the request of the grievor's counsel.

[9] For the reasons that follow, I dismiss both the grievance and the complaint.

II. Summary of the evidence

[10] The following witnesses testified for the employer: Jeremy Hebert, the grievor's manager; Margarita Clayton, who replaced Mr. Hebert in 2011; and George Zolis, Director of Finance and Administration for the CRA's Ontario Region. The grievor testified and called David Babb, a fellow worker who was terminated in circumstances similar to his own.

[11] The grievor is a licensed electrician who started working as a maintenance electrician for the CRA in May 1992 after working in the private sector. He remained in that position until 2006, when a reorganization at the CRA meant that it no longer employed electricians. He was reassigned duties in accommodation planning.

A. Health concerns

[12] Over the course of his employment with the CRA, the grievor developed significant health problems, to the point where he had to take leave in 2008 as he was no longer able to work. He believed that the health problems could be attributed in large part, if not entirely, to a toxic work environment.

[13] The grievor worked (except for a few months before he left in 2008) at the Heron Road complex at 875 Heron Road in Ottawa, Ontario. As an electrician, he worked throughout the complex, but his workshop and lunchroom were in the basement, where a print shop and paint shop were also located. According to him, those shops created unhealthy conditions as the ventilation was entirely insufficient to deal with the associated fumes and air contaminants.

[14] The building also contained asbestos. Employees were advised in 1998 of its presence in the building as well as the employer's intention to deal with it. According to the grievor, he was exposed to asbestos when he worked in the walls and ceilings, and he was insufficiently protected against the dangers it posed.

[15] The grievor was active in the local Health and Safety Committee and reported many worrisome conditions to the employer through it. At the hearing, both parties presented a great deal of evidence on the conditions at the Heron Road complex, the employer to show how it had sought to address problems that were raised, and the grievor to show the deficiencies in what was done. From the evidence I heard, there were three main areas of concern: asbestos, air quality, and electrical issues. In the following paragraphs, I will summarize what I heard from the witnesses.

1. Asbestos

[16] In 1998, the Department of Public Works and Government Services (PWGSC) gave an information session on asbestos removal that was planned for the basement of the Heron Road complex. The four electricians working in the building, including the grievor, requested a lung exam (a pulmonary function test and a chest X-ray) as they were concerned that they might have been unwittingly exposed to asbestos-containing material. The employer contacted the Occupational Health and Safety Agency (part of Health Canada) to arrange appointments for the four electricians.

[17] From the evidence filed at the hearing, it seems that Health Canada examined the grievor several times. He started to be regularly monitored in 1994 as in his occupation, he could have been exposed to dangerous materials. Also, specific examinations were linked to the request because of the asbestos.

[18] In 1998, after the lung testing, Health Canada wrote a letter with the following substantive content:

…

> *We have received the results of your chest x-ray and spirometry. There is a slight difference since 1994 in your pulmonary function and this is probably due to the discomfort in your chest wall.*
>
> *I recommend that you show these results to your family doctor and when you come for your occupational assessment at our clinic this can be discussed with the physician you see.*

…

[19] The occupational monitoring took place yearly and dealt with exposure to dangerous materials in the workplace such as solvents, PCBs, fiberglass, paint, and voltage. Asbestos was added in 1999.

[20] In 1998 and 1999, Health Canada noted a "mild chest restriction" in the grievor. In 2001, it wrote a letter to his family doctor. The medical officer who wrote it was concerned by the fact that the grievor reported some dizziness and light-headedness. Since the grievor worked on ladders, the officer asked the family doctor whether restrictions would be necessary. The doctor answered that the grievor was taking some medication but only after working hours and added: "… I have seen little drowsiness or dizziness in chronic use patients."

[21] In the 2001 Health Canada monitoring, again, a mild chest restriction was noted, and nothing else. It appears that monitoring was discontinued after 2004. The grievor's pulmonary function test results, according to an email Health Canada sent him at his request in 2010, can be summarized as follows: 1994, normal; 1998, 1999, and 2001, mild chest restriction; and 2004, normal. The monitoring was discontinued, still according to the same email, because the employer no longer requested it.

[22] It seems that the CRA's position on asbestos was that left undisturbed, as an insulating material, it posed little danger to employees. It was different for workers, such as the grievor, who might come into direct contact with it when working inside walls. Therefore, precautions were necessary. The CRA provided masks and disposable coveralls, which were insufficient, according to the grievor.

[23] The grievor repeatedly sought his files from Health Canada and requested the employer's help. It answered that Health Canada required his consent, which he never gave. The employer's information was that in 2001 and 2004, Health Canada conducted assessments on exposure to asbestos, and that no further follow up had been required.

[24] Reports on the asbestos situation at the Heron Road complex were introduced at the hearing. Starting in 1999, a survey and plan for asbestos abatement were made periodically.

[25] In 1999, friable materials containing asbestos that were in poor or fair condition were removed, with air monitoring. In 2006, the findings read as follows:

…

> *During the re-assessment [sic], friable asbestos-containing materials in fair or poor condition were observed. These materials included parging cement firestop at wall and floor penetrations, insulation on mechanical piping systems (pipe fittings), fire-rated door insulation and texture ceiling finish. The damaged materials are predominantly located in areas accessible to maintenance staff, (i.e., mechanical rooms and mechanical pipe chase shafts), with the exception of the ceiling texture finish which is located in areas accessible to building occupants (i.e. elevator lobbies).*

…

[26] The firestop cement parging material containing asbestos is again mentioned in reports dated 2008 and 2015. Apparently, a project was prepared for the removal of asbestos-containing materials from the perimeter induction units.

[27] It is difficult to conclude from the reports introduced at the hearing the extent of the work that was done to decrease exposure to friable asbestos in the building. The monitoring and removal seemed to be ongoing.

2. Air quality

[28] Air quality concerns were of two orders: the air contaminants in the workshop, and air quality throughout the building.

[29] In 2002, the employer ordered a thorough inspection of the basement workshop of the Heron Road complex. The inspection concluded that the ventilation, lighting, and fire prevention were defective, and the area was shut down.

[30] The workplace inspection report, dated October 24, 2002, was introduced at the hearing. A Health Canada environmental health officer prepared it.

[31] The first observation that needed to be acted upon immediately was reported as follows:

…

> *… it was observed that room D95B is used as a cleaning/paint room using a cleaning tank filled with Kleen-Solv (Stoddard Solvent). It was recommended … to cease to use this cleaning tank to prevent any possible vapour exposure to employees and/or fire due to fugitive emission.…*

…

[32] The officer also recommended a further inspection by a safety engineer, who completed the report with his observations and recommendations.

[33] The safety engineer indicated the necessity for the CRA to carefully review the *National Fire Code*. Several activities in the basement posed a fire hazard: combustible dust, the use of air compressors to clean the dust, and open-flame torches being used in an environment in which volatile solvents oils and dust created a combustion risk.

[34] The paint shop should not have been placed in the basement, according to the *National Fire Code*. Moreover, the lighting and ventilation systems were inadequate. The safety officer recommended installing a proper ventilation system that exhausted to the outside. He recommended that the painting activity be relocated to another floor. The recommendations detail the exhaust systems for the new paint room.

[35] The workshop could continue to operate in the basement area, in his words, "… provided all activities are compatible with the intent of the National Fire Code." This meant eliminating all flammable liquids and ensuring dust, vapour, and odour control "… by using appropriate filter collectors and exhaust fans that discharge contaminants to outside the building."

[36] On February 3, 2003, the grievor signed a document about the investigation. It was unclear from his testimony in what circumstances the employer had him sign it. As time went on, he saw it as a cover-up. It reads as follows:

…

> *I have been employed by Canada Customs and Revenue Agency from May 1st, 1992 to Feb 3, 2003. During this time, I worked at 875 Heron Rd in the Lower Suites.*
>
> *A workplace inspection was conducted at 875 Heron Rd in the workshop and paint room in Facilities Management in October of 2002.*

> *Tests conducted by Workplace Health and Safety Program have confirmed some irregularity in the ventilation, lighting and the National Fire code.*
>
> *This area will be shut down until an estimate of repairs are prepared.*
>
> *Summary of tests results will be held in Facilities Management.*
>
> *I am requesting that this statement be placed permanently in my personal file.*
>
> …
>
> [*Sic* throughout]

[37] Both the grievor and an employer representative signed it.

[38] An "Occupational Health Assessments Summary" from Health Canada, dated November 25, 2002, reported that six employees of Facilities Management had undergone pulmonary function tests. Three showed mild obstructions or restrictions; one who had a past problem was now normal, and the other two remained normal.

[39] The assessment seems to have been done in good part because of exposure to solvents, paints, and chemicals. As stated earlier, monitoring was discontinued after 2004. The workshop was closed after the investigation report was received.

[40] According to the grievor, employees complained of the air quality throughout the building. He was aware of this as he sat on the Health and Safety Committee, to which employees would report problems.

[41] In January 2008, an indoor air quality (IAQ) consultant, Tedd Nathanson, presented a report on IAQ to the CRA for the Heron Road complex, following assessments done in 2006 and 2007 as well as a walkthrough inspection. The conclusion was that "<u>All measured IAQ parameters were within occupational health regulations and comfort guidelines</u>" (emphasis in the original). The report did include a number of recommendations to ensure the optimum functioning of the heating, ventilating, and air conditioning system (HVAC), mainly on inspections and cleaning.

[42] Sometime in late 2008 or early 2009, a memorandum was prepared for the minister responsible for the CRA. It begins as follows:

…

> *The purpose of this memorandum is to inform you of allegations about the indoor air quality (IAQ), at the 875 Heron road location of the Ottawa Technology Centre (OTC), made by three employees who are currently on leave. This matter attracted media attention in the past.*
>
> …

[43] The three employees referred to were the grievor, Mr. Babb, and a third employee who also went on an extended sick leave and, like the grievor and Mr. Babb, was eventually terminated.

[44] The memorandum stated that a third-party expert report had concluded that the facility was in compliance with IAQ standards. The salient parts of the memorandum read as follows:

> …
>
> *Since 2005, Greenough Environmental Consulting, has conducted independent evaluations of the entire 875 Heron Road complex on an annual basis. As a standard practice, reports are presented to members of the OTC's OHS* [Occupational Health and Safety] *Committee, at which time recommendations are discussed. Over the years there have been some minor deficiencies, which have been addressed and air quality readings have fallen within the required standards of the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE). In cooperation with the property manager – SNC Lavalin ProFac (Profac) and Public Works and Government Services Canada (PWGSC), the OTC has investigated all air quality complaints brought to its attention. HRSDC Labour Programs and Health Canada also contributed to these investigations. In all cases identified, it was concluded that there was no danger. A review of all OTC employees' sick leave usage indicates that usage of sick leave is comparable to that used in other CRA offices across the country.*
>
> [The union (Union of Taxation Employees, UTE) local carried out a survey that concluded that there was a link between poor IAQ and employee health issues. The survey results were posted on the union's website in October 2007.]
>
> …
>
> *On November 26, 2007, Greenough presented the October 2007 Heron Road annual air quality testing results to the OTC OHS committee. Again, the report identified that the air quality at the 875 Heron Road location met required industry standards. The OTC Director, Regional VP UTE, and the Ontario Region OHS specialist met with a third party expert, who was identified by the union, and agreed to by management. On January 16, 2008, the*

> *third party expert report was provided to the OHS committee members at Heron road. The report concluded that the facility is in compliance with established IAQ standards and guidelines. A number of recommendations were put forth to further enhance the existing HVAC system maintenance and operation.*
>
> *A meeting was held on February 15, 2008, to review and discuss the report with members of the OTC's OHS committee. On February 27, 2008, the local OHS Committee issued an all-staff message to 875 Heron Road OTC employees to confirm the expert's findings and provide a link to his report. The local OHS Committee continues to receive regular updates on the status of recommendations and to date, most have been addressed.*
>
> …

[45] The memorandum mentioned that the three employees alleged that the CRA was withholding information and obstructing their access to information.

[46] A further report, dated October 2010 for SNC-Lavalin, the property manager, indicates that measurements were within industry-accepted ranges, that the air-handling units appeared well maintained, and that some mould remediation should be carried out.

[47] In his application to the Workplace Safety and Insurance Board (WSIB) dated November 8, 2011, for occupational illness benefits, the grievor presented his perspective on the toxic work environment in the following manner:

> …
>
> *I now look back and can say I had no health problems prior to 1996-97. I started becoming ill in 1996-97. I started with fatigue/sleep problems, breathing problems and these started showing up in my Occupational health assessments. I remember discussing with Health Canada doctors and nurses… In the last while I have contacted a few past co-workers and found that I wasn't the only one with breathing issues, chemical in blood issues and others that no one want to elaborate on in fear that their employment or their pension could be affected. Restrictive breathing issues was common in my past workshop and that is certainly why it was closed and our health monitoring assessments discontinued. I now know that many serious workplace hazards were hidden from us. Lung testing was being done without advising exactly why. Hazard investigation findings were hidden and advised as just irregular findings on a made up document we were all asked to sign on February 3rd of 2003 instead of the very serious findings that surely affected everyone's health. The actual report (inspection) was dated October 24, 2002. Dangerous hazardous exposures and other dangerous circumstances were*

> *known to have existed for several years. We were not made aware of the risk and were not trained or provided proper personal protective equipment to protect our health.…*
>
> …
>
> [*Sic* throughout]

[48] I have quoted only part of the complaint. It details the dust and the exposure (to asbestos, PCBs, and fiberglass) in the course of electrical work, as well as fumes from solvents, paints, and the printing shop in the basement (which was closed in 2003) and sewer gases not being properly contained.

3. Electrical issues

[49] As an electrician, the grievor pointed out situations that he thought posed a hazard. One was the wiring in the ceilings, which according to him was deficient and hazardous. One electrician had been electrocuted by live wires in the ceiling.

[50] PWGSC, the owner of the Heron Road complex, had gradually entrusted all the electrical work to a contractor, SNC-Lavalin, and its subsidiary, Profac. By 2005, the electrical work was being almost entirely done by Profac. At one point, the CRA ordered its staff to no longer work in the ceilings. The danger that the grievor had pointed out was recognized as acknowledged in the following email from the Director of Facilities on October 6, 2005:

> *The general prohibition against CRA staff, and contractors hired directly by CRA, entering the ceiling plenum was put in place by CRA in recognition of the fact that there is an acknowledged electrical hazard that could affect persons working in the ceiling plenum (above the tiles).*
>
> *Profac (the company contracted to ensure maintenance) and their contractors will continue to access these areas to carry out their normal duties. Profac is responsible through their contractor safety programs and internal health and safety programs to manage the risk associated with working in these areas.*

[51] Profac carried out some remedial work to correct electrical defects. However, the grievor believed it insufficient, and on April 6, 2006, he registered a work refusal with a fellow CRA electrician.

[52] The matter was investigated by a health and safety officer (of the Labour Program at what was then Human Resources and Skills Development Canada), on

April 12 and 18, 2006. After inspecting the worksite, he concluded that no danger existed.

[53] Already on April 10, the employer had responded to the grievor and his fellow electrician, stating that measures had been taken to correct the deficiencies and that any remaining deficiencies did not pose a health or safety risk to employees in the course of their normal activities. Moreover, the grievor was reminded that he was no longer allowed to access the ceiling plenum, electrical panels, electrical rooms, and the duct system. His work was restricted to workstations. Consequently, the employer did not believe that any safety concern affected him.

[54] In May 2006, the grievor was advised that under the "Workforce Adjustment" program, his electrician position was being eliminated. Under the terms of that program, the employer had to provide an employee who wished to remain in the workforce with a reasonable job offer (RJO). He was reassigned to a job as an accommodation clerk. Mr. Hebert and Mr. Zolis testified that it coincided with a major reorganization throughout the CRA to restructure its Finance and Administration branch, including Facilities, the section in which the grievor worked. Maintenance work was contracted out.

[55] In December 2008, the employer offered the grievor a position as a mail and general services technician. It was classified at a lower level than the electrician position, but his electrician salary level would be maintained. Since he was already on indefinite sick leave, the employer agreed to defer further action until he returned to work.

B. Illness and return-to-work discussions

[56] By 2001, the grievor had been diagnosed with fibromyalgia. He suffered from dizziness, and his prescribed pain medication could increase the dizziness and cause drowsiness.

[57] In July 2008, he was assessed by a physician specializing in environmental medicine who disagreed with the fibromyalgia diagnosis but rather thought that he met the criteria for chronic fatigue syndrome. The assessment can be summed up by the following extract from the physician's letter:

…

> *… Typical of patients seen in environmental medicine, he has the polysystem symptom complex and central nervous system complaints of fatigue, sleep disturbance, chronic pain, chronic complaints and mood changes. Many of these patients have an associated sleep disturbance, as he does as well.…*
>
> …

[58] The physician recommended to the family doctor pain-management medication, weight reduction, and non-pharmaceutical treatments for chronic pain.

[59] In August 2008, the grievor went on sick leave, first with pay, then without pay. He received unemployment insurance, then disability benefits from Sun Life, one of the federal government's insurance carriers. His main medical complaints were excessive sleepiness, difficulty concentrating, and memory loss, as well as generalized pain.

[60] In 2009, the grievor was assessed by a team in Calgary, Alberta, specializing in environmental ailments such as "… Chronic Fatigue Syndrome, Fibromyalgia, Multiple Chemical Sensitivity & Related Disorders …" (the "Calgary assessment"). The Calgary assessment was comprehensive and included both a physical examination and psychological testing. As follows, I quote some passages from it on disability, prognosis, and causality:

> …
>
> *If the 2 days on which I met with Mr. Lapointe are indicative of his overall state of health, then he is not currently able to work at any job. He had clear cognitive difficulties maintaining a train of thought, remembering recent and less recent details about his life and making himself sufficiently understood, all things which are necessary to do most jobs. In addition, Mr. Lapointe's reported levels of energy are below that which is needed to work, even on a part-time basis… Mr. Lapointe's level of pain though variable, continues to be severe and impacts sustainable activity.*
>
> …
>
> *The prognosis at this point is extremely uncertain and depends upon whether any treatable cause can be found for one or more of Mr. Lapointe's disabling physical symptoms.…*
>
> …
>
> *Mr. Lapointe's has a number of disabling symptoms and a number of objective test results confirming physical and cognitive dysfunction. The onset of Mr. Lapointe's health issues occurring shortly after beginning a new job and his history of good health prior to that certainly raises the question of whether these symptoms are related to workplace exposures. Mr. Lapointe has noted and documented numerous problems with the buildings he*

> *worked in. To believe that a "sick building" was the cause or precipitant of Mr. Lapointe's problems one would also have to explain the ongoing ill health over a year after discontinuing work… The elevated score on the Kilburn battery of tests further suggests (though does not prove) that Mr. Lapointe's symptoms are at least in part related to toxic chemical exposures. In our polluted world, the workplace is not the only potential source of toxic exposures. However, the timing of onset of Mr. Lapointe's symptoms are suggestive of workplace impact on health.*
>
> …
>
> *How do we explain the ongoing disability 1 year after leaving work? Many of the effects of toxic exposure are chronic and irreversible. Therefore the ongoing disability is consistent with the health problems being related to work place chemical exposures.*
>
> …
>
> [*Sic* throughout]

[61] The assessment concludes with the following paragraph, titled "Return to Work":

> *… Given the plausible connection between Mr. Lapointe's workplace exposures and his current symptoms, I would be opposed to him returning to work at his previous workplace. Even in remediated work places [sic], previously affected workers tend not to do well. If, at some time in the future, he is healthy enough to consider part time employment, it will be important to work in a place with excellent air quality, no mold [sic], no asbestos, no fiberglass, no sewer gas and a reasonably chemical and scent-free environment.*

[62] When the grievor left the workplace in 2008, his employment situation had still not been settled. In December 2008, he received an RJO, which he never signed.

[63] More than a year after the grievor had left work for medical reasons, on December 14, 2009, his family doctor signed a note stating in part, "This man is <u>not</u> fit to return to work. He should be considered <u>TOTALLY</u> disabled" (emphasis in the original). In March 2010, the family doctor again wrote a note that the grievor should remain off work, this time until December 1, 2010.

[64] On June 17, 2010, the family doctor wrote to Sun Life to report on the grievor's disability status. He concluded his letter with the following statement: "Mr. Lapointe will never be able to return to work to any position. He does not believe this but in my

experience the likelyhood [*sic*] of returning to any commensurte [*sic*] employment is extremely remote."

[65] I note that when the grievor applied for Canada Pension Plan disability benefits after the termination, the family doctor filled out the medical report (January 2013) and indicated that the grievor "will never return to gainful employment" (use of all capitals in the original changed for ease of reading).

[66] On December 6, 2010, the grievor's manager, Mr. Hebert, wrote to him what is commonly referred to as an "option letter". By then, the grievor had been on leave without pay for illness for almost two years. He had used sick leave credits, which covered August to December 2010, after which the employer had granted him leave without pay. Mr. Hebert explained the CRA's policy on leave without pay for illness or injury in the following manner:

…

- *When employees are unable to work due to illness or injury and have exhausted their sick leave credits, managers must consider granting leave without pay.*
- *Where it is clear that the employee will not be able to return to duty within the foreseeable future, managers must consider granting leave without pay, for a period sufficient to enable the employee to make the necessary personal adjustments and preparations for separation from the Public Service on medical grounds.*
- *Where management is satisfied that there is a good chance the employee will be able to return to duty within a reasonable period of time (the length of which will vary according to the circumstances of the case), leave without pay provides an option to bridge the employment gap. Management must regularly re-examine all such cases to ensure that continuation of leave without pay is warranted by current medical evidence.*
- *Management must resolve such leave without pay situations within two years of the leave's commencement.*

…

[67] The options offered to the employee are then stated in the following terms:

…

All such leave without pay will be terminated by the employee's:

a) return to work (with applicable medical clearance);

> *b) retire on medical grounds (subject to Health Canada's approval);*
>
> *c) resign for non medical reasons (resignation letter is required);*
>
> *d) release under Section 51 (1)(g) of the* Canada Revenue Agency Act *.*
>
> …

[68] The letter states that the employer "will be obligated" to end his leave without pay by February 25, 2011. If the grievor chose to return to work, the employer would require a letter from a treating practitioner to identify medical limitations or restrictions requiring accommodation. If such a letter could not be obtained, the employer would require his consent to undergo an independent medical assessment to identify limitations so that the employer might provide an accommodation.

[69] Following that letter, the grievor and the employer had numerous exchanges, which the witnesses discussed at length at the hearing. On the employer's side, efforts were made to obtain from the grievor the necessary information to allow a return to work, since it seemed that he did not want to resign or retire. The original deadline of February 25, 2011, was extended a number of times.

[70] For his part, the grievor was profoundly dissatisfied with the way he felt the employer was treating him. He considered harassment Mr. Hebert's insistence on obtaining answers as to a possible return to work. The grievor did not want to endanger the disability benefits he was receiving from Sun Life, and he expected Sun Life to be involved. He also sought an assessment by Health Canada, since according to him, it already had his files (because of the monitoring from 1994 to 2004) and should have been responsible for assessing him.

[71] In the past, Health Canada carried out return-to-work assessments (fitness-to-work evaluations). However, by 2011, the CRA had contracted a third-party provider, the AIM Group, to conduct fitness-to-work evaluations in the context of a planned return to work. This was repeated to the grievor a number of times, but he simply refused to go to the AIM Group, as he thought Health Canada was better suited to carry out the evaluation. At the hearing, he maintained his position, despite having been told repeatedly that Health Canada no longer carried out these evaluations for the CRA.

[72] The grievor's family doctor never provided information on the grievor's fitness to work or functional limitations requiring accommodation. The Calgary assessment was never provided to the employer, including the comment that the grievor should not return to the same workplace.

[73] In December 2008, the grievor had received the offer for the mail and general services technician position as his electrician position no longer existed at the CRA. After receiving the letter, he asked for a work description as well as a job-hazard analysis and his occupational health file from the employer before meeting his doctor. His appointment was scheduled for March 1, 2011.

[74] The employer agreed to postpone the February 25 deadline, and Mr. Hebert emailed the job description to the grievor, so he could discuss it with his doctor. In his email, Mr. Hebert stated that there was no job-hazard analysis for that job and that the CRA did not have an occupational health file for the grievor.

[75] In an email dated February 4, 2011, to Mr. Zolis (to whom Mr. Hebert reported), the grievor insisted that his position was still as an electrician. Mr. Hebert answered, "Your substantive position remains Electrician… The position to which you received a reasonable job offer is that of Mail and General Services Technician. Should you choose to accept the reasonable job offer, this would become your substantive position."

[76] After that last email, the grievor wrote to Mr. Zolis to state that he did not want to deal with Mr. Hebert anymore, as he considered him one of many who would be included in his harassment complaint. Mr. Zolis responded by emailing the grievor a copy of the CRA's policy on *Preventing and Resolving Harassment in the Workplace* and offering his phone number if the grievor wanted to discuss further. However, in the meantime, the grievor was still expected to deal with Mr. Hebert for the return to work.

[77] On March 2, 2011, the grievor emailed Mr. Zolis, stating that he had met with his doctor. According to him, she could not give her opinion on the job being offered "… as it would likely not suit with the accommodations [the grievor] would require."

[78] At this point, the grievor asked for his union (the UTE, a component of the Public Service Alliance of Canada (PSAC)) to help him deal with Sun Life to facilitate his return to work. A PSAC pensions and disability insurance officer responded that he

would be in touch with Sun Life to facilitate the return to work; he also requested information from the grievor on his accommodation requirements.

[79] The employer had extended the deadline to March 15, 2011, to obtain sufficient information from the grievor. On March 7, 2011, in an email addressed to several union officials, Sun Life, and Mr. Hebert, he asked the following question: "Will I be terminate [*sic*] on March 15th while waiting for Sun Life to allow a return to work program to start?"

[80] Mr. Hebert responded the same day as follows:

> …
>
> *Just to clarify, as indicated in my e-mail of last Friday, March 4, 2011, we will, of course, continue to be reasonable in affording flexibility for required deadlines. As you recall, in that same e-mail, I requested additional information that will enable me to consider an appropriate extension.*
>
> *Also, please note that the date of March 15th was not a termination date, but a date by which we felt it was reasonable to expect your response to our previous letter of December 6, 2010. We are more than willing to continue to work with you, Denis, to ensure you have every opportunity to return to work with us. We do, however, need certain information to do so, including the information requested from your physician and the consent form, with which you authorize CRA to discuss your situation with your physician for purposes of facilitating your return to work.*
>
> …

[81] Mr. Hebert repeated his request for the consent and the Functional Abilities Assessment Form on March 14, 2011. At the hearing, the grievor explained that he had been very worried that his disability benefits would suddenly be cut off if Sun Life did not agree with a gradual return-to-work program. Therefore, it was very important that Sun Life be involved. On March 14, 2011, he emailed the following to Mr. Zolis and Mr. Hebert:

> …
>
> *My return to work request was forwarded to Sun Life by the Disability officer of the P.S.A.C. As I now understand, this is a multi party program which Sun Life is responsible to initiate. Please understand that my file will be referred to their Health Management Consultant. I am not aware of how this program works or who contacts and updates the employer.*

…

[82] Mr. Hebert answered that even with Sun Life's involvement, he still needed the two requested documents from the grievor; namely, the consent form, so the employer could contact the grievor's physician, and a Functional Abilities Assessment Form, to be completed by the physician, certifying that the grievor was able to return to work and specifying the required accommodation measures.

[83] At the same time as the employer was concerned with the return to work, the grievor was concerned with finding information on his exposure to dangerous materials in the workplace. There are numerous emails to that effect. The following is from one dated March 22, 2011, and addressed to Mr. Zolis:

…

> *Since 1992, I have been a maintenance electrician for the C.R.A and had never been advised that any of the work I had done through the years had exposed me to asbestos containing materials or any other hazardous dust. Because I was not advised, I had also not been trained to know anything about asbestos, silica in the cement, fibreglass in the ceilings, ect.… I like everyone else in that complex would only learn limited information at asbestos information sessions. My health Canada records attest to that. Not only was I not aware of my exposures but also that I was exposing everyone else to the asbestos, silica from the cement, fibreglass from the ceilings, ect... I had been exposed to or had disturbed while doing my work. It was an everyday practice for myself and some co-workers to use the air hose in our shop to remove as much dust from our work clothe before going home… How much of this dust was asbestos, fibreglass from the ceilings and/or silica from the cement that I had drilled into all day. How much of this did I take home to my family through the years. How was I to know that my work clothes should not have washed with my family clothes.*
>
> *I have no doubt from the records I have gotten and reviewed, that I was regularly exposed to asbestos and other serious hazards as fibreglass from the ceilings, silica dust from the cement and others which I have yet to discover. I can now understand the run around I was getting when I requested an asbestos exposure letter and record for all of my other exposures from this employer.*
>
> …
>
> [*Sic* throughout]

[84] The email ends by asking when further records will be received.

[85] I note that the Health Canada monitoring forms of 1994 to 2004 mentioned that protective measures against dust were ensured by disposable coveralls. In his form,

the grievor indicated that he used them. In 1999, asbestos began appearing on the list of hazardous materials he was exposed to.

[86] On April 29, 2011, he wrote the following to Mr. Zolis, copying Mr. Hebert:

> …
>
> *It appears at this point that the Employers Insurance provider does not want to initiate my return to work process. I am aware that I cannot return to work without their consent. I have informed them through* [the PSAC's disability officer] *that I am willing to meet with their Health management consultants as my physicians are health care providers and not return to work specialist. They in turn have advised me through* [the PSAC's disability officer] *that they would be contacting me in the very near future. This has not happened yet and I don't know why. Even with disabilities and limitations I have a right to work.*
>
> …
>
> [*Sic* throughout]

[87] Mr. Hebert responded on the same day as follows:

> …
>
> *Rest assured that our interest here is also facilitating your successful return to work as soon as possible. This is why we are offering you the services of the AIM Health Group. AIM has experts in return to work programs. They perform Fitness to Work Evaluations, and will work with you, and with us, to develop a comprehensive plan to facilitate your return to work, which, I believe, is exactly what you are looking for. AIM services include the assessment and identification of any limitations, and the development of an appropriate accommodation plan that would respond to those limitations, allowing a successful return to work.*
>
> …

[88] In another email, Mr. Hebert again stated the need for the documentation to enable the return to work; that is, a note from the physician clearing the return with a statement of limitations and the grievor's consent for the employer to contact the physician. Mr. Hebert requested the consent and the Functional Abilities Assessment Form by May 13, 2011.

[89] Sun Life wrote a letter to the grievor, dated April 29, 2011. It is unclear when he received it, but he certainly had received it by mid-May. It stated that Sun Life needed information from his physician, or from a fitness-to-work evaluation, to assist in the return-to-work effort. I quote the relevant part, as follows:

…

> *The Disability claim was submitted for the substantive position of Electrician even though that position had been abolished mid 2005. Your employer offered you a permanent position in the mailroom, but you state that this position does not meet your medical limitations and restrictions.*
>
> *At this time, for both Sun Life and your Employer to understand and plan next steps in respect to your Disability claim and/or your reintegration into the workplace, what is needed is an updated medical report providing us, both your Employer and Sun Life, with an explanation of what your limitations and restrictions are, and what type of work you are suited to do given your medical condition. As such, we strongly suggest you submit to a Fitness to Work evaluation or ensure that your treating physician provide us with this information.*
>
> *Once this information is reviewed, we will be in a better position to determine the practicality of further Health Management assistance.*

…

[90] In early May 2011, Mr. Zolis offered to meet with the grievor and his union representative to discuss the return to work. The grievor declined the invitation. He asked that everything be discussed through email communication.

[91] On May 19, 2011, Mr. Hebert wrote a letter to the grievor that starts with the following paragraph:

> *This is further to the letter I sent you on December 6, 2010, and our conversations with you. We have, on numerous occasions, requested a medical certificate stating that you are fit to return to work as well as any limitations and restriction. We have provided you with many extensions in order to provide the requested documentation. In our most recent communication dated April 29, 2011 we requested that the information from your doctor be received no later than May 13, 2011 or for you to notify management if you would like to undergo a Fitness to Work Evaluation with AIM Health Group. We still have not received any documentation from you.*

[92] The letter then restated the options offered to the grievor: return to work, with a medical certificate stating that he was fit to return (or a fitness-to-work evaluation by the AIM Group), retirement on medical grounds, or resignation. The last option was a dismissal. He was given until June 17, 2011, to respond.

[93] During that period, the Board (which was then the PSLRB) heard a complaint made by the grievor under the *Canada Labour Code*. Mr. Hebert was asked for details about the grievor's employment, in preparation for the hearing, and he responded in the following manner:

> …
>
> *Here is my recollection. Please keep in mind that Denis's time with CRA pre-dated my own.*
>
> *Denis was hired as an Electrician, (GL-EIM-10), and worked with the OTC primarily at Heron Road, with some time at 2215 Gladwin, in his role as electrician.*
>
> *I believe his actual workspace was in the Lower Level of 875 Heron Road, but he often worked throughout the building on various electrical issues. I do not believe that Denis worked at any other locations as an electrician until sometime around 2004-5, at which point he was moved up to Room 1050 of the OTC, with the Regional Real Property group, which subsequently moved to room 154 also at 875 Heron.*
>
> *After he was declared affected due to F&A reorg, Denis was given alternate duties related to minor accommodations services, and worked at various Ontario Region locations in Ottawa, primarily at 875 Heron and 333 Laurier.*
>
> *He submitted a refusal to work based on perceived electrical deficiencies, which was appropriately investigated. I recall at one point, Denis did not feel well, and went home. He felt it was an issue with air quality. His manager … worked with OSH committee to investigate, and found no issues. I believe there was a WSIB claim for this incident as well.*
>
> *In general, as a member of the OSH committee, Denis was also active in ensuring a safe work environment, championing and voicing concerns related to perceived air quality issues, all of which were investigated, thoroughly, with the eventual conclusion that no air quality issues existed. This included concerns that the building had allegedly been constructed on a dump, which was allegedly impacting air quality. This, too, was investigated by the local OSH and Management and found to be groundless.*
>
> …

[94] On June 7, 2011, the grievor's family doctor addressed the following note to Sun Life:

> …
>
> *Mr. Lapointe has asked me to write this letter on his behalf. He would like to participate in a vocational rehabilitation program. Currently he finds that staying at home is detrimental to his health. I am unable to give a definitive measure of his restrictions*

> *and limitations for any new type of employment. We are hoping that a vocational rehabilitation program would show us these limitations.*
>
> *I hope this provides you with the necessary information.*
>
> …

[95] On June 15, 2011, Sun Life wrote a letter to the grievor in response to his physician's request, which read in part as follows:

> …
>
> *We acknowledge receipt of your attending physician's letter concerning vocational rehabilitation.*
>
> *We have reviewed the letter, and note the attending physician has not provided us with information that would constitute medical evidence that you are capable of successfully participating in a Rehabilitation program that would lead to commensurate level work. As such, we are unable to approve your request for vocational assistance.*
>
> *If you feel you are now medically capable of resuming work in some capacity, we suggest you work with your Employer and undergo a Fitness to Work Evaluation in order to execute a healthy return to work plan if possible. Following the evaluation, we will require a copy of the report, and will monitor your progress accordingly.*
>
> *At that time, we can revisit our decision concerning Health Management involvement.*
>
> …

[96] The same day, Mr. Hebert's replacement, Ms. Clayton, wrote to the grievor, reiterating the need for a medical certificate and again offering the AIM Group's services.

[97] The grievor responded to Sun Life's letter the following day in an email copied to the employer. In it, he voiced his dissatisfaction with Sun Life not being willing to arrange for his fitness-to-work evaluation, stating in closing, "I am unwilling to undergo further harm at the hands of my employers as AIM Group physicians are not independent when paid by the employer." At the hearing, he conceded that he knew nothing about the AIM Group other than the fact that the employer had offered its services.

C. Termination

[98] The employer prepared a memorandum on the grievor's proposed termination dated July 20, 2011. It is addressed to the assistant commissioner for the CRA's Ontario region and was drafted by Mr. Zolis.

[99] In the memorandum, Mr. Zolis recounts the efforts made to obtain information from the grievor to accommodate his health needs, to no avail. His physician was not providing the information, and the grievor refused to submit to an assessment by the AIM Group.

[100] The memorandum details the grievor's five outstanding recourses underway, comprising complaints, a grievance, and an application, as follows:

1. a complaint under the *Canada Labour Code* before the Board (since dismissed);
2. the WSIB application (for which apparently, the appeal is still ongoing);
3. a discrimination complaint before the CHRC based on disability (the CHRC advised him to first avail himself of the adjudication recourse);
4. a harassment complaint, which apparently was never formalized; and
5. a discrimination grievance held in abeyance at his request so that he could receive information in response to an access to information and privacy (ATIP) request.

[101] The memorandum also deals with the grievor's frequently expressed concerns about IAQ, with the issue having been addressed to the employer's satisfaction.

[102] Mr. Zolis signed the termination letter dated August 3, 2011, which stated that it was effective as of the end of the day on August 5, 2011. The letter sets out the employer's reasons for concluding that it could no longer employ the grievor by presenting the following facts.

[103] The grievor had been on leave without pay for illness or injury since December 16, 2008. Two years later, as per the policy on leave without pay, the employer provided him several options, including returning to work or taking medical retirement. His leave without pay was extended many times to allow him to obtain the

necessary information from his family doctor to facilitate an accommodation commensurate with his functional limitations. The information was never provided. The help of a vocational assessment group was offered but was declined.

[104] The letter then concludes with the following:

…

> *Given the length of time elapsed since you first proceeded on leave and the fact that you have failed to provide the required medical information from a medical practitioner, by the authority delegated to me under Section 51(1) (g) of the* Canada Revenue Agency Act*, you are hereby terminated for incapacity ….*

…

[105] At the hearing, I heard evidence that in 2016, the Social Security Tribunal concluded that the grievor has suffered from a disability that has prevented him from working since 2008. That conclusion was reached long after the employer decided to terminate him. For the purposes of this decision, I have considered the evidence as it was as of his termination. He had been on sick leave for three years, and no medical certificate stated that he was fit to return to work.

D. Mr. Babb's testimony

[106] Mr. Babb was called as a witness by the grievor, largely to show that his experience had been very similar to the grievor's. Mr. Babb also suffered from several ailments, which he claimed had been aggravated by the workplace at the Heron Road complex. He was also terminated after a prolonged sick leave and had been very active on the local Health and Safety Committee.

[107] Mr. Babb also grieved his termination before this Board. His case was heard and is awaiting a decision. I am not seized of that grievance.

[108] Mr. Babb's circumstances were a little different in that when he started to work for the CRA, he had already been diagnosed with illnesses linked to his previous workplaces. He testified that the employer was made aware of his medical condition when he started to work there. He worked in the print shop. Unlike the grievor, he did not move around the building but rather was confined to the basement until the print shop was moved after the 2002 report.

[109] Mr. Babb testified at length on a document that the employer had drawn up before his termination, which showed the several complaints he had made about the Heron Road complex. With all due respect, I do not think that Mr. Babb's circumstances are relevant to my decision in this case. He and the grievor were both active in denouncing working conditions in their workplace, and they both lost their jobs after a prolonged period of illness. That is not sufficient to find a pattern in the employer's behaviour that would lead to a conclusion that the grievor's termination amounted to retaliation for exercising his rights under the *Canada Labour Code*.

III. Summary of the arguments

A. For the employer

[110] The Board has no jurisdiction to hear the grievance, as the termination was not disciplinary. Because the CRA is a separate agency, the Board does not have jurisdiction to inquire into a termination for reasons other than discipline for misconduct.

[111] The Board does not have stand-alone jurisdiction to consider a discrimination claim (see *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115); it can be seized of one only if it is properly seized of a grievance. Since the Board does not have jurisdiction over the grievance, it cannot have jurisdiction over the discrimination claim. The issue in this case was the possibility of the grievor returning to work. He had the duty to participate in the effort (see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970), but he never did.

[112] There is no convincing evidence of any reprisal on the CRA's part that would support the complaint under the *Canada Labour Code*. Simply put, the grievor was terminated because of the lack of information that would have allowed him to return to work. He was not medically certified as fit to return.

B. For the grievor

[113] The grievor submits that he has a valid grievance before the Board and alleges that the termination was disciplinary. Therefore, the Board has jurisdiction to consider the discrimination claim under the *CHRA*. The Board also has jurisdiction under ss. 133 and 147 of the *Canada Labour Code* to consider whether the termination was retaliatory.

[114] The briefing paper prepared for management before the grievor's termination shows that at least in part, his actions to protect his rights were considered at the time the decision was made. If not, why include his concerns (air quality, asbestos, and complaints) if the employer's concern was truly only the two-year rule and the consequent obligation to end the employment relationship?

[115] In his argument, the grievor emphasized how his termination was remarkably similar to that of two other Health and Safety Committee members, Mr. Babb and another member, who were all made sick by the conditions at the Heron Road complex, went on sick leave, and were terminated after two years of absence.

[116] In the grievor's case, from the evidence that was heard, the employer did not truly attempt to facilitate his return to work; nor did it consider an individualized assessment. The two-year mark passed, and from there, it was decided that he would be terminated, with no opportunity to seek more information or wait a little longer.

[117] The grievor wanted to cooperate, but he was concerned about losing his disability benefits; it was essential that Sun Life be involved so as not to jeopardize his rights. He requested assistance to identify limitations and restrictions, but no help was forthcoming. He was willing to go to Health Canada for the assessment, but the employer refused. Yet, medical retirement would have required Health Canada's approval; if so, there was no reason Health Canada could not contribute to the fitness-to-work evaluation.

[118] According to the grievor, the terms of the *Government Employees Compensation Act* (R.S.C., 1985, c. G-5; *GECA*) should have applied, as it was a workplace injury. According to the *GECA*, the proper assessment should have been done by the WSIB. He was willing to go to Health Canada. It was improper for the employer to insist that he consult the AIM Group, which had no record of him and no authority. Rather, it was an agent of the employer. Instead, it was reasonable for him to want to go to Health Canada, which had records of his monitoring from 1994 to 2004.

[119] In his testimony, Mr. Zolis confirmed that the termination briefing paper was the basis of the grievor's termination. The briefing paper referred to his health concerns and complaints. Therefore, it was logical to view his exercise of his rights as a motive for the termination, which could be considered retaliatory, disciplinary, and a sanction for what the employer considered were his excessive complaints.

IV. Analysis

[120] Both parties presented case law to support their respective positions. I will discuss the relevant case law in this section.

[121] Under s. 209, the Board has jurisdiction over the grievance only if the termination was disciplinary. As for the complaint, the grievor has to show that the employer's action was a reprisal. He also alleges discrimination on the basis of disability. Therefore, I must decide those issues, which are whether the termination was disciplinary or a reprisal against him and whether the termination was discriminatory.

[122] Before I start my analysis, I wish to state that I have no doubt that the grievor suffers from several ailments. They might or might not have been caused or aggravated by his work environment. As I stated at the outset of the hearing, medical causality is not part of my mandate or expertise. Apparently, he has an ongoing case before the Ontario WSIB, which is the proper authority to decide such matters. My analysis is confined to the questions stated in the preceding paragraph. My conclusions have no bearing on what might have caused the grievor's very real health problems.

[123] I add that whether the work environment made the grievor sick is of no import to my decision. I believe that on numerous occasions, the employer followed up and investigated working conditions, and that it took steps to remediate the situation. From the evidence at the hearing, I concluded that the grievor became obsessed with finding liability on the part of the employer for his ailments. Again, I cannot decide that issue. However, unfortunately, it became obvious that his obsession in pursuing information blinded him to the need to provide clear information to the employer on his ability to return to work, with details as to his limitations. That information was never provided to the employer, and that lack of information is fatal to his case.

A. Was the termination disciplinary?

[124] Section 209 covers the referral of grievances to the Board for adjudication. It reads as follows:

> ***209 (1)*** *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to*

> *and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> ***(a)*** *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> ***(b)*** *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> ***(c)*** *in the case of an employee in the core public administration,*
>
> ***(i)*** *demotion or termination under paragraph 12(1)(d) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*
>
> ***(ii)*** *deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*
>
> ***(d)*** *in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*
>
> ***(2)*** *Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*
>
> ***(3)*** *The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).*

[125] It is clear that the only ground for referral would be s. 209(1)(b). The bargaining agent did not support the referral, and the CRA is a separate agency, which as of the grievor's termination had not been designated under s. 209(3).

[126] The employer terminated the grievor's employment for medical incapacity under s. 51(1)(g) of the *Canada Revenue Agency Act* (S.C. 1999, c. 17), which reads as follows:

> ***51 (1)*** *The Agency may, in the exercise of its responsibilities in relation to human resources management,*
>
> …
>
> ***(g)*** *provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part.…*

[127] Therefore, for me to have jurisdiction over the grievance, I must find that despite the employer's overt reason for the termination, medical incapacity, its motivation was disciplinary.

[128] The Board and the Federal Court have recognized that it is not sufficient for the employer to claim that an action was not disciplinary to make it so. An apparent administrative action may in fact be disguised discipline. Consequently, it is necessary to consider the hallmarks of the disciplinary measures.

[129] In *Canada (Attorney General) v. Frazee*, 2007 FC 1176, the Federal Court considered the elements of a disciplinary action. To distinguish between an administrative and a disciplinary action by the employer, one must consider both the purpose and the effect of the action. That said, the Court also stated the following, at paragraphs 22 and 23:

> *[22] It is not surprising that one of the primary factors in determining whether an employee has been disciplined concerns the intention of the employer. The question to be asked is whether the employer intended to impose discipline and whether its impugned decision was likely to be relied upon in the imposition of future discipline.…*
>
> *[23] It is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known and a necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended. Thus in* Gaw v. Treasury Board (National Parole Service) *(1978) 166-2-3292 (PSSRB), the employer's attempt to justify the employee's suspension from work as being necessary to facilitate an investigation was rejected in the face of compelling evidence that the employer's actual motivation was disciplinary ….*

[130] When considering whether an action by the employer was in fact disciplinary, according to the Federal Court, one must consider the purpose and effect of the action.

[131] There is no dispute as to the effect of the employer's action: the grievor was terminated, which is very serious. The question that remains is the purpose of the employer acting that way.

[132] The grievor submits that the employer's purpose was to rid itself of a troublesome employee. He points to the termination brief as an illustration of this purpose, since in it, the employer dwells on his complaints.

[133] I cannot see disciplinary intent in the employer considering the whole of its relationship with the grievor. He is never blamed for bringing up issues, and the issues, through the years, were thoroughly investigated, which shows that the employer took him seriously. His last major action, before going on sick leave, was the work refusal because of the conditions in the ceilings. The employer acknowledged the risk but concluded that he was not exposed to it, since he no longer worked in the ceilings. Again, there was no blame but rather an acknowledgement.

[134] According to *Frazee*, it is clear that some attempt to punish behaviour must be found to find an action disciplinary. The employer never told the grievor that his actions were wrong and never imposed any sanction on him for bringing up issues. This is in contrast to the case mentioned in *Frazee*, *Gaw v. Treasury Board (National Parole Service)*, PSSRB File No. 166-02-3292 (19780220), in which the employer had imposed what it termed an administrative suspension pending an investigation. The adjudicator found otherwise, as letters addressed to Mr. Gaw clearly showed that the employer had perceived him as guilty of misbehaviour, so that the suspension could in fact be seen as disciplinary.

[135] Nothing in this case shows the employer's decision in a disciplinary light. The grievor perceived the loss of his electrician position as punitive, but it is clear from Mr. Zolis's testimony that the CRA as an organization no longer wanted the responsibilities that PWGSC had taken on as the manager of federal buildings. The grievor's loss of his electrician position cannot be seen as punishment for the work refusal.

[136] As to the termination, the employer afforded the grievor every opportunity to show that he was able to return to work and to provide the functional limitations that would dictate the accommodation he would require. Contrary to the situation in *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101, the grievor's physician never wrote to the employer stating that he was able to return to work. The most the physician wrote in this respect was a note to Sun Life requesting vocational rehabilitation. Once it was clear that Sun Life would not provide it, no further attempt was made, by the grievor or his doctor, to find ways to return him to work.

[137] The employer's actions of extending deadlines, offering an assessment service, and asking repeatedly for a statement from the treating physician and the grievor's

consent to allow it to contact the physician all are difficult to reconcile with a punitive motive. Its efforts to return the grievor to work were met by a complete absence of cooperation. I cannot see that it was disciplinary for the employer to come to the end of the road and think that it could not go any further.

[138] I find the termination not disciplinary, and consequently, the Board does not have jurisdiction to decide the grievance.

B. Was the termination a reprisal for exercising rights under the *Canada Labour Code*?

[139] The *Canada Labour Code* provides recourse before this Board for federal public sector employees who believe that the employer has denied them their rights under that legislation by imposing retaliatory measures for having exercised those rights. The relevant sections, all found in Part II, "Occupational Health and Safety", read as follows:

> …
>
> ***123 (2)*** *This Part applies to the federal public administration and to persons employed in the federal public administration to the extent provided for under Part 3 of the* Federal Public Sector Labour Relations Act.
>
> …
>
> ***133 (1)*** *An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*
>
> …
>
> ***147*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*
>
> ***(a)*** *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*
>
> ***(b)*** *has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*

> ***(c)*** *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*
>
> …

[140] In *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52 at para. 64, the PSLRB enunciated the following test to be met for a complainant to establish that the employer took reprisal measures against the complainant for exercising rights under the *Canada Labour Code*:

> *[64] Thus, the complainant would have to demonstrate that:*
>
> *a) he exercised his rights under Part II of the* CLC *(section 147);*
>
> *b) he suffered reprisals (sections 133 and 147 of the* CLC*);*
>
> *c) these reprisals are of a disciplinary nature, as defined in the* CLC *(section 147); and*
>
> *d) there is a direct link between his exercising of his rights and the actions taken against him.*

[141] The grievor actively participated in denouncing work conditions in his workplace. This can be seen as exercising his rights under Part II. He also participated in a work refusal that was investigated. He suffered an adverse effect, as he lost his employment. However, the loss of his job, I have concluded, was not disciplinary. Moreover, I can see no direct link between actions taken against him (the loss of his job) and the fact that he exercised his rights.

[142] The employer's explanation, which is that the grievor was terminated because he did not provide sufficient information to allow his return to work, is entirely plausible, given the documentary evidence. I note the tone of Mr. Hebert's email of May 25, 2011, sent when the employer was preparing for a hearing before the Board of a complaint made by the grievor. It is dispassionate and does not criticize him for his concerns about the building deficiencies; rather, it reports that the concerns were investigated. Throughout the correspondence with him, the tone remained civil and professional.

[143] The grievor argues that his persistence in seeking information on the toxic work environment caused the employer to dismiss him. There is no doubt that he was persistent. However, I fail to see anything in the evidence that would show that the dismissal was retaliatory. When considering the termination, the employer recounted his complaints throughout his employment. I understood this recounting as a safety

measure for the employer to consider if, indeed, there might have been substance to the complaints that would cast a shadow on the dismissal.

[144] Again, I cannot decide the causality of the grievor's ailments. But from the employer's point of view, it did what it had to do to ensure a safe workplace by following up on complaints through inspections and investigations. The grievor may disagree with the conclusions of those investigations, but I take them as the results of third-party investigations that I have no reason to doubt. The workshop was closed in the basement after the 2002 Health Canada investigation. At the request of the electricians, they were monitored for respiratory issues from 1998 to 2004. The employer ensured the monitoring of IAQ, and asbestos was an ongoing concern with monitoring and abatement programs.

[145] The reason for the grievor's dismissal is simple and obvious — he refused to cooperate with the employer's efforts to help him return to work. His physician, who it seems thought he could not return to work, never provided a clear direction for a return to work or limitations. The recommendation from the Calgary assessment that the grievor should not return to his original workplace was never presented to the employer.

[146] I do not believe that the grievor's loss of his electrician position was due to the work refusal. The transfer of responsibility to contractors for maintenance work was a general endeavour by the CRA, not a specific decision for the Heron Road complex.

[147] The grievor was unhappy with the RJO, so it was never analyzed by a medical practitioner from an accommodation point of view. He could offer no coherent reason for not submitting to a fitness-to-work evaluation by the AIM Group after it was made clear to him that neither Health Canada nor Sun Life would be able to help him in this regard.

[148] The employer's conclusion that the return to work was not possible was not a reprisal; it was simply the only conclusion it could have reached.

C. Was the termination discriminatory?

[149] The employer objected to my jurisdiction to hear a discrimination claim, given that according to it, I do not have jurisdiction over the grievance. Section 226(2) of the *Act* provides that the Board may apply the provisions of the *CHRA* "… in relation to

any matter referred to adjudication …" The *Act* is silent, as is the *Canada Labour Code*, as to the application of the *CHRA* in relation to a complaint under the *Canada Labour Code*.

[150] The grievor's response to the employer's argument was mainly that the termination was in fact disciplinary, and therefore, the Board has jurisdiction. He also provided as authority for jurisdiction on the discrimination aspect of the grievance the decisions in *Babb v. Canada Revenue Agency*, 2015 PSLREB 80, and *Lovell v. Canada Revenue Agency*, 2010 PSLRB 91. Both cases can be distinguished by the fact that in them, the grievors had bargaining agent support, and the referrals were done under s. 209(1)(a). In this case, the grievor does not have bargaining agent support for the grievance, and therefore, it could not have been referred under s. 209(1)(a). This means that the no-discrimination clause of the relevant collective agreement cannot be invoked to give me jurisdiction over the discrimination claim.

[151] I have concluded that I have no jurisdiction over the grievance, since I concluded that the termination was not disciplinary. In *Chamberlain*, the adjudicator found that without jurisdiction over a grievance, he could not consider discrimination allegations, despite the authority granted in s. 226(1) of the *Act* for an adjudicator to apply and interpret the *CHRA*. His reasoning can be found as follows at paragraphs 83 to 87 of his decision:

> ***83*** *In my view, subsection 226(1) of the* PSLRA *applies only to an adjudicator appointed to hear and determine grievances that have first been found adjudicable under subsection 209(1) of the* PSLRA*. These powers, which include the ability to interpret and apply the* CHRA*, are available to the adjudicator only when the matters referred to adjudication are contemplated in subsection 209(1) of the* PSLRA*. This means subsection 209(1) is a threshold determination before the exercise of powers pursuant to subsection 226(1).*
>
> ***84*** *As noted earlier, subsection 226(1) of the* PSLRA*, in my view, is limited to matters properly before the adjudicator in the first place. It reads in part as follows:*
>
> > **226**. (1) An adjudicator may, in relation **to any matter referred to adjudication**,
> >
> > …
> >
> > (g) interpret and apply the *Canadian Human Rights Act* and any other Act of Parliament relating to employment matters, other than the provisions of the *Canadian Human Rights Act* related to the right

> to equal pay for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;
>
> (h) give relief in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the *Canadian Human Rights Act*…
>
> *[Emphasis added]*
>
> ***85*** *I am of the view there is no jurisdiction solely based on the words of subsection 226(1) of the* PSLRA. *The words "to any matter referred to adjudication" must mean something. I am of the belief they mean for an adjudicator to apply subsection 226(1) of the* PSLRA *there must be a matter that can properly referred under subsection 209(1) of the* PSLRA.
>
> ***86*** *Subsection 226(1) of the* PSLRA *does grant broad power to adjudicators with respect to the* CHRA *but only with respect to grievances or matters referred to adjudication under subsection 209(1) of the* PSLRA.
>
> ***87*** *In other words, the condition precedent for an adjudicator to consider a remedy under subsection 226(1) of the* PSLRA *requires him or her to first conclude the matter was referred to adjudication under subsection 209(1) of the* PSLRA.

[152] As in *Chamberlain*, I conclude that I do not have jurisdiction to consider the discrimination argument in the context of a complaint, but in any event, if I did, I would conclude that there is an absence of discrimination.

[153] On the facts before me, I would have had no difficulty finding that the grievor had established a *prima facie* case of discrimination based on disability. However, I would have also determined that the employer met its onus with respect to the duty to accommodate.

[154] The grievor argued that it was discriminatory to terminate his employment, given the low cost of accommodating him by keeping him on-strength on leave without pay. That is not the issue when deciding whether the employer has the right to put an end to an employment contract.

[155] In both *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, and *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, the Supreme Court of Canada ruled that an employer may end an employment relationship when there is no foreseeable return to work for an employee after affording the employee a reasonable period in which to

recover from an injury or illness. The grievor argued that the two-year rule was itself discriminatory, but the fact is that the employer did not apply it rigidly. He was given every opportunity to produce a medical certificate stating that he was fit to work. It was never done, and from the physician's comments to Sun Life, it could be understood that in fact the physician believed that the grievor would never be fit to return to work. As far as the employer knew, there was no return to work for him in the foreseeable future.

[156] The grievor submitted the case of *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, which also dealt with the two-year rule to resolve situations of leave without pay for medical reasons. The employee in that case had complained to the CHRC, which had dismissed her complaint. At first instance, the Federal Court ruled that the two-year rule was *prima facie* discriminatory, as it applied to persons with disabilities and did not allow individualized assessments or envisage that some disabilities might last longer than two years, thus precluding an eventual return to work. The Federal Court of Appeal upheld the decision and referred the matter back to the CHRC for further investigation.

[157] In that case, it was apparent that the employee had requested additional time to see if a recovery might be possible and that the request was denied, which forced her to take medical retirement. The grievor in this case requested extensions, which were granted. However, no information was provided to facilitate his return to work. Even if the two-year rule were *prima facie* discriminatory, I believe that the employer has shown that it was willing to be flexible, as long as some cooperation could be seen on the grievor's side.

[158] The grievor presented *Kingsway Transport v. Teamsters, Local Union 91*, 2012 CanLII 20111 (CA LA), in which it was decided that s. 239.1 of the *Canada Labour Code* imposed an obligation on the employer not to end an employment relationship because of an absence caused by a work injury. Two factors distinguish that decision from this case. First, the grievor is not covered by the *Canada Labour Code* with respect to his employment, which is covered by the *Act*. Second, the WSIB has still not decided whether to consider his illness work-related.

[159] For the same reason, I find ill-founded the grievor's argument that the *GECA* should apply. The *GECA* provides that provincial workplace insurance boards will

determine whether a workplace injury occurred. In *Canada Post Corp. v. Smith*, 1998 CanLII 1947 (ON CA), the Ontario Court of Appeal ruled that it meant that the protection afforded by the provincial statute also applied to federal workers, including s. 54 of the Ontario *Workers' Compensation Act* (RSO 1990, c W.11), which requires an employer to offer re-employment to a worker unable to work as a result of a work injury. However, the WSIB has yet to make a decision finding that the grievor suffered a workplace injury, over 8 years after his termination for medical incapacity and over 11 years since he left work on sick leave. Moreover, the employer's obligation, which it never denied, ceases to exist if the grievor cannot establish that he is fit to return to work.

[160] The grievor also submitted *Canadian National Railway Company v. Teamsters Canada Rail Conference*, 2018 ABQB 405 ("*CNR*"), in which the Alberta Court of Queen's Bench upheld the decision of an arbitrator who had reinstated an employee dismissed for excess absenteeism, after a prolonged leave of absence. The employee's medical practitioner had written a note stating that the employee was "unable to work indefinitely." However, the arbitrator found the employer had made no effort to consider accommodation for the employee, and on that basis, the arbitrator reinstated him.

[161] That is not so in this case. The employer was well aware of its duties to seek proper accommodation for the grievor. It repeatedly requested information to that effect and offered to pay for his assessment. Contrary to the employee in *CNR*, several times, the grievor was made aware of the consequences of not responding to information requests on the accommodation for a return to work.

[162] Other cases presented by the grievor, in which the Canadian Human Rights Tribunal found that discrimination had occurred (see *Willoughby v. Canada Post Corporation*, 2007 CHRT 45, and *Brunskill v. Canada Post Corporation*, 2019 CHRT 22), can be distinguished by the fact that in them, medical information was made available to the employer but was not acted upon.

[163] As this Board has concluded in several other cases (see, for example, *Belisle v. Deputy Head (Department of Aboriginal Affairs and Northern Development)*, 2016 PSLREB 88, and *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24), I find that it was not discriminatory for the employer to

conclude that it could no longer employ the grievor, as he was neither cooperating in the effort to return him to work, nor was there any medical information that he could return to work in the foreseeable future. The employer has a duty to accommodate disabled employees, but that duty is shared. The employee must also cooperate in the effort (see *Renaud*). The employer showed flexibility, but in the end, it was forced to conclude that no medical certificate would be forthcoming and that no fitness-to-work evaluation would be done. After three years' absence, and after nothing to indicate a foreseeable return to work for the grievor, it was not discriminatory to end his employment.

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

(The Order appears on the next page)

V. Order

[165] The complaint in file number 560-34-79 is dismissed.

[166] The Board does not have jurisdiction to decide the grievance in file number 566-34-9150. The file is closed.

February 25, 2020.

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