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

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

BETWEEN

DAVID GLENN BABB

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Babb v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Wassim Garzouzi, counsel

For the Employer: Caroline Engmann, counsel

Heard at Ottawa, Ontario,
July 18, 19, and 22, 2016, January 9, 10, 12 and 13, 2017, and February 13, 2017.
(Written submissions filed October 24 and November 7 and 14, 2019.)

I. Individual grievances referred to adjudication

[1] David Glenn Babb ("the grievor") was terminated from his employment with the Canada Revenue Agency ("the CRA" or "the employer") by letter dated April 13, 2010. He was terminated pursuant to s. 51(1)(g) of the *Canada Revenue Agency Act* (S.C. 1999, c. 17; *CRAA*) for non-disciplinary reasons. In the termination letter, the employer stated that he was terminated for incapacity, effective the close of business that day.

[2] The grievances that the grievor filed against his termination were denied at the final level on September 16, 2011. The material portion of the final-level grievance response to the grievances is as follows:

> …
>
> *I note that you have been absent from the workplace for medical reasons since March 6, 2007. In such cases of extended periods of leave without pay, management must determine whether or not the employee will be able to return to work in the foreseeable future. Based on the medical information on file, it is clear that you were not in a position to return to work in the foreseeable future, and as such, I am satisfied that the decision to terminate your employment for reasons of incapacity was appropriate.*

[3] The grievor referred his grievances to the Public Service Labour Relations Board (PSLRB), which is now the Federal Public Sector Labour Relations and Employment Board ("the Board"), on October 24, 2011. His union, the Public Service Alliance of Canada ("the PSAC"), also referred them on November 4, 2011. Notice was also served on the Canadian Human Rights Commission, alleging discrimination based on disability. He also claimed that his termination violated the "no discrimination" clause (article 19) of the collective agreement between the CRA and the PSAC for the Program and Administrative Services Group that expired on October 31, 2010 ("the collective agreement"). The grievor alleged that his termination was improper and discriminatory and that it was tainted by bad faith on the part of the employer.

[4] For the reasons that follow, I have determined that the employer established undue hardship on the basis that Mr. Babb was unable to return to work in the foreseeable future. I have also found that the grievor did not establish that the employer's decision to terminate him was tainted by bad faith. Accordingly, the grievances are dismissed.

II. Summary of the evidence

[5] The employer called two witnesses: Judie Thompson and Dan Couture. The grievor testified on his own behalf. He also called Jean-Claude Banville to testify. The relevant portions of the documentary evidence tendered at the hearing will be referred to as appropriate.

A. For the employer

1. Ms. Thompson

[6] As of the hearing, Ms. Thompson had been a manager with the CRA for 20 years. Since February of 2008, she had been Manager, Revenue Processing, Ottawa Technology Centre (OTC), CRA.

[7] Ms. Thompson had 100 people reporting to her through team leaders (TLs) in 6 different units. Her duties and responsibilities included processing payments from businesses and taxpayers and allocating them to the proper accounts. Human resources (HR) duties, including discipline, budget, and staffing, were mostly managed by TLs. TLs who were experienced or comfortable with long-term sick leave would handle such matters as well. HR matters beyond the scope of a TL would be referred to Ms. Thompson.

[8] Ms. Thompson knows the grievor. In 2002, he was an employee with Facilities Management. He was a technician working on a machine for mechanized distribution of material to be mailed. In June of 2003, he changed to her mechanized distribution unit, with no change to his job. That unit in Ottawa closed in the summer of 2007. The equipment and work were transferred to Winnipeg, Manitoba, and Summerside, Prince Edward Island. Forty employees, including Ms. Thompson, were subject to a workforce adjustment (WFA). Before then, in the spring of 2005, the grievor had been subject to another WFA, when he moved from the mechanized distribution unit to the CRA's Revenue Processing section.

[9] In November or December of 2004, the grievor was sent to Health Canada for a fitness-to-work (FTW) assessment. In March of 2005, its report stated that he had to work in a well-ventilated area. He was also to avoid solvents, but if he had to work with them, he was to use personal protective equipment. According to Ms. Thompson, he was asked what type of mask he wanted, but he never followed up. In October of 2005,

some of the workshop activities were curtailed. The air was deemed the same as in other areas of the building at issue.

[10] The last time Ms. Thompson saw the grievor was in March or April of 2008. At that time, he was aware that he was sensitive to certain things, but he did not know everything that he was sensitive to; nor did his doctors. He told her that he had to approve everything that came into his home because he feared reactions. She recalled that the conversation arose because of an odour in the basement level of the building at 875 Heron Road, Ottawa, Ontario, where they both worked. She stated that the odour had been fully investigated that same day, and no volatile organic compound had been detected.

[11] Ms. Thompson asked the grievor what could be done to protect him and to ensure his health and safety. He told her that he did not know. She asked him whether a mask would be beneficial. He replied that it would be too hot and uncomfortable and too difficult to communicate through. When he mentioned toner used on paper, she asked him about gloves. He replied that he would react to them. According to Ms. Thompson, the grievor talked about digging up the basement floor and replacing the ventilation system.

[12] Ms. Thompson testified that she forwarded a synopsis of that conversation to her supervisor, stating that if Mr. Babb did not know what could be done to protect him, and his doctors did not know, then she could not guess. He emailed her a few days later, stating that he was not comfortable telling her how the situation could be remedied.

[13] Ms. Thompson confirmed that her understanding was that both management and Labour Relations (LR) deal with long-term disability. Once sick leave is exhausted, LR is advised, and LR is the liaison with Sun Life once sick leave benefits are engaged. The employer considers that employees who meet the sick leave criteria are on leave without pay (LWOP). If anything changes for such an employee, LR informs management, which generally means the employee's manager. Ms. Thompson interacted with the local LR representative; she was unaware of Kathy Mawbey, the Ontario regional occupational health and safety specialist.

[14] Ms. Thompson became aware of the grievor's situation during discussions with the local LR representative, whom she believes told her that the grievor was

approaching the "2-year mark." The last medical note on his file was from February 2008 (Exhibit E-3, tab 12). According to Ms. Thompson, the grievor's file came to her because the first of his previous TLs had retired, and his current one did not have much experience as a TL.

[15] Ms. Thompson first contacted the grievor by telephone in November of 2008, while he was on sick leave. As far as she was aware, he was receiving sick leave benefits from Sun Life at that time. Since Sun Life was taking care of him, she had no need for a medical certificate other than for the file. In cross-examination, she confirmed that she contacted him on her own initiative; she did not speak to anyone in management before making the call. The last communication she saw on the grievor's file was from his TL in May of 2008, but she did not know the context of the communication. Moreover, she did not know whether anyone in management had communicated with him between May and November of 2008.

[16] She testified that it is important to maintain contact with employees when they are away, and since there had been changes in the division, it was important to let employees know they had not been forgotten. In cross-examination, Ms. Thompson confirmed that there had been considerable change in terms of management personnel, due to such things as retirements, after the grievor left on sick leave. As of the grievor's termination, Mr. Couture was the OTC's director.

[17] Ms. Thompson introduced herself to the grievor as his manager and provided her telephone number in case he wanted to contact her. She did not recall him ever calling her or requesting a face-to-face meeting. According to her, the purpose of the call was to inquire as to how he was doing and to learn if there was anything new with his medical situation. He confirmed that he was in discussions with Sun Life, which she knew, and that there was nothing new to report on his medical condition.

[18] According to Ms. Thompson, the call lasted 15 to 20 minutes, and the tone was good. She documented the conversation on her own initiative in an email dated November 12, 2008, to her director, Mr. Couture, and copied a number of management and LR personnel (Exhibit E-3, tab 13).

[19] On cross-examination, she was asked about it. She testified that Greg Currie was likely an assistant director, as was Frank Davoudi (the assistant director of development); she listed both because at the time, one of them had a short-term

assignment. Denis Maurice was in charge of LR, and Edith Bernard was a senior labour relations officer at the local level. Finally, Gary Gustafson was the OTC's director. Ms. Thompson was not instructed to put the conversation in writing. She did not recall any response from any person listed on her email. On cross-examination, she confirmed that she copied her director because she was aware that her director had received several complaints via communications with a number of individuals, the nature of which she was unaware.

[20] When she was asked if it was standard procedure to call the grievor and then record the conversation in a memo to her director, Ms. Thompson confirmed that "[i]t occurred often." She confirmed that from 2008 onward, there were other employees on LWOP; however, she had involved her director with only one of them.

[21] Ms. Thompson did not recall having any further direct communications with the grievor between the call and April of 2009, when she again called him, this time to inform him that as he had been off work for more than two years, he would be receiving a two-year options letter. The letter would set out three options and allow him two months to make a decision.

[22] The first option was to return to work if a medical certificate indicated that he was fit to return and listed all restrictions and limitations so that the employer could formulate an accommodation plan, if necessary. The second option was that if he was not fit to return, he could retire on medical grounds. The third option was to resign his employment. Failing to select an option could result in the termination of his employment. According to Ms. Thompson, she spoke to the grievor from the perspective that he would return to work.

[23] The grievor and Ms. Thompson exchanged emails between April and July 2009 (Exhibit E-3, tab 17). On cross-examination, she confirmed that she was involved in preparing the letter in late April 2009 concerning his compensation package. According to her, the normal process is that the letter is issued once two years have expired. On cross-examination, she confirmed that she did not know when the grievor had applied to Sun Life or when his benefits had been approved. She knew only that he went on sick leave in April 2007 and that it had been extended in April 2009. In cross-examination, she further testified that her understanding of "foreseeable future" is that the employee is never coming back. When she was asked whether the medical

retirement recommendation is standard, she replied that the letter is a template for virtually any employee on long-term leave.

[24] She testified that contrary to the grievor's assertion in his April 24, 2009, email that he was advised that as of June 2009, his employment would be terminated, she did not tell him that. She told him that failing to select an option could result in his termination. She also denied his assertion that she became aware of an environmental illness only during their April conversation. On cross-examination, she confirmed that she knew that he intended to return to work, but she stated that she does not know whether he said it then. She conceded that perhaps the phrase "or return to work" should have been included in the recommendation for medical retirement.

[25] Ms. Thompson further disagreed with the grievor's assertion in his April 24, 2009, email that he was "never granted accommodation." She conceded that she was unaware of some of his medical conditions. However, with respect to accommodation, personal protective equipment in the form of a mask and gloves and steel toe caps for his shoes were available to him. In addition, when he was on the fifth floor of 875 Heron Road, he requested and was provided with an ergonomic assessment, which led to a new chair, storage cabinet, computer monitor, and a height-adjustable desk. He was denied a headset because his work did not involve being on the phone.

[26] Ms. Thompson's email to the grievor of May 6, 2009 (Exhibit E-3, tab 17, page 5), informed him that she did not agree with everything in his summary of their conversation. She sent the email because she wanted a record of what she had told him.

[27] Ms. Thompson was asked about her April 24, 2009, telephone call with the grievor that lasted about 30 minutes. She could not say whether it was a tense call. She felt badly for him because he had so many difficulties, and she felt his frustration. She did not refer him to the Employee Assistance Plan or the union. She did not call the union because the grievor had been a union steward and a local union president. He had also been Occupational Health and Safety Committee (OHSC) co-chair. He knew the union representatives and knew what to do. She believed that since he was seeing his doctors, he would share his concerns with them.

[28] According to Ms. Thompson, the grievor told her that he would not answer the options letter. She confirmed that she did not obtain his permission to contact his doctor.

[29] The options letter was dated May 11, 2009 (Exhibit E-3, tab 18). The grievor was given until July 10, 2009, to apply for medical retirement. She concedes that there was a typo in the letter; it should have stated July 10, not June 12, as the date to exercise his option. From his April 24, 2009, email, she was aware that he would not open the options letter.

[30] Ms. Thompson was asked about her understanding of the meaning of the phrase in the options letter stating, "can be extended to accommodate exceptional cases". According to her, if an employee indicates a desire to return to work pending medical certification, he or she is given a short while longer on leave. Her understanding is that "foreseeable future" means six months. She was asked for her understanding of "… unable to return to work within a reasonable period of time [sic] (e.g. two years)" in the CRA's *Illness and Injury Policy*. She understood "reasonable period of time" as being two years. She confirmed that "manager" in the *Illness and Injury Policy* refers to the delegated authority; she could make a recommendation to terminate someone, but she had no authority to do it herself. In the context of the *Illness and Injury Policy*, the "manager" could be a manager at any level with the delegated authority for the situation being discussed in the policy.

[31] As a manager, Ms. Thompson dealt with the collective agreement. The two-year period is in the *Illness and Injury Policy*, not the collective agreement. She was aware of the LWOP provisions in the collective agreement, but in her 20 years of service, she had never had an employee on such types of leave, such as for the care of a parent or for a spousal relocation. Her understanding is that the five-year period referred to in the collective agreement is over the entire period of an employee's employment.

[32] On re-examination, she stated that she had had only one experience of an employee on leave under article 33 of the collective agreement. In that case, she referred to the collective agreement only to verify if the return-to-work date met the collective agreement provisions.

[33] On cross-examination, Ms. Thompson was asked about a telephone call on June 29, 2009 (Exhibit E-3, tab 17, page 4). She did not recall it but did not deny that it

took place. She confirmed that she had no contact with the grievor between her letter of May 11, 2009, and that call.

[34] Ms. Thompson then testified with respect to the correspondence between the grievor and the employer from July 2009 to February 1, 2010 (Exhibit E-3, tab 29). In her July 6, 2009, email, she sent the grievor the employer's *Illness and Injury Policy* and its *Leave Without Pay Policy*. She stated that if he wished to involve the union, a return to work is a collaborative process involving the union, management, and the grievor. In his email response, she saw for the first time that he had copied Mary Mackinnon, the grievor's lawyer. She had no idea of her role and assumed that the grievor wanted to keep his lawyer informed.

[35] On cross-examination, Ms. Thompson confirmed that she did not offer the grievor an extension of his LWOP in her July 6, 2009, email. She further confirmed that she did not meet with him face to face; nor did she have any other telephone conversations with him.

[36] She was taken to her July 20, 2009, email to the grievor (Exhibit E-3, tab 29, page 16). Ms. Thompson extended the grievor's leave to September 18, 2009, to accommodate him for medical reasons. He had made it clear that he would have a medical appointment in August. Her reference to prior medical notes in that correspondence related to Health Canada in 2005. She did not have access to his Sun Life long-term disability file, and she was not authorized to deal with Sun Life. She explained that the phrase "follow the policy" in her email meant that the only option open to the employer pursuant to the *Illness and Injury Policy* was to terminate his employment if he did not provide the requested information.

[37] Ms. Thompson was asked about the phrase in the grievor's email stating, "work at home as required by Sun Life." She stated that one of Sun Life's specialists had said that the grievor should work outdoors or in a well-ventilated area. Ms. Thompson stated that she never told him that the CRA would refuse the accommodation of him working from home, but she believed that he knew that from Mr. Davoudi.

[38] Ms. Thompson testified that the grievor's duties could not be performed outdoors and that while management looked for a number of jobs for him, none could be done either outside or from home. In terms of a well-ventilated area, management felt that he could work in an office with its own air supply, which would have allowed

him to carry out the duties of his position. However, he advised that he had problems when walking through the building at issue, such as going to the cafeteria, washroom, etc.

[39] Ms. Thompson testified that the employer looked into the grievor working from home in his occupation and that she was involved with it. At the time, a request for a cheque could come to the CRA by fax, mail, or telephone. The request was logged and given to the control clerk in the unit. The clerk would carry out research and retrieve a copy of the requested cheque. Once it was processed, front and back, it was printed and sent to the requestor. Requests originated from tax services offices, CRA headquarters, or any CRA office.

[40] The employer looked into connecting technologically and at production standards, which were immediate; i.e., responses were to be made within 24 to 48 hours. It also considered items such as the referral of clients' cheques submitted to the Receiver General from taxpayers or corporations but felt that the security and confidentiality of taxpayer information could be compromised. The employer also considered that requests had to reach the grievor daily and that the results had to be returned daily. Management decided that it could not take that risk and that the grievor working from home would not work. The documents had to be printed, and toner was an issue for him.

[41] Ms. Thompson was referred to a letter from Sun Life to the grievor dated July 29, 2009 (Exhibit E-3, tab 19). Sun Life's doctor disagreed with the grievor's physician, Dr. Jennifer Armstrong. Ms. Thompson emailed him on August 6, 2009 (Exhibit E-3, tab 29, page 14), and suggested a Health Canada assessment, which required two consents: one to an FTW evaluation, and one to release medical information to Health Canada. On August 6, 2009, Ms. Thompson emailed the grievor; she attached the consent forms (Exhibit E-3, tab 20).

[42] Management did not receive the forms from him. He did not believe that they were official forms and believed that the CRA had doctored them, so he did not sign them. He did not specify the parts of the forms that he believed had been doctored. LR contacted Health Canada, which confirmed that the forms were the same as those on its website and that they were sent to everyone who needed them. Ms. Thompson explained to the grievor that once an employee signs the consent form, a letter is sent

to the doctor, and the employee is copied. The grievor wanted it to go the other way around.

[43] Ms. Thompson testified that she told the grievor all this after October 2, 2009.

[44] On cross-examination, Ms. Thompson confirmed that she became aware that the grievor was communicating with the assistant director, Ainslee Cardinal, but she was unaware of the content of their discussions. She never saw Ms. Cardinal's September 22, 2009, letter to the grievor (Exhibit E-3, tab 23). She did not recall discussing timelines with Ms. Cardinal.

[45] Ms. Thompson received Dr. Armstrong's October 23, 2009 letter (Exhibit E-3, tab 27), after her letter of October 2, 2009. Ms. Thompson agreed that Dr. Armstrong's letter was a response to the three questions raised in Ms. Cardinal's September 22, 2009, letter (Exhibit G-8).

[46] On cross-examination, Ms. Thompson confirmed that she had no communication or meetings with the grievor between the two emails of July 20 and August 6, 2009, as well as those between August 6 and October 2, 2009. If he communicated with someone else during that time, she was unaware of it. She also confirmed that she had no exchanges of any kind with him between October 29 and December 2, 2009.

[47] Ms. Thompson was asked about a medical note from Dr. Armstrong dated August 28, 2009 (Exhibit E-3, tab 21). Ms. Thompson believes that the note arrived in mid-September 2009 but that it was not forwarded to her. It went to Ms. Cardinal (tab 25). Ms. Thompson believes that when management received this note, it granted the grievor a further extension. His LWOP was extended to September 18, 2009 (Exhibit E-3, tab 29, page 15). After that, another letter was received from Dr. Armstrong, stating that an assessment would take place in November 2009.

[48] When Ms. Thompson wrote a registered letter to the grievor on October 2, 2009 (Exhibit E-3, tab 26), she was unaware of Dr. Armstrong's August 28, 2009, medical note, as it had been sent to Ms. Cardinal. In her letter, Ms. Thompson recommended terminating his employment because he did not provide her with any information, and as far as she knew, there was no medical certificate from a doctor. According to her,

she wanted the information for accommodation based on his desire to return to work. Only later in October did she learn that he was to have a medical assessment.

[49] After receiving a medical certificate from Dr. Armstrong dated October 23, 2009 (Exhibit E-3, tab 27), Ms. Thompson then informed the grievor that his LWOP was extended to February 15, 2010, so that a report from a specialist, Dr. Ellie Stein, could be completed and provided to Dr. Armstrong, and hopefully, she and he would discuss it.

[50] Ms. Thompson testified about her December 4, 2009, correspondence to the grievor (Exhibit E-3, tab 29, page 4). She confirmed that a return to work was her position at that time, which she did not change. She emailed him on December 6, 2009 (Exhibit E-3, tab 28). The purpose of the functional ability form (Exhibit E-3, tab 28) is for a doctor to complete it and indicate what the employee can or cannot do, so that the employee may be accommodated. One was never completed for the grievor, and the employer never received any information about the grievor's functional abilities. She confirmed that she was not copied on the grievor's correspondence to Mr. Scarcello, an interim OTC director, of December 9, 2009.

[51] In cross-examination, Ms. Thompson was asked more questions about her December 4, 2009, correspondence. She confirmed that the expectation was that management would receive word from the grievor by February 15, 2010. The extra two months were an example of accommodation. The penultimate paragraph of her letter stated that there was no option for further LWOP. Ms. Thompson confirmed that her only contact with the grievor between December 4, 2009, and February 22, 2010, was her email to him of December 6, 2009 (Exhibit E-3, tab 28). She had no communication with Ms. Mackinnon during that time.

[52] On re-examination, Ms. Thompson was asked what she meant by "accommodation". She testified that it meant that management granted the grievor extensions to provide information required to return to work.

[53] Ms. Thompson did not have any communication with the grievor in January of 2010. She communicated in February, but with Ms. Mackinnon by writing to her on February 22 (Exhibit E-3, tab 33) as she needed the information concerning the grievor's status. On cross-examination, she testified that she did not recall a telephone conversation with Ms. Mackinnon but agreed that one was possible concerning another

request to extend the grievor's LWOP. Ms. Thompson did not review the grievor's medical report and was unaware of the type of specialist he had consulted. According to her, the extension of LWOP to March 31, 2010, was an example of an accommodation.

[54] Ms. Thompson and Ms. Mackinnon continued to exchange emails from March 16 to 29, 2010. Ms. Thompson was asked about the reasons Ms. Mackinnon provided in her March 29, 2009, email (Exhibit E-3, tab 34) for granting a further extension to Dr. Armstrong. Ms. Thompson testified that those reasons were not of any substance, as far as she was concerned.

[55] The specialist's medical report was issued on January 6, 2010. Ms. Thompson was of the view that Dr. Armstrong would have reviewed the report before she met with the grievor on March 22, 2010, because that meeting was to discuss it.

[56] The request for an extension of the grievor's LWOP was for two weeks. Ms. Thompson ended the accommodation of extending the LWOP on March 29, 2010, because the reasons set out by Ms. Mackinnon did not have substance. Ms. Thompson's February 22, 2010, email was based on information being provided no later than March 31, 2010. Ms. Thompson believes that LR was involved in her email, and before sending it, she likely informed the director by phone of the request to extend the grievor's LWOP and of Ms. Mackinnon's reasons. LR was aware of Ms. Thompson's refusal to extend the LWOP before the email was sent.

[57] Ms. Thompson stated that management had to follow policy concerning extensions of LWOP as doing so is based on receiving medical information, which was available at the end of March 2010. The specialist's report was issued on January 6, 2010, and the grievor and Dr. Armstrong reviewed it on March 22, 2010. The last LWOP extension was based on management receiving the information by March 31, 2010.

[58] On further cross-examination, Ms. Thompson was asked for the negative impact on the employer had the grievor's LWOP been extended. She stated that information was available and that it was not provided. She did not see a reason to extend his LWOP. She was asked the same question again. She conceded that she did not know what went on behind the scenes. When she was asked whether, as a manager, she had

received a negative impact by not extending the grievor's LWOP, she replied, "I don't believe so."

[59] On re-examination, Ms. Thompson was asked to clarify her testimony on the refusal to grant the grievor a 2-week extension in March 2010. She stated that the request was refused for a number of reasons. He had been granted 6 extensions, totalling 11.5 months. Each one had been based on the expectation that on the date indicated, he would provide management with information as to the limitations and restrictions required for him to return to work, which he indicated he wanted to do, so that management could accommodate him.

[60] The last extension was no different. He was to provide the information by March 31, 2010. The grievor was assessed in November 2009, and the specialist's report was dated January 6, 2010. Management was told that he met with Dr. Armstrong on March 22, 2010, to discuss it. All that was needed was the required information. Dr. Armstrong knew what was required, as did the grievor and Ms. Mackinnon. The following day, information was provided that he was not fit to return to work.

[61] On March 30, 2010, Ms. Thompson received an email from Ms. Mackinnon's office that had attached a medical certificate from Dr. Armstrong, which Ms. Thompson gave to the director and LR. She stated that she did not make a recommendation to the director and LR; she presented them with the facts, including the letter from the lawyer's office and Dr. Armstrong. She agreed that LR was likely involved in her presentation of the facts. She had no further involvement in the matter.

[62] Ms. Thompson confirmed that she did not speak with Ms. Mackinnon after receiving the March 30, 2010, email and certificate; nor did she communicate with the grievor. She did not communicate with either the union or Dr. Armstrong after that. She did not inquire into the meaning of the phrase "at this time", which appeared in Dr. Armstrong's letter, the treatments, or their cost. She did not ask for a copy of the specialist's assessment after March 20, 2010, and before the grievor's termination.

[63] Ms. Thompson was not aware of any instance in which Dr. Armstrong reached out to the employer before March 30, 2010. To have an exchange with Dr. Armstrong, the employer needed the grievor's consent, which it did not have. Ms. Thompson did not ask to see the specialist's report because it was confidential and it was none of her

business. All the employer needed was someone to certify that the grievor was fit to work, along with his limitations and restrictions so that he could be accommodated as he had indicated that he wanted to return to work.

[64] Ms. Thompson testified that for any potential accommodation, the employer needed to know the grievor's restrictions or limitations so that the appropriate material could be used. Management repeatedly asked him for his limitations and restrictions but never received an answer.

[65] On cross-examination, Ms. Thompson was asked about the CRA's accommodation guidelines (Exhibit G-4). She testified that her understanding of the duty to accommodate is that once the employer is made aware of an employee's limitations or restrictions, it has a duty to accommodate that employee to the extent possible. Her understanding of the phrase "to the extent possible" is that it means "reasonable" and that that word means dollars and cents. She gave the example of when carpeting is an accommodation issue, the entire floor's carpeting is not removed; instead, the employee is moved to a non-carpeted area.

[66] Ms. Thompson confirmed that the steel toe caps were required while the grievor was a technician between 2002 and 2005 and that the ergonomic assessment occurred after May 2005 and before he left in 2007.

[67] Ms. Thompson confirmed that from February 2008 to April 2010, she had no face-to-face meetings with the grievor. She did not recall him ever asking for one. It never occurred to her to hold one with him as she had never held one with any employee. She was aware that he could not return to the building. She communicated by email, phone, or letter. During that time, she had two or possibly three telephone conversations with him. All her communications with Ms. Mackinnon are found in the documentary evidence that has been discussed. Ms. Mackinnon never requested a face-to-face meeting with her.

[68] From Ms. Thompson's point of view as a manager, the extensions given to the grievor were exceedingly generous and were twice as long as they generally were.

[69] Finally, on re-examination, Ms. Thompson stated that an employee on sick LWOP is not receiving an accommodation because in all likelihood, the sick LWOP was granted on a doctor's instruction, which management followed.

2. Mr. Couture

[70] As of the hearing, Mr. Couture had worked at the CRA for all but 1 of 26 years. He spent 1 year working at the Treasury Board Secretariat in the pensions and benefits area. He was an HR director at CRA headquarters, a director general of executive programs, and the OTC's director from November 1, 2009, to July 2013. From July 2013 to the hearing date, he was Deputy Assistant Commissioner, HR Branch, CRA. His direct report was Karen Ellis, Assistant Commissioner, Ontario Region. He had the delegated authority to terminate employees, in consultation with LR at the local, regional, and headquarters levels, along with Ms. Ellis.

[71] The OTC is the CRA's only technology centre. It has two locations: 875 Heron Road and 2215 Gladwin Crescent, both in Ottawa. Between 1400 and 2000 employees work there at any point. As the director, Mr. Couture was responsible, through a management team, for ensuring that the OTC functioned well.

[72] Before he assumed the OTC director position, there had been two interim directors: Ms. Cardinal, whose term ended September 30, 2009, and Mr. Scarcello, whose end of term corresponded roughly with Mr. Couture's appointment.

[73] Over the course of his career, he has worked with 17 unions on workplace reintegrations after injuries or illnesses.

[74] On his arrival in the director position, Mr. Couture was briefed on program and personnel files. He was briefed on the grievor's case, along with other cases, as part of the labour relations environment at the OTC. He had reviewed the grievor's file in consultation with LR. He was aware of the grievor's email dated December 17, 2009 (Exhibit E-3, tab 29, page 3), to Mr. Scarcello, in which the grievor sought financial assistance and alleged, among other things, harassment. He confirmed that he would have also seen the grievor's letter to Ms. Cardinal (Exhibit E-3, tab 22).

[75] On cross-examination, Mr. Couture was asked why the grievor's file was brought to his level of a director. He stated that the grievor's was not the only file; there were other files of that and other natures. Being briefed was part of the first 30 days of transition. The correspondence with the two previous directors (Ms. Cardinal and Mr. Scarcello) was added to the package that new directors receive. Correspondence was exchanged with respect to the nature of the file's timing; i.e., there had been

several extensions for the grievor. The correspondence includes Mr. Couture asking for the LR file, memos, briefing notes, etc., which the local LR representative possessed.

[76] Before November 1, 2009, Mr. Couture had never had a face-to-face meeting with the grievor. The first time he saw the grievor in person was at the hearing. December 1, 2009, was the date of his first contact from the grievor. He never spoke with the grievor on the phone, and he was unaware whether anyone at the CRA had met him face to face. Other than Ms. Thompson, he was unaware of anyone else who had called the grievor.

[77] Mr. Couture did not meet with the union before December 17, 2009, and never spoke with anyone at the national union level about the grievor. He was aware that Ms. Mackinnon was the grievor's lawyer, but he did not call her.

[78] Mr. Couture felt that it was important to communicate with the grievor, so he invited the grievor to contact him. He did so by way of an email to the grievor dated December 21, 2009. On cross-examination, he confirmed that the management representatives (Ms. Thompson, Mr. Davoudi, Ms. Cardinal, Mr. Scarcello, and Ms. Ellis) had regular bilaterals with him and that they would have been part of the discussion. This email addressed a number of matters, such as the harassment allegation, the Workplace Safety and Insurance Board (WSIB) proceedings, and the return to work. For the latter, he reminded the grievor that Ms. Thompson was his manager and that he was to deal with her with respect to the return to work. Mr. Couture provided his direct telephone line to the grievor in this email.

[79] Mr. Couture was asked what he meant by this statement in his email: "This process should not be long drawn-out [*sic*]." He explained that his review of the grievor's file indicated that it was complex and complicated. His nature is to simplify things; the employer has to return employees to productive work. Medical instructions on limitations and restrictions is required. He felt it necessary to share that with the grievor because his review of the file revealed countless extensions and delays and a lack of information. Mr. Couture testified that he believes in resolving issues by talking about them openly.

[80] On cross-examination, he confirmed that in his email, "drawn-out" referred to the original leave that began in 2007 and was approved in 2009; "delays in the file" referred to the many extensions granted to the grievor to provide information. He was

unable to confirm whether he saw specifics on medical information that was provided between May and December 2009. Mr. Couture conceded that a reference in his December 21, 2009, email could have been interpreted as asking the grievor to call him with respect to the harassment policy. However, to him, resolving the issues involved more than harassment.

[81] On cross-examination, Mr. Couture stated that his comment that the grievor's file was complex and complicated referred to all his issues, not just his LWOP, although Mr. Couture's focus was on LWOP.

[82] Rather than calling him, the grievor responded by email on January 27, 2010 (Exhibit E-3, tab 29, page 1). Mr. Couture was asked about the statement in that email about "your demands [sic] I return to work." He stated that nothing in his December 21, 2009, email would lead to the conclusion that he made such a demand. The grievor's email was forwarded to D. Martineau, the manager of LR at the time.

[83] Based on his briefing, Mr. Couture expected that the CRA would receive a communication from the grievor before January of 2010 in response to its request for information.

[84] Mr. Couture was asked about his email exchange with the grievor (Exhibit E-3, tab 30). Before the grievor's email, Mr. Couture was unaware of expenses being incurred or whether they were incurred with the expectation of being reimbursed. He knew that Ms. Mackinnon was the grievor's lawyer. According to Mr. Couture, the grievor communicated that he was unable to return to work. His email was only a partial response to the information that the employer sought. Mr. Couture wanted assistance from LR with the grievor's email.

[85] On cross-examination, he was asked about the grievor's January 27, 2010, email. He did not recall whether he had discussed it with LR. He was asked whether he thought it was a red flag with respect to the grievor's health issues. He stated that he did not think so but that he could not recall.

[86] In his February 4, 2010, email the grievor assumed that expenses would not be reimbursed. Mr. Couture's February 8, 2010, response advised the grievor not to reach that conclusion before Mr. Couture had reviewed the matter (Exhibit E-3, tab 31). Mr. Couture confirmed that it was his only contact with the grievor between January 27

and February 22, 2010. He had no contact with Ms. Mackinnon between those dates. He could not recall whether Ms. Thompson and the grievor discussed the incurred costs.

[87] On February 22, 2010, Mr. Couture emailed the grievor in response to three emails from him (Exhibit E-3, tab 32). According to Mr. Couture, a comprehensive rather than a piecemeal response was better. Concerning the final paragraph in his email, with respect to medical information, Mr. Couture stated that while the employer had partial medical information, Ms. Thompson had extended the grievor's leave in the hope of receiving more information, from medical tests. Despite copying the grievor's lawyer, Mr. Couture never received a response on any of the three issues that he raised in this correspondence. Without that additional information, the issue of reimbursing the grievor's expenses could not be resolved.

[88] On cross-examination, Mr. Couture confirmed that at that point, he must have been aware of discussions between Ms. Thompson and the grievor about expenses. He was asked about his statement in the last paragraph of his email, which begins with, "I will have no alternative …". At that point, he would not have considered extending the LWOP without further information, such as if the grievor consented to a Health Canada assessment or medical information that he was fit to return to work, along with any limitations or restrictions. The February 22, 2010, email was Mr. Couture's last communication with the grievor until the termination letter. He had no contact with Ms. Mackinnon. He replied to Ms. Addario, a union official, although he did not know her, because he would have replied to all parties.

[89] Mr. Couture was aware of the communication between Ms. Thompson and the grievor's lawyer and of the conditions Ms. Thompson set for another extension (Exhibit E-3, tab 34). Mr. Couture was involved in the discussions with Ms. Thompson and LR that led to the response, and he supported the decision not to extend the grievor's leave based on his review of the file, the facts, and his practical nature. In his words, "Say what you're going to do, and do what you're going to say." The final extension was to March 31, 2010.

[90] On cross-examination, he stated that he did not recall a request for an additional two weeks of extension. He stated that the "lengthy report" would have come up as one of the reasons for the extension. According to him, the grievor was declared unfit for work on March 30, 2010.

[91] On cross-examination, Mr. Couture was asked about Dr. Armstrong's medical certificate of March 30, 2010, and what he understood by her phrase, "at this time". He confirmed that he did not communicate with either Dr. Armstrong or Ms. Mackinnon to ask what it meant and that he did not direct anyone else to. And he did not ask for a copy of the specialist's report or direct anyone else to ask for one.

[92] Mr. Couture confirmed that he saw Dr. Armstrong's medical certificate dated March 30, 2010 (Exhibit E-3, tab 35), which reaffirmed the fact that the grievor was not fit to return to work.

[93] Mr. Couture confirmed that he did not know whether anyone communicated with Dr. Ellie Stein. He looked into the *Illness and Injury Policy* and its application. On re-examination, Mr. Couture stated that there was no reason for him to communicate with Dr. Stein because nothing had changed in the scenarios he was considering. Although the grievor told him in February 2010 about Dr. Stein's report, as a manager, Mr. Couture could not communicate with the grievor's physician without the grievor's consent. Mr. Couture stated that the same applies to an employee's lawyer and union representative. He never received written consent from the grievor to communicate with any of those individuals, their firms, or their representatives. None of them communicated directly with him by phone or other means.

[94] On cross-examination, Mr. Couture was asked about the reference in the termination briefing paper (Exhibit G-10) to "management seeking support". He testified that the briefing paper was prepared to obtain support for the decision from Ms. Ellis. In that context, he could have been part of management seeking support. He confirmed that he saw the paper before it went to Ms. Ellis and that he agreed with it; its contents were factual.

[95] Mr. Couture was asked about the termination letter (Exhibit E-2). According to him, several items of information led him to decide to terminate the grievor, who had been on sick LWOP since 2007. On May 11, 2009, he was given different options, per the policy. He was granted several extensions to meet with medical practitioners. The extensions were reminders that he should continue to cooperate and that failing to would result in termination. Mr. Couture pointed to several instances in which it was confirmed that the grievor was not fit to return to work. Furthermore, medical certificates about limitations and restrictions were never received; nor was consent to

refer the grievor to Health Canada. On March 30, 2010, letters from the grievor's medical practitioner and his lawyer confirmed that he was not fit to return to work. Mr. Couture concluded that the grievor had failed to provide the required medical information, which led to his termination.

[96] On cross-examination, Mr. Couture stated that another extension of the grievor's LWOP was not necessarily an option as several extensions had already been granted, in good faith.

[97] On cross-examination, he stated that he could not recall whether he saw the CRA's *Guideline on Accommodation for Designated Group Members* (Exhibit E-3, tab 5). According to Mr. Couture, the term "duty to accommodate" means that the employer is responsible for making every reasonable effort to bring an employee back to a productive, positive environment while respecting the specified limitations and restrictions. His understanding is that LWOP does not fall within the duty to accommodate.

[98] He was also asked about the CRA's *Illness and Injury Policy*. He confirmed that he was familiar with and had applied it. When he was asked what he understood the phrase "must resolve" in the policy to mean, he stated that in his experience, it means positively working with employees. The options are resignation, medical retirement, or termination. The employee may choose one of those options or return to work. He stated that he begins to resolve such cases at the 18-month mark so as not to go beyond 2 years, if possible. He was unable to speak to why the limit is 2 years rather than 3 or 4. He agreed that the phrase "reasonable period of time" in the policy refers to the 2 years, which begin once the employee exhausts sick leave. Mr. Couture testified that the ultimate goal is to return the employee to the workplace.

[99] He was asked about the word "recommendation" in the *Illness and Injury Policy*. As the delegated authority, his decision does not require a recommendation. However, he did consult others. He was unsure whether a recommendation was part of the process with respect to the manager. In any event, Ms. Thompson was not the manager in this situation; he was. The term "manager" in this context is not a hierarchical title.

[100] On re-examination, Mr. Couture stated that the employer's expectations of employees concerning returns to work or limitations and restrictions are clearly defined in the *Illness and Injury Policy*. The employer expects to receive both

information and cooperation. His experience with such cases was that the union partners with the employee and management to work out the details to support a return to work. In this case, the union did not contact him or ask for a meeting about the grievor. Neither the grievor, the union, nor Ms. Mackinnon mentioned or requested a face-to-face meeting with him before he made his decision. He did not communicate with any of them without the grievor's authorization, to protect his right to privacy.

[101] Mr. Couture was asked about Ms. Thompson's reference in her October 2, 2009, letter to the grievor that she had to proceed with the recommendation. He was asked whether she made the recommendation to him. He responded that she might have made it to LR or to others in management. He did not recall whether management made a recommendation.

[102] Mr. Couture confirmed that he is familiar with the collective agreement leave provisions (articles 41, 42, and 46) and that the maximum period is five years. He agreed that the grievor's leave status was the same as those leave types, but for a different purpose.

[103] Mr. Couture was asked how an employee on LWOP impacts him as a director. He stated that dealing with information costs the employer, including in LR time, assistant-director time, and management time, and that it takes time from other work. With respect to the costs associated with a five-year leave, management has found that it does not have to be proactive with the employee on leave as the employee updates the employer. On cross-examination, Mr. Couture agreed that if an employee is on LWOP for childcare, for example, the financial cost is the same as for an employee on sick LWOP.

[104] Mr. Couture was asked about the costs if the employer decides to lengthen sick LWOP to four to five years. He stated that the costs would not be the same as those for other long-term leave. If the leave is for family related reasons, then no information comes in from lawyers and no costs are incurred with respect to access-to-information (ATIP) requests. In his experience, employees on sick LWOP make more of such requests.

[105] On re-examination, Mr. Couture stated that he did not ask for a copy of the specialist's report because it would have had to have been provided before the

deadline date. The March 30, 2010, email from Ms. Mackinnon's assistant did not include that report.

B. For the grievor

[106] The grievor had been employed by the CRA since February of 2002 as a maintenance and repair technician and an equipment technician at 875 Heron Road. His primary duty was servicing the mailing machine. He also worked with an electrician throughout the building. He performed those duties for about three years. He was also a union steward, a local union president, and the OHSC co-chair. He took training in 2006 for being the OHSC co-chair. He also took a one-to-two-day union basics course.

[107] At the beginning of his employment, the grievor's manager was Mr. Banville, who reported to Rick Wiley, who in turn reported to Mr. Currie. He confirmed that he began his work there with an orientation. He met with compensation officials, who gave him the CRA's *Code of Ethics* and security policies and notified him of training courses. Ms. Thompson was the manager of mechanized distribution. Assessments and taxpayer communications were sent with mail processing equipment. In mid-2003, the grievor was told to report directly to Ms. Thompson.

[108] In 2005, the grievor was subject to a WFA and was transferred to the Revenue Processing section. The work description for a clerk (Exhibit G-3) applied to him in 2005. It was for everyone in the unit, but he did not perform all the included duties. He worked in the document retrieval unit. His job was to retrieve certain taxpayer documents at the tax offices' requests.

[109] The retrieval system moved from mechanical to electronic. He would print the required documents and place them on his supervisor's desk for further action.

[110] On cross-examination, the grievor was asked a series of questions about his workplace and job duties. At first, his work location was the basement level before being moved to the fifth floor. He confirmed that the client service results section of the work description (Exhibit G-3) accurately described the Revenue Processing section. He did not handle incoming mail, did not allocate payments to client accounts, and did not handle reconciliations. That job was assigned to him under the WFA.

[111] His daily routine involved dealing with requests for taxpayer information. He would reconcile assessment notices with payment vouchers and submitted cheques.

The requests went to the supervisor. The way the requests were processed evolved; in the end, they were processed via computer, printed, and put in the completed requests file. The grievor worked in a sealed building that had an open-office concept.

[112] In addition to his work as described earlier in this decision, the grievor was also a union steward, a local union president (Union of Taxation Employees (UTE), Local 70030), and the OHSC co-chair. In those roles, he was involved with complaints under the *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*), workplace health and safety issues, and labour relations matters. He was actively involved in lobbying the employer with respect to indoor-air-quality issues at 875 Heron Road.

[113] On cross-examination, the grievor was asked about his Health Canada assessment in 2005 with Dr. John Given. Dr. Given provided the employer with accommodation recommendations, but they did not cover ergonomics.

[114] The grievor testified that Mr. Banville was his supervisor when he first began working at the CRA. As he had difficulties working with solvents, he asked for a respirator mask. He was told that he would have to go to Health Canada. He brought his own respirator mask and was told that he could not wear it. He was placed on probation. The grievor stated that he submitted a receipt for the respirator mask to Mr. Banville, who told the grievor that he was not allowed to wear it. Mr. Banville told him that the direction had come from Mr. Wiley. The grievor was asked who told him that he was on probation. He stated that he believes that the issue of his probationary status came up but that he does not think that Mr. Banville threatened him.

[115] While Ms. Thompson stated that she provided him with a mask, it was a dust mask, not an organic cartridge respirator mask, which is what he required, according to his work description. The employer identified what employees worked with and told Health Canada that additional equipment was available, but it was not true.

[116] The grievor was asked about his workstation assessment on January 12, 2007 (Exhibit E-7). He stated that he never received a sit-stand workstation before he left the workplace. The report recommended at page 4 that it be given to his treating physician. When he was asked whether he had done so, he replied that he had made an indoor-air-quality work refusal and that his problems were worsening. He stated that going to Health Canada was discussed and that he told the HR person that he would go there. He had no say in the referral process. He was reminded that his visit to Health

Canada was in 2005 and that the workstation assessment report was from 2007. He was again asked if he gave the report to his treating physician. The grievor stated that in the fall of 2007, he told the employer to send him to Health Canada.

[117] The grievor was shown a medical certificate from Dr. Stuart Kurtz dated February 22, 2007 (Exhibit E-3, tab 6). He stated that he thinks that it was his first medical certificate. He testified that a number of symptoms, which he listed, were becoming prevalent in 2006.

[118] The grievor was then shown a medical certificate dated March 15, 2007 (Exhibit E-3, tab 7). He stated that he returned to work between the dates of the two certificates. It was apparent to him that the workplace caused his health issues. He went on sick leave from March 15 to April 15, 2007.

[119] Dr. Kurtz referred the grievor to Dr. John Molot, an environmental medicine doctor, who provided a medical certificate (Exhibit G-13).

[120] The grievor was referred to a letter from the CRA dated April 20, 2007 (Exhibit G-9). He did not recall meeting with or receiving communications from the CRA about the letter. Dr. Molot did the paperwork for his disability claim. At about that time, the grievor made his application to Sun Life. He does not believe that anyone from the CRA spoke to him about a maximum time limit for LWOP. On cross-examination, he was asked whether he had opted out of the Public Service Health Care Plan. He stated that he did not know what he did. He did not recall if he claimed medical expenses while on LWOP.

[121] The grievor testified that while he was on leave in November 2007, he was still the OHSC co-chair. An officer had been designated to replace him, but he was still active. While he was out of the workplace, the Ottawa Sun newspaper and the CBC interviewed him. The grievor introduced an email chain involving Mr. Gustafson during this time. The grievor confirmed that he also obtained those documents through an ATIP request.

[122] He was asked about a chain of emails from November 13 to 16, 2007, with respect to occupational health and safety information (Exhibit E-6). Kevin Boyd was the assistant director of facilities. Debbie Rose was the grievor's alternate on the OHSC, and Denis Lapointe was on the employee side of the OHSC.

[123] In his November 13 email, the grievor stated that he needed information for his doctors. He was asked if he made a list of the required information in consultation with his doctors. He stated that he did not sit with his doctors to make a list. The purpose was to provide information to the workers' compensation unit.

[124] The OHSC had been dealing with issues of indoor air quality for years. He testified that he was still involved with the OHSC and his issues and that he was still the union local president. He needed the information for himself and the OHSC. He was unsure and could not recall if he wanted everyone's illness and leave-usage statistics or just his own.

[125] The grievor received a letter dated November 26, 2007, from Mr. Gustafson (Exhibit G-14, tab 3), which had attached a copy of the CRA's *Code of Conduct*. The grievor stated that he does not believe that before he received it, he was spoken to about speaking out or warned verbally not to.

[126] The grievor stated that he received the *Code of Ethics* and that he was threatened with discipline. He confirmed that it was not the first time he had seen the *Code of Ethics*. In the workplace, he had access to the CRA's intranet and used a computer daily, on which a monthly pop-up appeared about the use of electronic networks.

[127] On December 4, 2007, the grievor met for two hours with Ms. Mawbey; Chris Aylward, Regional Vice-President, UTE; and Ted Nathanson at the UTE's national office with respect to ongoing air quality issues at 875 Heron Road. He brought his medical records and certificates, and they discussed air quality, his absence from work, and his medical status. The CRA knew that his leave had been approved and that he was receiving sick leave benefits.

[128] The grievor does not believe that he received any communication from the employer concerning his LWOP status between April 20 and December 18, 2007. He received a letter dated December 18, 2007, from Mr. Currie (Exhibit G-14, tab 6). He was upset and felt threatened by the letter because it asked him to provide medical certificates.

[129] An email exchange from December 19, 2007, to January 30, 2008, followed between the grievor and Mr. Currie (Exhibit G-14, tab 7). The grievor did not

understand why he needed a medical certificate when he was on approved leave. A medical certificate dated February 15, 2008, from Dr. Kurtz was provided (Exhibit E-3, tab 12). He was asked to provide medical certificates dating after February 13, 2008. Asked if he did, he stated that he would have done so, had he been asked to.

[130] As of January 30, 2008, the employer was aware that Sun Life had approved his benefits because the employer was copied on every letter that he received from Sun Life. He was referred to an email to Ms. Mawbey dated December 28, 2007, concerning the date of his Sun Life approval (Exhibit G-14, tab 9). He agreed that it was possible that he received the letter from Sun Life, approving his benefits, in December 2007.

[131] The grievor was involved in the OHSC but ended his involvement in late December 2007 because the local union told him that he was no longer involved. He was referred to an email dated January 2, 2008, from the employer's OHSC co-chair (Exhibit G-14, tab 12). He had not been copied on it but obtained it through an ATIP request. The email stated that committee members were not to have any contact with him as it would have been improper and contrary to the CRA's policies.

[132] The grievor testified that when that email was issued, the majority (7 or 8 out of 10) of the local union's representatives resigned, and the local went into trusteeship. The grievor testified that he was devastated that the employer would send such an email, cutting off access not only to the OHSC union members but also to those not on the OHSC, especially while he was on leave.

[133] On cross-examination, it was put to the grievor that he continued to communicate with certain individuals with respect to occupational health and safety matters. He responded that at the time, Mr. Aylward told him that the grievor was done with the union and the OHSC, and then, union representatives resigned. Certain members were pulled off the OHSC.

[134] The grievor identified a bundle of medical certificates for the period of 2004 to 2007 (Exhibit G-17). He stated that the employer never questioned the legitimacy of his medical certificates.

[135] The grievor testified that although he had been on leave since 2007, he tried to maintain his OHSC co-chair duties as much as he could. He chaired some local meetings when he could. He stated that because he had health issues, he should have

had access to the OHSC. In December 2007 and January 2008, there were outstanding complaints under s. 133 of the *CLC* and work-refusal complaints, and accident investigations were underway.

[136] The grievor was referred to a January 7, 2008, email from Mr. Gustafson (Exhibit G-14, tab 10). The grievor stated that his claim with the WSIB is ongoing and that it lost medical evidence.

[137] The grievor was referred to an email exchange in February 2008 between several CRA people (Exhibit G-14, tab 8). He testified that during the relevant period, he never received questions from the employer on the legitimacy of his medical certificates or for those he submitted between 2002 and 2007.

[138] The grievor stated that his next interaction with the employer was in May 2008 for the hearing of the complaint under s. 133 of the *CLC*. With the possible exception of the director, he does not recall any communications with the employer, with either supervisors or managers, between May and November 2008.

[139] The grievor was then referred to Ms. Thompson's email dated November 12, 2008 (Exhibit E-3, tab 13), concerning their telephone conversation. He stated that he does not remember the call. He was asked whether anything was incorrect in it or if he disagreed with respect to Ms. Thompson's summary of the call. He stated that he did not recall anyone calling him in May 2008.

[140] The grievor was asked about correspondence between Ms. Mawbey and a Pete Campbell in early 2009. The first was a January 22, 2009, letter from Mr. Campbell (Exhibit G-15), followed by a March 16, 2009, reply letter from Ms. Mawbey (Exhibit G-16), which stated at page 2 that the grievor's position could not be performed at home. The grievor stated that Mr. Campbell is a contractor with Sun Life who handles returns to work and the duty to accommodate. The grievor further confirmed that his only contact with Ms. Mawbey was at the meeting on December 4, 2007, at the UTE's national office.

[141] On cross-examination, the grievor stated that he thought that he had received a copy of Ms. Mawbey's letter through an ATIP request and in his Sun Life file. He was asked if Mr. Campbell's role was to facilitate returns to work after two years. He responded that it was to facilitate a return to work anytime and not beyond two years

unless his benefits continued after that. He was asked if he discussed the contents of the letter with Mr. Campbell. He responded that he did not review the Sun Life file in preparation for this hearing. He was asked if he discussed with Mr. Campbell the statement in the letter that his substantive position could not be performed from home. The grievor responded that he had a discussion, but he recalled that no jobs were available.

[142] The grievor was aware that Ms. Mawbey was the employer contact for his accommodation. They exchanged emails on January 26 and 27, 2009 (Exhibit G-14, tab 15). He was confused because she called him about returning to work and accommodation.

[143] The grievor was referred to his email to Ms. Thompson of April 24, 2009 (Exhibit E-3, tab 17, page 8). He stated that he sent it so that he would remember as he has a memory issue. He makes a record of his telephone calls. He stated that he received a letter shortly after April 2009 setting out his options. He stated that he does not recall whether Ms. Thompson discussed the options with him on April 24, 2009.

[144] The grievor received Ms. Thompson's May 11, 2009, letter (Exhibit E-3, tab 18).

[145] The grievor was referred to Ms. Thompson's August 6, 2009, email, to which she attached the consent forms (Exhibit E-3, tab 20). He testified that he was not able to sign the forms because he understood that protocols had not been followed. When he read the forms, in his mind, the requirements had not been met. He stated that parts of the FTW referral checklist (Item A - letter from supervisor, and Item B - important HR issues) would include his complaints, and so forth. He interpreted that the inclusion of such information was necessary before giving his consent. He wanted the letters to come to him. He went to Health Canada in 2005.

[146] The grievor was then asked about Ms. Thompson's testimony that he questioned the consent form's authenticity. He replied that he had another consent form that said, "reasons have been explained to me in writing". His biggest concern was the absence of the clause, "provided to me in writing". To manage his file, he needed records.

[147] No meeting was held with Ms. Thompson about the whole process. He received documents by email.

[148] On cross-examination, the grievor was asked about his refusal to sign the FTW evaluation consent form. He stated that there were many reasons for his refusal. There were many policies to read as part of the process, and he believed that according to the policies, written reasons had to be provided. He did not agree with what Ms. Thompson had written. He did not believe that her stated reasons for the referral met Health Canada's requirements. The consent form had different reasons than those Ms. Thompson used for the need for the referral.

[149] The grievor stated that he believes that the passage in her email, "As suggested by you", was a reference to his suggestion that they contact Health Canada and others to be involved in the duty-to-accommodate process. He indicated that he wanted to return to work in the near future. But he did not agree that the Health Canada assessment would help with that. He stated that if Health Canada was not given the proper information, it was problematic. A general statement in the form was not the reality of the situation of his complex disease.

[150] The grievor was asked whether as a general proposition he would agree that for the employer to obtain information from Health Canada or his doctors, his consent was needed. He replied that at that time, August 2009, the employer was communicating with the WSIB and Sun Life. At the meeting of December 4, 2007, he explained his health issues.

[151] The grievor was asked about Dr. Armstrong's medical note dated August 21, 2009 (Exhibit E-3, tab 21). He testified that he had been seeing Dr. Armstrong for about one year as of then. The reference in her note to his referral to "another medical team" meant Haydon & Associates. He stated that he had first discussed a neuropsychological assessment with Dr. Given (of Health Canada) and Dr. Molot.

[152] On cross-examination, the grievor was asked about his letter to Ms. Cardinal of September 16, 2009 (Exhibit E-3, tab 22). He testified that he did not know what was on his mind at that time. He had to identify his restrictions and limitations to return to work. He was asked about his statement at the end asking that "all communications are in writing". He testified that he did not take that position throughout the whole process. In this specific letter, he stated that he had an issue with having to deal with Ms. Thompson for a return to work. When he was asked if his preferred

communication method was in writing, he stated that it was not an accommodation process; it was a dispute concerning a return to work, an accommodation, and workers' compensation.

[153] Still on cross-examination, the grievor was asked about Ms. Thompson's October 9, 2009, letter to him (Exhibit G-19). He confirmed that the handwriting stating, "See Requirement of FTW" on the first page was his. He stated that he was referring to letters from Health Canada that were supposed to identify all the issues. He felt that the employer did not provide all the necessary documentation for the doctors.

[154] The grievor was asked whether he communicated with the employer to see if he could return to work. He responded that from his understanding, the *Illness and Injury Policy* was not being followed.

[155] From November 8 to 15, 2009, the grievor went to Calgary, Alberta, for Dr. Stein's assessment. He received a copy of Dr. Stein's report.

[156] The grievor confirmed that he received Dr. Stein's report (Exhibit G-18) in mid-January 2010. He could not do anything with it because he had to wait to see Dr. Armstrong. He saw her in late March 2010. He believes that that visit was the first time Dr. Armstrong sat down to read the report. Dr. Armstrong knew that the grievor had been cut off from Sun Life benefits and of his financial difficulties as he had to pay for Dr. Stein's assessment, along with his hotel accommodations and airfare.

[157] The grievor was asked about the termination fact sheet (Exhibit G-14, tab 25). He knew the other person named in the document, Samantha Scharf. She was his colleague, a local union treasurer, and an OHSC member. She also had outstanding complaints about indoor air quality.

[158] On cross-examination, the grievor was asked if at any time he had requested a meeting with Ms. Cardinal, Mr. Currie, Mr. Couture, or anyone else. He responded that he had asked for a meeting with Mr. Nathanson, and Ms. Mawbey and Mr. Aylward attended. The grievor confirmed that he had not asked to meet with management.

1. Mr. Banville

[159] Mr. Banville had been employed by the CRA beginning in 1996; he retired in 2014. Beginning in 1997 or 1998, he was a supervisor, and he reported to Ms. Thompson. His duties were to manage employees and the workload. In 2002, he was the grievor's supervisor.

[160] Mr. Banville's responsibilities for employees on sick leave depended on the length of the sick leave. If it was for one year or more, he would communicate with the employee monthly to encourage a return to work and to offer support, if needed. At times, he would take the initiative, but most of the time, it was done at management's request. If he followed up with an employee, he would write a memo or summary and send it to his manager and, in some cases, LR. Mr. Banville confirmed that his manager did not ask him to follow up when the grievor was on LWOP while he was the grievor's supervisor. While he was not instructed to phone the grievor, he confirmed that he did not follow his practice of monthly phone calls and writing memos in the grievor's case.

[161] Mr. Banville confirmed that he was aware that the grievor was gone from the workplace for a long time. As a supervisor, Mr. Banville had had only one case of an employee being on sick leave for more than two years. He is unaware whether that person's employment was terminated.

III. Summary of the arguments

A. For the employer

[162] The employer submits that the issue to be determined in this case is that when it terminated the grievor on April 13, 2010, was he able to return to work in the foreseeable future?

[163] The test is whether an employee is unfit to work and to return to work in the foreseeable future. The meanings of "a reasonable period" and "the foreseeable future" depend on the circumstances of each case.

[164] As of April 2010, the grievor was not fit to be in the workplace. Dr. Armstrong's March 30, 2010, letter (Exhibit E-3, tab 35) states that he was not fit to be at work.

[165] Moreover, Dr. Stein's medical report dated January 6, 2010 (Exhibit G-18), provides a summary of the grievor's health conditions and states that the grievor is "currently fully disabled."

[166] In neither medical report do the medical practitioners anticipate that the grievor can return to the workplace.

[167] The employer states that the facts are straightforward and uncontested with respect to the relevant timelines at issue in this case. The grievor was absent from the workplace from March 5, 2007, to May 11, 2009. On April 20, 2007, the employer sent him a letter in which it noted that he could consider retirement on medical grounds (Exhibit E-3, tab 9, page. 6).

[168] Ms. Thompson telephoned the grievor in November of 2008 and made a record of it in an email dated November 12, 2008 (Exhibit E-3, tab 13). She initiated the call as he had been last contacted in May of 2008. She wanted to touch base and to see if anything was new with respect to his condition or to the accommodation that he might need. She gave him her phone number and invited him to contact her if there was any change to his condition or the accommodation need. He never phoned her.

[169] In April of 2009, Ms. Thompson and the grievor had several email exchanges (Exhibit E-3, tab 17, pages 8 and 9).

[170] The employer then sent a letter dated May 11, 2009, to the grievor (Exhibit E-3, tab 18) to establish two things: that he had been on sick LWOP for almost two years, and that he should consider medical retirement.

[171] Ms. Thompson emailed the grievor on August 6, 2009 and attached the consent forms for a Health Canada assessment (Exhibit E-3, tab 20). A medical note from Dr. Armstrong dated August 28, 2009, stated that the grievor was unable to return to work (Exhibit E-3, tab 21). The employer submits that each time it requested information on the grievor's return to work, the response was that he was unable to return.

[172] In September of 2009, the grievor told the employer that he would not consent to the Health Canada assessment.

[173] The employer continued to extend the grievor's LWOP while waiting for information concerning a return-to-work date with any restrictions or limitations for accommodation. It received no answer from him. It gave him options to deal with his absence from the workplace, yet no concrete information came from him with respect to a return to work.

[174] Although it extended the grievor's sick LWOP, the employer submits that sick LWOP is not in and of itself an accommodation and that neither is keeping an employee on LWOP on strength.

[175] The employer further submits that the facts of the OHSC issue were both irrelevant and non-factors in its decision to terminate the grievor.

[176] Finally, the employer submits that the grievor's union could have been involved and that for a face-to-face meeting to take place, an effort by everyone was needed since the grievor could not be in the workplace. The fact that a face-to-face meeting did take place between Ms. Mawbey, a union representative, and the grievor shows that such a meeting with the employer could have been initiated by the grievor or the union. The employer was never asked for one.

[177] The employer references the following decisions in its book of authorities:

- *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at paras. 11 to 15, 18, 19, 20 to 23, 38, and 54 to 60 ("*McGill*");
- *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24 at paras. 93 and 95;
- *Gauthier v. Treasury Board (Canadian Forces Grievance Board)*, 2012 PSLRB 102 at paras. 10, 11, 37, 42, and 43;
- *Belisle v. Deputy Head (Department of Aboriginal Affairs and Northern Development)*, 2016 PSLREB 88 at paras. 18, 42, and 49 to 51;
- *Calabretta v. Treasury Board (Department of Public Safety and Emergency Preparedness)*, 2015 PSLREB 85 at paras. 256 to 272 and 298;
- *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 at paras. 11 to 21, especially para. 15;
- *Lafrance v. Treasury Board (Statistics Canada)*, 2007 PSLRB 31 at paras. 126 and 132;
- *McCormick v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26274 (19950918), [1995] C.P.S.S.R.B. No. 92 at 28 and 31 (QL);
- *McCormick v. Canada (Attorney General)*, [1998] F.C.J. No. 1904 at paras. 17 to 21 (QL);
- *Mutart v. Canada (Attorney General)*, 2014 FC 540 at paras. 35 and 37; and

- *Scheuneman v. Canada (Attorney General)*, [2000] F.C.J. No. 1997 at paras. 5 to 8 (C.A.) (QL).

[178] In my analysis, I will return to the authorities that I found useful to this case.

B. For the grievor

[179] The grievor was terminated for incapacity. He submits that he has established *prima facie* discrimination, relying on both *McGill* and *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101. As such, the root of this case concerns the duty to accommodate, which has evolved in the case law. As a secondary line of argument, the grievor raised allegations that the termination was the result of bad faith on the part of the employer.

[180] At the crux of this case is the employer's *Illness and Injury Policy* (Exhibit E-3, tab 4), which sets a two-year limit on employees absent from the workplace on sick LWOP. The employer states that the two-year limit may be extended in exceptional circumstances and that it has no obligation to keep an employee on strength indefinitely.

[181] The grievor argues that since he has made out a *prima facie* case of discrimination, the onus now shifts to the employer. He accepts that the two-year limit meets the first two steps of the well-known three-part "*Meiorin*" test set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at paras. 54 and 79 ("*Meiorin*"). He submits that the employer failed the third step, namely, showing undue hardship on its part. According to him, there is no evidence of undue hardship in this case.

[182] The discriminatory nature of the two-year limit was confirmed in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404. The grievor submits that the facts in *Sketchley* are remarkably similar to those in this case. The Federal Court of Appeal upheld the Federal Court's findings of discrimination. Consistent with *Sketchley*, the evidence in this case reveals that the employer simply relied on a mechanical application of the two-year rule.

[183] The grievor relies on *McGill*, in which the Supreme Court of Canada confirmed (at paragraph 22) the following: "Reasonable accommodation is thus incompatible with the mechanical application of a general standard." The evidence conclusively

established that management felt bound to simply apply the two-year rule in the *Illness and Injury Policy* in an automatic and mandatory way. *McGill* stands for the principle that reasonable accommodation is incompatible with the mechanical application of the standard. Accommodation is an individualized process; one must look at the situation and circumstances to determine whether the employer has shown undue hardship.

[184] The grievor asserts that the employer cannot establish a *bona fide* occupational requirement (BFOR) defence without adducing specific evidence of undue hardship. He relies on *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 133, where the Court noted that "… determining whether there is undue hardship requires evidence of hardship in a particular case." The employer must present cogent evidence that it could not accommodate the grievor without experiencing undue hardship; evidence of it cannot be anecdotal or impressionistic (see *Meiorin*, at para. 70). The grievor submits that the Canadian Human Rights Tribunal has followed the same approach. For example, in *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20 at para. 70, it stated, "An employer must demonstrate that the discrimination is necessary to achieve legitimate work-related objective and tender affirmative evidence that the point of undue hardship has been reach [*sic*] in its efforts to accommodate the employee."

[185] In April 2009, Ms. Thompson called the grievor and sent him a letter, alerting him to the fact that he was approaching the 2-year deadline for LWOP for reasons of injury or illness. She testified that the letter was "automatic" and stated, "It's a process; the 2-year period comes, we send out the letter; it's a matter of course." She testified that an extension of 6 months could be granted, in exceptional circumstances. The director, Mr. Couture, testified that the 2-year mark should not be extended and that his preference was to review cases at 18 months so they could be resolved within the 2-year period. The grievor received the standard 2-year letter on May 11, 2009, which stated that management has to resolve such LWOP situations within 2 years. His email correspondence with Ms. Thompson in July 2009 further demonstrated that the employer was solely driven by its 2-year rule.

[186] The grievor summarized the key events from October 23, 2009, to March 30, 2010. When Ms. Thompson received the March 30, 2010, letter from Dr. Armstrong, she did not follow up to ascertain any of the following: the meaning of

the phrase "at this time" in Dr. Armstrong's letter, the available treatment options, or the grievor's prognosis were he able to access those treatments.

[187] The April 13, 2010, termination letter referred to the *Illness and Injury Policy*. While it emphasized the policy's two-year resolution requirement, the employer was selective as to its application of other of its aspects. There was no follow-up inquiry from the employer when it learned that treatment was available for the grievor. Ms. Thompson clearly did not follow the policy's requirement to "maintain frequent and regular contact."

[188] The employer submitted that the documentary evidence and witness testimony confirm that the two-year rule was of paramount importance in its decision to terminate the grievor. This evidence reflects the precise type of mechanical application of a general standard that in *McGill* the Supreme Court held was incompatible with a reasonable accommodation.

[189] The evidence of the employer's witnesses, as well as its communications with the grievor during his LWOP, demonstrates that the termination was premised on an application of the two-year limit in the policy. The grievor's manager, Ms. Thompson, conceded that extending his LWOP would have created no negative impact. There is no doubt about the significance of the two-year period based on the letters, emails, and testimonies of Ms. Thompson and Mr. Couture. Numerous documents state that management must resolve a sick LWOP within two years. Moreover, the Board heard testimony that "exceptional circumstances" means that in such circumstances, LWOP could be extended for an additional six months.

[190] The grievor further submits that there is clear evidence that additional LWOP would not have amounted to undue hardship. Considerable weight may be accorded to the collective agreement. He relies on *McGill*, in which the Supreme Court held that a clause providing for a period of authorized absence can be a "significant factor" in determining the appropriate period in which employees can be absent from the workplace.

[191] The collective agreement stipulates that employees can receive up to five years of LWOP for the care of children (article 41), care of a parent (article 42), and relocation of a spouse (article 46). The grievor asserts that the fact that the parties agreed that employees can be away from the workplace for up to five years is crucial to the undue-

hardship analysis. It is entirely arbitrary to impose a hard-two-year deadline in cases of illness or injury and permit leaves of absence for up to five years in the other circumstances specified. The presence of these entitlements to significantly longer LWOP makes it impossible for the employer to claim that it reached the point of undue hardship in this case.

[192] According to the grievor, the employer's claim of undue hardship lies in the administrative burden associated with dealing with him while he was on sick LWOP. On cross-examination, Ms. Thompson confirmed that she experienced no negative impact as a manager due to extending the grievor's LWOP. He asserts that undue hardship was first raised in Mr. Couture's cross-examination. He submits that Mr. Couture's testimony established that his rationale demonstrated a clear discriminatory stereotype that employees with disabilities are more troublesome than those on leave for other reasons.

[193] Two different aspects of the employer's administrative burden were put forward. First, when he was asked for the difference between an LWOP used to care for a child and one used to care for oneself, Mr. Couture confirmed that the status was the same but that the costs were different. For an LWOP for childcare, there are no lawyers' or doctors' fees, and management is not affected. The second aspect of the employer's administrative burden was with respect to the ATIP requests the grievor made following his termination.

[194] The grievor submits that with respect to the first aspect of the administrative burden, it is manufactured by the employer's policies. For LWOP for childcare, the employer could require monthly updates. For an employee on LWOP for spousal care, the employee is expected to update the employer. In the grievor's case, the administrative burden the employer relied on was one call from Ms. Thompson. Lawyers' and doctors' fees arose only due to the two-year rule. As for the second aspect, the employer was obligated to present affirmative evidence of hardship related to ATIP requests; it offered no evidence of hardship, only speculation of it.

[195] The grievor is covered by the collective agreement (Exhibit G-7) in which each LWOP type is the same in terms of coding. Articles 41, 42, and 46 provide for LWOP for up to five years for the care of a child or parent or for a spouse's temporary relocation.

Thus, it cannot be undue hardship for an employer to provide sick LWOP for up to five years since it already provides such a benefit to employees.

[196] The grievor did not take the position that his leave should have been extended indefinitely. However, it should have been comparable to the other five-year LWOPs provided for in the collective agreement. At a minimum, sick LWOP should be comparable to the five-year rule for the other types of LWOP. This would mean that the employer would accommodate employees on sick LWOP for five years. In the grievor's case, had he had one year of sick leave credits in his bank, he would have been on leave for three years.

[197] The grievor submits that the employer failed to present any evidence of undue hardship had it extended his LWOP while he pursued available treatment for his disability, to permit him to return to work.

[198] Turning to the pertinent facts, all the employer did as first contact was Ms. Thompson's call to the grievor in November of 2008. According to her, she wanted to maintain contact to see if anything was new with respect to his medical condition. She knew that he was receiving benefits from Sun Life, which was taking care of him, so there was no need for medical certificates, except to place in the file.

[199] There was no follow-up with the grievor until April 2009 to warn him about the approaching two-year mark. That was the extent of the administrative burden on the employer up to that point. Ms. Thompson confirmed in her testimony that it is a process; a letter is sent at the two-year mark. In other words, it is simply a mechanical, automatic phase in the process.

[200] The grievor had been waiting to see specialists, such as Dr. Molot, since 2007. Between 2007 and 2009, the employer called the grievor just once. The April 13, 2010, termination letter refers to six extensions to his LWOP. He cooperated fully, as he was waiting to see specialists. In May of 2009, he was given two months to inform the employer as to whether he would return to work, retire on medical grounds, or be terminated.

[201] The grievor wanted to return to work (Exhibit E-3, tab 29, page 15). At that point, the employer's administrative burden began.

[202] The grievor further submits that despite the fact that the outward basis for the termination was discriminatory, there is compelling evidence that that was not the CRA's true motivation. Its interactions with him during his LWOP, as well as its internal memoranda on the termination, demonstrate that it was motivated at least in part by his many health-and-safety complaints and demands for information, when it made its decision to terminate him. Therefore, the termination was tainted by bad faith and must be struck down.

[203] The employer viewed the grievor as someone who caused many problems due to his involvement with the union and the OHSC; thus, it looked for the first opportunity to terminate his employment. The grievor relies on *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119), [1993] C.P.S.S.R.B. No. 192 (QL), and *Laird v. Treasury Board (Employment & Immigration)*, PSSRB File No. 166-02-19981 (19901207), [1990] C.P.S.S.R.B. No. 213 (QL).

[204] The grievor summarized the following evidence in support of his submission.

[205] First, he mentioned the letter referencing the CRA's *Code of Ethics*. He asserts that that evidence clearly demonstrates that the employer tried to discourage him from speaking publicly about the indoor-air-quality issues in the workplace at issue, which are later referenced in internal memoranda supporting his termination.

[206] Second, the evidence of the employer's abusive requests for medical notes and its threat of discipline in late 2007 demonstrate that it was searching for a way to challenge the grievor's authorized leave.

[207] Third were the events surrounding the grievor being cut off from communication with the OHSC in late December 2007 to early January 2008.

[208] Fourth, the PSLRB had allowed the grievor's complaint under s. 147 of the *CLC* and declared that the employer had engaged in reprisals. Fifth, is Ms. Thompson's suspicious telephone call to him in November 2008, with her meticulous notes and email to several members of management, all of which is consistent with the employer beginning to build its dismissal case.

[209] Sixth, and perhaps most significant, is the fact that the recommendation to terminate the grievor was prepared before the employer had received updated medical information. The internal termination briefing paper and the fact sheet were prepared

before the employer received Dr. Armstrong's final medical report. The employer reached a decision before it had collected all relevant information, which is clearly indicative of bad faith.

[210] The fact sheet's first three bullets confirm the clear link between the grievor's health-and-safety complaints and his termination. The third bullet states, "Letters of termination for incapacity will be sent to both employees on the same date. This matter may result in negative attention for the CRA." The fact sheet references the grievor's history of raising health-and-safety issues, together with his involvement with the union and the OHSC. The sheet concludes that the termination letter would be sent on April 1, 2010, to both him and another employee who was involved with the union and the OHSC.

[211] The termination briefing paper makes it clear that the employer had many other considerations in mind when it terminated the grievor, which were wholly irrelevant to a termination for incapacity and, thus, indicative of bad faith.

[212] In conclusion, the grievor submits that the employer's interactions with him during his LWOP reveal a pattern of retaliatory conduct for his "constant" complaints and demands, including threats of discipline, unwarranted and abusive requests for medical information, and attempts to isolate him from his colleagues. Furthermore, the fact sheet and the termination briefing paper confirm that the CRA rushed to finalize the termination before receiving further medical information and that its decision was premised at least in part on his numerous complaints and demands over the years. Therefore, the employer's decision to terminate him was also tainted by bad faith.

[213] As remedies, the grievor seeks reinstatement retroactive to the termination date, maximum damages allowed under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) for pain and suffering and wilful and reckless conduct on the employer's part, and punitive damages of $20 000 for its malicious conduct.

[214] The grievor submits a number of cases to support his arguments, as follows:

- *Rogers*, at paras. 52, 77 and 82;
- *Meiorin*, at paras. 54 and 79;
- *Hicks*, at para. 70;
- *Multani*, at para. 133;
- *McGill*, at paras. 19, 22, 25, and 27;
- *Sketchley*, at para. 91;

- *McMorrow*, at 10; and
- *Laird*, at 10.

[215] I will review the relevant cases later in my analysis.

C. The employer's reply

[216] The concept of accommodation must be clarified. The grievor states that LWOP is an accommodation, but human rights cases stand for the principle that the duty to accommodate is an objective-driven process. Accommodating an employee who has restrictions and limitations means allowing him or her to remain in the workplace. An employer does not accommodate an employee to not be at work. The grievor conflates LWOP with accommodation.

[217] Both *McGill* and *Hydro-Québec* confirm that an employee is to be supported while on sick leave. Accommodation begins when the employee returns to work. The employer did not receive answers from the grievor's medical providers about his restrictions and limitations. The reinstatement of LWOP status does not constitute accommodation.

[218] Concerning the collective agreement provisions, the employer replies that they were not raised either at the outset of the hearing or through the internal grievance process. Therefore, on the basis of *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), the grievor was precluded from raising this argument. In any event, clauses 35.09 and 41.02(iii) provide for five years of LWOP over an employee's entire public service employment. While the parties to the collective agreement included sick leave with pay, sick LWOP was not included. Therefore, arguably, it is left to the employer's discretion under article 54.

[219] On the facts, the employer was never told about the entirety of the time the grievor waited for medical attention. Dr. Armstrong did not specify the foreseeable future, although she had all the information. In her medical certificate of August 28, 2009 (Exhibit E-3, tab 21), she stated that the grievor was not fit to return to work. In October of 2009, he told the employer that he had an appointment for tests in November and that the report would take two months. The employer informed him that it would wait for the report. The January 6, 2010, report stated that the grievor was not fit to return to work. In February 2010, he emailed Mr. Couture to advise that Dr. Stein had stated that the grievor was fully disabled (Exhibit E-3, tab 30).

[220] Concerning the March 30, 2010, email from the grievor's lawyer to Ms. Thompson that had attached Dr. Armstrong's medical certificate dated March 30, 2010 (Exhibit E-3, tab 35), nothing indicated that were a two-week extension granted, the grievor would undergo another assessment. The medical certificate stated that he was not fit for "any work". On the issue of hardship, there is no evidence of his true situation.

[221] As for the argument that the employer manufactured an administrative burden, it stated that the grievor had been away for two years, and it was requesting information with respect to his employment status. As he stated that he wanted to return to work, the employer required medical information. It was not the same as an employee on LWOP to care for a child or parent. If an employee states that he or she wants to return to work, the employer must follow up. At no point did it force the grievor to take medical retirement.

[222] The argument that the employer applied the policy in a mechanical and automatic way is far from the facts. At the two-year mark, the employer sends the letter, but that is not the end of the process of reintegrating an employee. The earlier the employee returns, the easier a successful reintegration will be. If one looks at the entire communication between April and July 2009, it is clear that the employer did not mechanically apply the two-year rule.

[223] The grievor was wrong to claim that the "foreseeable future" was six months. It applied only to the time he was undergoing tests. The employer did not argue that in all cases, six months is the foreseeable future.

[224] With respect to the grievor's allegations of bad faith, the employer submits that there is no bad faith in HR preparing for an eventuality; it was being proactive.

[225] The grievor states that his removal from the OHSC was part of the employer's bad faith. He was on the OHSC as a union representative, and the union had to appoint someone to replace him. The reference in the January 2, 2008, email from the OHSC co-chair (Exhibit G-14, tab 12) about the employer not communicating with the grievor states only that replacements were made. Had that not been done, the grievor could have said that the employer was asking him to work while on sick leave. The employer said that he should not bother with workplace issues so that he could get well.

[226] Concerning the reprisal decision, it was about the OHSC's minutes. Neither Ms. Thompson nor Mr. Couture was involved or asked about that case or whether she or he was influenced by it.

[227] There is no cogent evidence of bad faith except the reference to preparing the termination briefing paper. If the employer is severing an employment relationship, it must consider the entire context, and there is no bad faith in doing so. Otherwise, the grievor could argue that the termination was unreasonable because the employer did not consider all the information. HR had to address everything that the director needed to know.

[228] In his argument, the grievor did not specify a period for sick LWOP. The employer did not receive the information it required to conduct an undue-hardship assessment. Keeping an employee on strength indefinitely without information as to when he or she can return to work constitutes undue hardship in and of itself. The employer requested a return-to-work date and the grievor's limitations and restrictions, to no avail.

[229] The grievor seeks reinstatement as a remedy. However, when he was terminated, he was not fit to work. He submits that he should be reinstated to LWOP indefinitely or reinstated to work with an accommodation. The employer submits that reinstating him would require a specific order.

[230] There is no basis for human-rights damages, and there was no bad faith on the part of the employer that warrants damages.

[231] The employer also offers a reply with respect to some of the cases that the grievor cited. It states that *Rogers* is distinguishable on its facts. In that case, the employee was fit to work on a gradual basis. The grievor in this case was not fit for any work. Unlike in *Multani*, the employer in this case did not receive any information. Finally, it states that *Sketchley* did not overturn the analysis in *Calabretta* and cases after it.

[232] By way of conclusion, the employer replies that the Board should dismiss the grievance on the basis that the employer's application of its sick leave policy was not done automatically but that it accounted for the grievor's situation. His doctors deemed him unable to return to work. There was no evidence that he explored the

issue of medical retirement. As well, he did not demonstrate bad faith by the employer leading to the termination letter. Given all this, the employer had no choice but to terminate him for incapacity.

D. Additional submissions

[233] After the hearing, the grievor requested that the Board permit supplementary submissions from the parties on its recent decision in *Edwards v. Treasury Board (Canada Border Services Agency)*, 2019 FPSLREB 62. I granted the request, and supplementary submissions were provided on October 24, November 7, and November 14, 2019, respectively.

[234] In *Edwards*, the Board found that the employer had discriminated against the grievors on the basis of disability when it denied their requests for personal needs leave because they were on sick LWOP.

[235] I do not intend to provide an exhaustive summary of the parties' arguments with respect to the application of *Edwards* to the present case. Suffice to say that the grievor's main argument is captured at paragraph 11 of his reply submissions as follows: "The central importance of the Edwards decision to the present case is in regards to the Board's finding that leave without pay is a form of accommodation and undue hardship is not simply notional, it is an evidence-based assessment." For its part, the employer submits that *Edwards* "… has no application to the present case and is completely distinguishable on both the facts and the law."

[236] I am certainly prepared to accept the union's submission that undue hardship requires an evidence-based assessment. In my view, the Supreme Court of Canada established that principle long before *Edwards*. However, I am not prepared to import anything further from *Edwards* into my reasoning in this decision. In *Edwards*, the Board considered the interplay between the Treasury Board directive that with respect to sick LWOP uses similar language to that of the CRA's *Illness and Injury Policy*, namely, "… such leave without pay situations are to be resolved within two years …".

[237] An important passage of the Board's decision in *Edwards* reads as follows (at paragraph 66):

> *[66] As there is no provision for sick leave without pay in the collective agreement, the employer can apply the directive and resolve any sick leave without pay situations at the two-year mark.*

> *However, the employer cannot rely on the directive to deny a benefit to which an employee is otherwise entitled under the collective agreement….*

[238] The Board found that in the absence of a provision in a collective agreement for sick LWOP, an employer can apply its directive, which transpired in this case. I agree with the employer that *Edwards* is distinguishable. Therefore, I have not considered it further in this decision.

IV. Analysis

[239] I must determine whether the employer discriminated against the grievor on the basis of disability when it terminated him for medical incapacity on April 13, 2010. I am also asked to determine whether his termination was tainted by bad faith. I will start with the human-rights analysis.

A. *Prima facie* discrimination

[240] The grievor alleged that his termination was discriminatory, in violation of the *CHRA* and article 19 of the collective agreement.

[241] According to s. 226(2)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), the Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA* (other than its provisions relating to equal pay for work of equal value) whether or not there is a conflict between the *CHRA* and the collective agreement, if any.

[242] Section 7 of the *CHRA* provides that it is a discriminatory practice to refuse to continue to employ any individual on a prohibited ground of discrimination.

[243] To establish that an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination that covers the allegations 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 S.C.R. 536 at para. 28). The Board cannot consider the employer's answer before determining whether a *prima facie* case of discrimination has been established (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 22).

[244] It is not necessary that discriminatory considerations be the sole reason for the actions at issue for the discrimination claim to be substantiated. The grievor need only show that discrimination was one of the factors in the employer's decision (see *Holden v. Canadian National Railway Company* (1990), 14 C.H.R.R. D/12 (C.A.) at para. 7). The standard of proof in discrimination cases is the civil standard of the balance of probabilities (see *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FC 789 (C.A.)).

[245] To demonstrate *prima facie* discrimination, the grievor had to show that he had a characteristic protected from discrimination under the *CHRA*, that he experienced an adverse impact with respect to his employment, and that the protected characteristic was a factor in that adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33).

[246] On the facts before me, I have no difficulty finding that the grievor has established a *prima facie* case of discrimination in this case. First, he had a characteristic protected from discrimination under the *CHRA*. He suffered from a disability within the meaning of s. 25 of the *CHRA*, namely, "… any previous or existing mental or physical disability …". It is noteworthy that quite rightly, the employer did not contend that he did not establish that he suffers from a disability. Secondly, he experienced an adverse impact with respect to his employment; he was terminated. Finally, his disability was clearly a factor in that adverse impact; he was terminated for incapacity.

B. The BFOR defence

[247] An employer faced with a *prima facie* case of discrimination 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). If a reasonable explanation is given, it is up to the grievor to demonstrate that the explanation is merely a pretext for discrimination.

[248] In this case, the employer relied on its statutory BFOR defence.

[249] Section 15(2) of the *CHRA* sets out a statutory defence to what would otherwise be a discriminatory practice. The applicable portions of s. 15 read as follows:

> **Exceptions**
>
> ***15*** **(1)** *It is not a discriminatory practice if*
>
> **(a)** *any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a* bona fide *occupational requirement ….*
>
> **Accommodation of needs**
>
> **(2)** *For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement … it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*
>
> [Emphasis in the original]

[250] Given my finding of *prima facie* discrimination, it fell on the employer to establish that its application of the two-year standard was justified. In *McGill*, the Supreme Court of Canada reiterated the three-part *Meiorin* test as follows (at paragraph 13):

> *13 It is well established that the employer must justify the standard it seeks to apply by establishing:*
>
> *(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
>
> *(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment [sic] of that legitimate work-related purpose; and*
>
> *(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*
>
> *(*Meiorin*, at para. 54)*

[251] The grievor conceded that the employer satisfied the first two parts of the *Meiorin* test. The crux of this case centres on the third part.

[252] As is often the case in these types of grievances, the BFOR defence revolves around the concept of undue hardship. Both parties agree that that is indeed so in this case. Thus, the analysis shifts to whether accommodating Mr. Babb's disability would have imposed undue hardship on the employer.

[253] The grievor pointed to other LWOP provisions in the collective agreement, which grant employees up to five years of it. Relying on *McGill*, he argued that a clause in a collective agreement providing for a period of authorized absence can be a significant factor in determining the appropriate period that employees can be absent from work. If the collective agreement provides for a five-year absence for LWOP in other situations, then the employer can clearly accommodate an employee on sick leave for a period up to five years, without reaching the point of undue hardship. As indicated earlier, the grievor further argued that *Edwards* provides additional support for this argument. I agree that there is a clear logic to it.

[254] The difficulty with the argument is twofold. First, unlike in *McGill*, sick LWOP is not encompassed in the collective agreement. The Board's decision in *Edwards* highlights this and makes it clear that since the Treasury Board's policy on sick LWOP did not form part of the collective agreement, it was open to the employer to apply the policy.

[255] Secondly, and more importantly, the grievor's argument is conveniently silent on the Supreme Court of Canada's express guidance in both *McGill* and *Hydro-Québec* that I need to determine whether the employer established that the employee is incapable of returning to work in the reasonably foreseeable future. If so, then the employer has met its duty to accommodate.

[256] The grievor argued that keeping him on sick LWOP for possibly a few more years so that he could undergo the necessary treatments to return to work would not constitute undue hardship. However, I have to look at the medical information that the employer had when it decided to terminate him. He had been absent on sick leave for three years. He made a vague reference in his February 4, 2010, email to Mr. Couture to Dr. Stein's report containing "8 treatment recommendations" (Exhibit E-3, tab 30). For her part, Dr. Armstrong informed the employer that "[t]reatments have been recommended to improve (the grievor's) tolerance to exposures" (Exhibit E-3, tab 35). That was the extent of the medical information. I will have more to say on this later in this decision.

[257] Relying on *Multani* and *Hicks*, the grievor argued that the employer cannot establish a BFOR defence without adducing specific evidence of undue hardship. He pointed to the testimonies of both Ms. Thompson and Mr. Couture to argue that the

employer adduced no affirmative evidence of undue hardship. He submitted that the reasons provided by Mr. Couture, namely, the purported administrative burdens of having to deal with ATIP requests and the costs associated with sick LWOP versus LWOP for childcare, parental care, or spousal relocation are absurd. Again, I agree that if the employer relied on those reasons to demonstrate undue hardship, then it would fall woefully short of establishing its BFOR defence.

[258] In *Hydro-Québec*, the Supreme Court of Canada provided explicit guidance for my analysis. I have highlighted as follows a considerable portion of the Supreme Court's reasoning in this case because, in my view, it is exactly how I am to approach the undue-hardship analysis in the employment context:

> …
>
> *[12] … What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances.…*
>
> *[13] … in the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship.…*
>
> …
>
> *[15] However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration.…*
>
> *[16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics… The employer … does have a duty, if it can do so without undue hardship, to arrange the employee's … duties to enable the employee to do his or her work.*
>
> *[17] … However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.*
>
> *[18] Thus, the test for undue hardship is not total unfitness for work in the foreseeable future… if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.…*
>
> *[19] … **The employer's duty to accommodate ends where the employee is no longer able to fulfill** [sic] **the basic obligations***

> ***associated with the employment relationship for the foreseeable future.***
>
> …
>
> [Emphasis added]

[259] In *McGill*, the Supreme Court of Canada stated at paragraph 11 as follows:

> *[11] The duty to accommodate in the workplace arises when an employer seeks to apply a standard that is prejudicial to an employee on the basis of specific characteristics that are protected by human rights legislation. This can occur in the context of a sick employee's right to be absent from work ….*

[260] However, importantly, the Supreme Court went on to hold the following, at paragraph 38:

> *[38] The duty to accommodate is neither absolute nor unlimited. The employee has a role to play in the attempt to arrive at a reasonable compromise. If in Ms. Brady's view the accommodation provided for in the collective agreement* [a three-year period] *in the instant case was insufficient, and if she felt that she would be able to return to work within a reasonable period of time,* ***she had to provide the arbitrator with evidence on the basis of which he could find in her favour****.*
>
> [Emphasis added]

[261] Neither party took the position that an employee is entitled to be on sick LWOP for an indefinite period. The employer argued that it discharged its onus in this case of proving undue hardship on the basis that the grievor was unable to resume his work in the reasonably foreseeable future. The grievor countered that it fell a great deal short of meeting its onus of showing undue hardship.

[262] I now turn to the evidence before me to determine whether I am satisfied that the employer met its evidentiary onus of proving that the grievor was incapable of returning to work in the reasonably foreseeable future.

[263] The starting point for this analysis is Mr. Couture's April 13, 2010, termination letter to the grievor. It is abundantly clear from a review of this letter and the testimonies of both Mr. Couture and Ms. Thompson that the CRA's *Illness and Injury Policy* triggered the events that led to Mr. Babb's termination. Indeed, the opening paragraph of the letter confirms it, as follows: "Our CRA Leave Without Pay Policy states that management must resolve such leave without pay situations within two years of the leave's commencement."

[264] The grievor had been on sick LWOP since April 19, 2007. He was not terminated at the two-year mark but on April 13, 2010. He argued that the employer applied the two-year standard automatically and mechanically. I disagree. Just because there might have been a considerable degree of boilerplate text in its correspondence to him in terms of the options available to him, both before and after the two-year mark, it does not in and of itself amount to an automatic and mechanical application of a policy. As the termination letter states, and as the evidence before me abundantly confirms, the grievor was offered a series of extensions to provide medical information setting out his limitations and restrictions to enable a return to work.

[265] The grievor argued that consistent with *Sketchley*, the evidence in this case reveals that the employer simply relied on a mechanical application of the two-year rule. In my view, *Sketchley* does not assist the grievor. In that case, the Federal Court of Appeal agreed that the relative inflexibility of the two-year deadline imposed by the Treasury Board policy on leave for medical reasons was sufficient to establish a *prima facie* case of discrimination. However, importantly, the Court held as follows (at paragraph 95):

> *[95] … In making its screening decision in this case,* ***the Commission clearly did not consider the BFOR test, and rendered no decision on this crucial question****. In these circumstances, the requirements of the* Meiorin *BFOR test have not been established as required, and this Court will not impute them as urged by the appellant.*
>
> [Emphasis added]

[266] I have already determined that the grievor established a *prima facie* case of discrimination. In this case, I must render a decision on the critical question of whether the employer has met the BFOR test.

[267] It is important to look again to the termination letter in this respect. Its second paragraph references the extensions granted to the grievor to provide him time to meet with his treating medical practitioners to identify his medical limitations and restrictions and to provide this information to the employer, to facilitate his return to work.

[268] In the third paragraph, the letter references the grievor's September 17, 2009, communication with Ms. Cardinal that he continued to be unfit to return to work. Mr. Couture further refers to Dr. Armstrong's August 24, 2009, medical certificate

confirming that the grievor continued to be unfit to return to work. He also wrote the following in the same paragraph:

…

> *… On February 2, 2010 you indicated to me that you are not fit to return to work and could not communicate a potential return to work date. You claimed that according to a medical report by Doctor Ellie Stein, dated January 6, 2010 you are "currently fully disabled".*

…

[269] The letter goes on in that same paragraph to highlight management's efforts to obtain a return-to-work date, including attempts to have the grievor undergo a Health Canada assessment and to obtain information from his treating medical practitioners.

[270] In the fifth paragraph, the termination letter states as follows:

…

> *On March 30, 2010 your manager received a copy of a letter from Dr. Jennifer Armstrong dated March 30, 2010… Dr. Armstrong advises that you are not fit to return to work at this time and there are no specific accommodations that would be appropriate or adequate as you are not able under any conditions to work at this time.*

…

[271] The grievor's sick LWOP commenced on April 19, 2007. On May 11, 2009, he received a letter from the employer that stated in part as follows: "Management must resolve such leave without pay situations within two years of the leave's commencement" (Exhibit G-6). The letter went on to inform him that his options were to return to work, to seek medical retirement, or to be terminated under s. 51(1)(g) of the *CRAA*. This was reiterated in an email dated July 6, 2009, to him from Ms. Thompson (Exhibit E-3, tab 17, pages 3-4). His emailed response dated July 9, 2009, stated that he "intended to return to work" (Exhibit E-3, tab 17, pages 1-3).

[272] Dr. Armstrong wrote a letter to the employer dated October 23, 2009 (Exhibit E-3, tab 27), advising it that she was unable to comment on the grievor's return to work until she received the specialist's report. She wrote in part as follows:

…

> *It is my expectation that Mr. Babb will be able to return to employment in the foreseeable future however I cannot address the specifics of this until I have received a report from these specialists. I cannot say that he will be able to return to work within a specific time frame.*

…

[273] From then until March 31, 2010, extensions were requested and granted to allow Dr. Armstrong to review the specialist's report.

[274] Counsel for the grievor wrote to Ms. Thompson on March 29, 2010 (Exhibit E-3, tab 34), seeking an extension for Dr. Armstrong to review the specialist's report and to prepare a letter to the employer. Ms. Thompson denied two extension requests.

[275] On March 30, 2010, Dr. Armstrong prepared a short letter that stated in part as follows (Exhibit E-3, tab 33):

…

> *This patient, as you know, has recently undergone a neuro-psychiatric assessment… It was basically concluded that Mr. Babb is not at this time fit to return to work. Therefore there are no specific accommodations that would be appropriate or adequate, as he is not able under any conditions to work at this time. Treatments have been recommended to improve his tolerance to exposures however finances have been an issue for him. He has been unable to acquire funding for treatments not covered by OHIP or Sun Life and his failure to obtain treatment has impeded his recovery and return to work.*

…

[276] The employer had not seen Dr. Stein's report when it terminated the grievor for incapacity. However, the grievor testified that he had the report as of mid-January 2010. While he did not provide it to the employer, he did email Mr. Couture on February 2, 2010 (Exhibit E-3, tab 30), the subject of which was, "LWOP Update Confidential Medical Information no consent provided for further distribution or dissemination". He wrote in part as follows:

…

> *In accordance with LWOP requirements and my duty to communicate this e-mail [sic] will serve to advise you "Mr Babb is currently fully disabled" as written by Dr. Ellie Stein in her report dated Jan. 6, 2010 which I have recently received by fax… It is unclear when and how I will be able to return to employment….*

…

[277] I reviewed the report bearing in mind the Supreme Court of Canada's guidance in *McGill*, at para. 38, which states that the grievor had to provide me evidence on the basis of which I could find in his favour. The salient portion that was not before the employer as of the termination is as follows (at page 15):

…

> *In summary Mr. Babb has a severe health condition most likely caused by his previous chemical exposure… In addition he has chemical insensitivity which prevents him from returning to similar work… The particular combination these conditions make any type of sustainable work (ie working enough hours to support himself and his family), especially work for which he has training and experience, impossible at the present time. Therefore Mr. Babb is currently totally disabled.*
>
> *… In my experience very few people with this degree of symptomatology are able to return to gainful employment. However, since stopping work, Mr. Babb has noticed some improvements. It is possible that some further slow improvements are possible but the prognosis for anything approaching full or functional recovery is very small.*
>
> …
>
> [*Sic* throughout]

[278] Had the employer seen Dr. Stein's report before Mr. Babb's termination, there is no question in my mind that regrettably still for the grievor, it would have reached the justifiable conclusion that he was unable to return to work in the reasonably foreseeable future. The excerpt from Dr. Stein's report is even more conclusive than the post-termination medical evidence in *Calabretta*, in which the Board found that that medical report arguably reinforced the employer's decision to terminate the grievor in that case.

[279] Yet, even in the absence of Dr. Stein's full report, in my view, given the medical evidence before me of the lack of progress in Mr. Babb's recovery following his absence from the workplace since 2007, I find that once faced with yet another extension request and no indication from the grievor's treating medical practitioners of a possible return-to-work date, the employer's conclusion that he was incapable of returning to work in the foreseeable future was reasonable. Thus, I am satisfied based on the Supreme Court of Canada's instructions in *Hydro-Québec* and *McGill* that the employer's duty to accommodate was at an end.

[280] Since I have determined that the employer met its statutory BFOR defence, I conclude that it did not discriminate against the grievor when it terminated his employment for incapacity.

C. Bad faith

[281] The onus was on the grievor to prove that on a balance of probabilities, the employer's decision to terminate him was tainted by bad faith. The union relied on *McMorrow* and *Laird*. As the former Public Service Staff Relations Board (PSSRB) held in *McMorrow*, "good faith should always be presumed" (at page 10). In that case, the former Board found that the "facts conclusively demonstrate[d]" that the employer's decision to reject the employee on probation was "rife with bad faith" (at page 10), and it stated as follows in *Laird* (at page 10):

…

> *On the basis of all the documentary evidence adduced and the viva voce testimony presented to me I can come to only one conclusion. It is clear to me that the employer's decision to lay the grievor off reeks of bad faith and that there were any number of motivating factors in the employer's mind other than those of economic necessity or volume of work-load [sic] which caused it to want to sever the employment relationship.*

…

[282] In the case before me, the primary documentary evidence that the grievor relied on is twofold: the fact sheet and the termination briefing paper. The fact sheet was dated March 30, 2010. I do agree that both documents refer to a number of matters that have nothing to do with the employer's stated reason for the termination, namely, his incapacity.

[283] The person who purportedly prepared the fact sheet was not called as a witness; she was apparently with an organization called the "Communications Ontario Region". The grievor introduced the sheet at the hearing. He testified that he obtained it through an ATIP request. The sheet does state that it was prepared in consultation with Mr. Couture. However, I have no evidence before me that Mr. Couture relied on it when reaching his decision to terminate the grievor for incapacity. On cross-examination, Mr. Couture was not asked a single question about the fact sheet.

[284] At bullet three on page 3 of the fact sheet, under the heading "Next Steps", is a reference to the grievor being sent a termination letter on "April 1, 2010." He asked

that I conclude that the decision to terminate him was made before the employer had received the updated medical information from Dr. Armstrong. While that is possible, there is an equally plausible, and indeed more probable, way to read the sheet. In the bullet directly above it, the sheet confirms that the employer was awaiting a further medical update by March 31, 2010, with respect to the grievor's medical limitations and restrictions. It then states, "Should Mr. Babb not submit this information, Mr. Babb's employment with the CRA will be terminated." How I interpret these bullets is that in the event that the information was submitted by the deadline, Mr. Babb would not be sent a termination letter on April 1, 2010. What transpired is consistent with the facts. The termination letter was sent to him on April 13, 2010.

[285] The other internal memorandum that the grievor asked me to consider is the termination briefing paper. The union asserts that just like the fact sheet, the paper was prepared before the employer received Dr. Armstrong's medical report. I cannot accept the grievor's assertion. The document is dated April 6, 2010. I have to ask why it would have been necessary had the employer already decided to terminate him on April 1, 2010. In any event, the paper was also introduced through Mr. Babb. It was purportedly prepared by Ms. Bernard, a labour relations advisor. Again, Ms. Bernard was not called as a witness. On the first page, the author wrote, "The last assessment received regarding Mr. Babb's fitness to work is dated March 30, 2010. His physician, Dr. Armstrong indicates that 'Mr. Babb is not at this time fit to return to work…'."

[286] On cross-examination, Mr. Couture was asked about the reference in the termination briefing paper to "management seeking support". He testified that the briefing paper was created to secure support for the decision from the assistant regional commissioner, Ms. Ellis. In that context, he could be part of management seeking support. He confirmed that he saw the paper before it went to Ms. Ellis and that he agreed with it since its contents were factual. This was the extent of the oral testimony concerning the termination briefing paper.

[287] Based on the evidence before me, I cannot conclude that the termination briefing paper was prepared before the employer received Dr. Armstrong's updated medical information.

[288] I have also examined the additional evidence that the grievor asserted supports his position that his termination was tainted by bad faith. First, there were the events

of late 2007 to early 2008, the employer's letter referencing its *Code of Ethics*, its requests for medical notes, and the events surrounding him being cut off from communication with the OHSC.

[289] The grievor asserted that the employer's letter to him of November 26, 2007 (Exhibit G-14, tab 3), referencing its *Code of Ethics*, demonstrated that it tried to discourage him from speaking publicly about the indoor air quality issue and that that issue was referenced in both the fact sheet and the termination briefing paper. While he testified that he was threatened with discipline with respect to this matter in 2007, I heard no evidence that he was in any way disciplined as a result. I note that Mr. Gustafson, the OTC's former director who wrote the letter, was not called as a witness.

[290] There is an equally plausible and logical explanation for including the reference to the *Code of Ethics* in the letter. In the paragraph preceding the reference to the *Code of Ethics*, Mr. Gustafson mentioned an independent indoor-air-quality report and highlighted that the report was the independent consultant's property. Mr. Gustafson wrote that (the report) "… may not be distributed without prior written consent …".

[291] Having fully read the letter, I find that it is equally probable that the grievor took the reference to the *Code of Ethics* out of context. Most likely, the reference was made in the context of ensuring that he was not to distribute the report. The emails that he obtained through an ATIP request about drafting the letter add further support to this interpretation. In any event, I have no evidence before me that Mr. Couture saw the letter or relied on it in any way in support of his decision to terminate the grievor.

[292] I next turn to the grievor's allegation that the evidence revealed that the employer's combination of abusive requests for medical notes and threats of discipline for failing to provide them demonstrate that it was looking for a way to challenge his authorized leave. Having reviewed the applicable evidence in this respect, I cannot agree with him. The emails he obtained through his ATIP request reveal that the employer was unable to locate the medical certificates and that it asked the grievor to provide them. The request came from his manager at the time, Mr. Currie. While these emails may demonstrate a lack of organization on the employer's part, I am not prepared to read anything more into them. The employer is entitled to request medical

notes certifying an employee's sick leave for its files, and the employee is required to provide them when they are reasonably requested.

[293] The one email exchange that I do find troubling was between Mr. Currie and Mr. Maurice on February 20 and 21, 2008, concerning the medical certificate provided by the grievor (Exhibit G-14, tab 8). The February 20 email from Mr. Currie appears to be completely inappropriate and insensitive. The response email from Mr. Maurice is even more troubling; he asked, "Does that certificate look legit?" Ms. Thompson responded, in Mr. Currie's absence, "The certificate looks legit to me but I'm only looking at a copy - Greg [Mr. Currie] has the original." This email exchange, while troubling, did not involve Mr. Couture; there is a lack of evidence tying either Mr. Currie or Mr. Maurice to the grievor's eventual termination in 2010. Moreover, I have no evidence before me that Mr. Couture believed that the grievor was attempting to take unauthorized sick leave. I certainly cannot read anything nefarious in the email reply of the other key player in this case, Ms. Thompson.

[294] Next, I turn to the circumstances surrounding the grievor's involvement with the OHSC in late 2007 to early 2008. The key documentary evidence is found in the emails of January 2 and 3, 2008, which he obtained through his ATIP request (Exhibit G-14, tabs 11 and 12). He asserted that the employer's action of cutting off communication with him was further evidence of bad faith. I cannot agree.

[295] The emails provide a plausibly legitimate explanation for the employer's actions that would not constitute bad faith. They state that the grievor was out of the office on an extended sick leave. Moreover, the employer reported that the decision to replace him as the local president and the OHSC co-chair arose from a meeting with union officials.

[296] While the reference to emails to and from Mr. Babb "using CRA systems" falling under the category of "personal use" might have been somewhat over the top, it was certainly within the employer's right to include a reminder on the CRA's electronic networks policy guidelines. The grievor conceded in his testimony that he was aware of the employer's monthly pop-up on the use of its electronic networks.

[297] Furthermore, I agree with the employer's submission that had it not sent a message to stop communications with the grievor while he was on sick leave, he could have claimed that it was asking him to work while on sick leave.

[298] The grievor also asserted that his reprisal complaint under s. 147 of the *CLC* that the PSLRB allowed is additional evidence of bad faith. I cannot agree. While the PSLRB's decision was issued in 2008, the complaint concerned a disciplinary sanction that he received in March of 2006. That matter occurred before he went on sick leave in 2007 and was terminated in 2010.

[299] The final piece of evidence that the grievor relied on is what he characterized as "the suspicious telephone call" from Ms. Thompson to him in November 2008, with her corresponding meticulous notes and email to several members of management. He asked that I find that her "suspicious" call was consistent with the employer beginning to build its case to dismiss him from his employment.

[300] Ms. Thompson testified that their call lasted 15 to 20 minutes. In my view, her explanation for why she contacted the grievor seems reasonable. It appears that there had been considerable change in management personnel at the OTC while he was on sick leave. For his part, he does not remember the call. When he was asked if he agreed with what was in Ms. Thompson's email, he mentioned only that he did not think anyone contacted him in May 2008.

[301] Neither Ms. Thompson's notes nor her testimony on the November 2008 telephone call leads me to import the "suspicious" nature that the grievor asked me to find. Her notes actually refer a number of times to asking him how the employer could accommodate his return to work. In my view, this is a far cry from an allegation that it constituted the starting point of the employer building its case for his dismissal.

[302] As I stated at the outset of this section, the grievor bore the onus of proving bad faith in the employer's decision to terminate him. Unlike in *McMorrow*, in which the PSSRB found that the facts conclusively demonstrated bad faith, or in *Laird*, in which the PSSRB determined that bad faith was the only conclusion it could reach, I am not so convinced that the grievor met his onus.

[303] The employer presented convincing documentary and testimonial evidence to support its position that the grievor was terminated for incapacity. Did other matters involving him motivate it to terminate his employment? Possibly, but I am far from satisfied that its actions "reek of bad faith", to quote *Laird* again. Based on the evidence presented, and taken either individually or collectively, I conclude that the

grievor did not prove that it is more likely than not that the employer's decision to terminate him was tainted by bad faith.

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

(The Order appears on the next page)

V. Order

[305] The grievances are dismissed.

April 23, 2020.

Steven B. Katkin,
a panel of the Federal Public Sector
Labour Relations and Employment Board