Date: 20200424

Files: 566-02-11935
566-02-11936
566-02-11937
566-02-11938

Citation: 2020 FPSLREB 43

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
JONATHAN DESJARDINS
Grievor

and
DEPUTY HEAD
(Shared Services Canada)
Respondent

and

TREASURY BOARD
(Shared Services Canada)
Employer

Indexed as
Desjardins v. Deputy Head (Shared Services Canada) and Treasury Board (Shared Services Canada)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Guido Miguel Delgadillo, Public Service Alliance of Canada

For the Employer: Julie Chung, counsel

Heard at Ottawa, Ontario,
October 7 to 11, 2019.
(Written submissions filed December 6, 2019,
and January 9 and 24 and February 28, 2020).

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Jonathan Desjardins ("the grievor") was described as a happy, gregarious, and fun-loving person when he was in college. The stress associated with failed marriages, acrimonious custody battles, and personal bankruptcy had a profound impact upon him. He began a pattern of unauthorized absences from his work. His employer at the time, the Department of National Defence (DND), began to systematically recover amounts from his salary for his unauthorized absences.

[2] By the time he arrived at Shared Services Canada (SSC or "the employer") in April of 2012, the grievor had been diagnosed with depression and general anxiety disorder. This diagnosis was shared with the employer.

[3] The grievor's depression manifested itself in a very destructive way in terms of his work attendance. He was susceptible to panic attacks. If one occurred in the morning, he was often unable to go to work or to even call in to report his absence. If one occurred during a workday, he would often simply leave the office without advising anyone and return home. He explained this to his manager.

[4] The grievor exhausted his available sick leave, and when he tried to use vacation leave to cover his work absences, he was told that he could not because vacation leave had to be requested in advance. A considerable number of his absences were treated as unauthorized leave, and his wages for those days were clawed back. This compounded his already significant financial difficulties, which by then included two separate and distinct garnish orders that had arisen from his bankruptcy and marital breakdown.

[5] The employer treated his absences as infractions that warranted discipline. He was issued a "Letter of Instruction", which spelled out his duties and responsibilities with respect to tardiness and absences, and he was disciplined for repeatedly violating its terms and conditions in the form of several suspensions without pay, which compounded his financial difficulties.

[6] The last iteration of the Letter of Instruction obliged the grievor to provide not only advance notice of unforeseen tardiness but also an explanation for it. In addition, the letter instructed, "For lateness, you must also send me an email upon your arrival to indicate the time that you arrived".

[7] On the morning of June 12, 2014, the grievor and his spouse awoke to find that the windshield of their car had been smashed; it was vandalism. That same morning, he experienced an adverse complication following a recent surgery. He was bleeding and in considerable pain.

[8] He texted his supervisor at 7:35 that morning, stating only that he would be in to work a little after 9:00. His message provided no explanation or proof. As soon as he arrived at work, he opened his computer, and at 9:23, he sent his supervisor a work-related email.

[9] The following day, June 13, 2014, the grievor and his supervisor discussed the events of his lateness the day before. He told her about the vandalism. When he told her of the bleeding from his recent surgery, she said that he did not have to go into that kind of detail.

[10] Despite his explanation, the grievor was summoned to a fact-finding meeting on June 27, 2014. He was told that the purpose was **not** to discuss the events pertaining to his lateness of June 12; rather, it was to discuss his not having adhered to the terms and conditions of the Letter of Instruction.

[11] At the meeting, ultimately, he was never permitted to discuss the events giving rise to his lateness of June 12.

[12] The grievor was terminated a few weeks later. His termination letter begins with the following paragraph:

> *This letter is further to the fact finding meeting of June 27, 2014 during which we discussed the events pertaining to your lateness of June 12, 2014. The explanation you provided was not satisfactory. In addition, you did not send an e-mail to your supervisor upon your arrival to indicate the time that you arrived (as per your letter of instruction dated August 24, 2012).*

[13] The discrimination grievance was filed on February 12, 2013. The termination grievance was filed on August 8, 2014. Those grievances were referred to the Public Service Labour Relations and Employment Board (PSLREB) on January 8, 2016.

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

name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) and the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (*FPSLRA*).

[15] For the reasons that follow, the grievances are allowed.

II. Summary of the evidence

A. Background: the grievor's (SSC) workplace

[16] The employer called the following four witnesses. One was Claire Forget, who at the time of the grievor's termination was his direct supervisor. Her title was Manager of Diversity and Official Languages in the Human Resources directorate of SSC. She reported directly to Lyne Gascon, Director of Human Resources and Official Languages. Peter Hooey was Acting Director General of Human Resources and Workplace Management. Throughout the relevant period, Elizabeth Tromp was Senior Assistant Deputy Minister, Corporate Services, as well as Chief Financial Officer, SSC. Ultimately, Ms. Tromp terminated the grievor's employment.

[17] The grievor testified on his own behalf. His spouse, Catherine Maynard, testified as well. All the witnesses were with SSC during the relevant period. Ms. Maynard and the grievor worked in different branches of SSC.

[18] All the employer's witnesses described SSC as a hectic work environment. It had been created by an Order-in-Council and was described in a colourful fashion by Ms. Tromp as, "One of the biggest transformation projects undertaken by any government, anywhere, at any time." The Order-in-Council took information technology infrastructure specialists from 42 different departments and placed them into SSC. Approximately 6000 employees came together in spring 2012 to form SSC.

[19] It was left to the 42 departments to decide whom to send to SSC. Those chosen were sent largely on the basis of merit, with little or no consideration of issues such as diversity, employment equity, or official-languages proficiency. Since many of the departments had their own (often unique and sometimes unreliable) methods of assessing and recording data on such topics as diversity and official-language capacity (as well as any training pertaining to these topics), the principal challenge of SSC's

Diversity and Official Languages Unit ("the Unit") was to develop systems and processes for the consistent collection, measurement, assessment, and interpretation of this important information.

[20] The Unit had approximately six or seven employees, including the director.

[21] Ms. Forget began at SSC in October of 2012, working alongside the grievor. She began as a special-projects analyst with a diverse portfolio, including open-source (Internet) research, health and safety issues, official languages, and diversity.

[22] Besides Ms. Forget, approximately five or six other subject-matter experts and analysts were in the Unit. Each specialized in issues pertaining to workplace diversity or official languages.

[23] As the only business coordinator for the Unit, the grievor's role was to provide business services support to the others.

[24] Michael Thomas (who did not testify) was the grievor's manager and the director of diversity and official languages at SSC from the grievor's arrival in the Unit in April 2012 until Ms. Forget took over from him as the director in January 2013.

[25] In correspondence dated December 14, 2012, Mr. Thomas described the grievor's support role in the Unit as follows:

…

> *… This support takes the form of correcting incorrect data entries concerning official languages in Shared Services' data bases [sic], based on his analysis of information contained in spreadsheets; monitoring the Department's ongoing use of staffing by contacting employees' managers and seeking information about the language training status of employees who have been appointed to their position non-imperatively. As well, he acts on requests from the other officers, the Unit manager and the Division's Director for internet research, statistical analysis, preparation of data requests for special reports or to other departments; the preparation of short texts; verification of the quality of short bilingual texts; or other similar requests.*

…

[26] Ms. Forget and Ms. Gascon testified that due to the unreliability of the data that had come over from the 42 contributing departments, much of the grievor's analytical work involved either setting up or conducting frequent face-to-face meetings with the

directors of other SSC departments, to learn more about employment equity, diversity and official-language proficiency issues.

[27] The grievor was required to regularly arrange meetings for the approximately half-dozen other analysts and subject-matter experts in his Unit, gather data from the meetings, populate spreadsheets with the data, interpret the data, and make it accessible to everyone in the Unit. Since the Unit's deliverables were under constant scrutiny, the managers (first, Mr. Thomas; later, Ms. Forget) and the Director (Ms. Gascon) regularly had to "brief up" to senior management. The briefings frequently required the grievor's input and assistance.

[28] Both Ms. Gascon and Ms. Forget described the grievor as a vital member of the Unit with a very important support role. Daily attendance was a necessity; the deadlines of deliverables certainly did not change depending on whether he was at work. If certain meetings had been planned, then information on who was to be present, when and where it was to occur, and how the data from it would be used all had to be easily accessible. He was the steward of all the information; Ms. Forget described him as the "point man" for the team, with a vital role to play. When he was absent, other Unit members had to fill in and do the support work

[29] Both Ms. Gascon and Ms. Forget emphasized that the Unit's analysts were not happy with having to step in and do the grievor's work for him when he was absent because of the pressure each felt from his or her own workload. Ms. Forget testified to the grievor's colleagues openly questioning her management skills where the grievor's attendance issues were concerned.

[30] Both Ms. Gascon and Ms. Forget testified to a great deal of pressure, both "top down" (from senior management) and "bottom up" (from their direct reports), to plan and accomplish the Unit's work and to report the results of the Unit's analyses and the implications for SSC. Both described the Unit's work environment as enjoyable but characterized by a tremendous amount of pressure to not just perform but to do it consistently well.

B. Disciplinary measures, including suspensions

[31] The grievor testified to extremely stressful events in his personal life that ultimately led to periods of deep depression and anxiety, which from time to time

resulted in self-destructive behaviour, including suicidal thoughts. He had been occasionally hospitalized due to these issues.

[32] Before he arrived at SSC in April of 2012, the grievor was employed at DND, where his condition first began to negatively affect his work performance and attendance. While there, he underwent a fitness-to-work evaluation (FTWE) from Dr. Gilles Hébert at Health Canada. Dr. Hébert's report was never entered into evidence at the hearing, but the grievor referred to it frequently in his testimony.

[33] The grievor testified to having described his panic attacks to Dr. Hébert. They frequently rendered him unable to speak. If one occurred at work, he would frequently simply leave the workplace for a safe location, usually his residence.

[34] After he exhausted his available sick leave, many of his absences from work at DND were deemed unauthorized, and a repayment program was put in place to recover the wages for those days.

[35] While he was employed at DND, in 2010, he suffered an acrimonious marital breakdown. His spouse was also a DND employee, so for personal reasons, he decided to voluntarily move from DND to SSC in the spring of 2012, when SSC was created.

[36] The grievor was suffering financially then. Two orders to garnish wages were in place, one from the marital breakdown, and the other from his bankruptcy. The effects of the salary recovery program due to his unauthorized leave at DND and later at SSC made matters worse, and he described his financial situation as grim.

[37] From April 2012 to January 2013, Ms. Forget worked alongside the grievor. However, she said that in her role at that time, she did not require much in the way of business coordination services. She did not rely much on him for support in her work. Their relationship was collegial, but she noticed that he was frequently absent, which affected the other members in the Unit.

[38] Ms. Forget worried about the grievor. She testified about one incident in particular in December of 2012. She saw him leave his desk for what she thought was simply a "smoke break", but he never returned. His work was spread out on his desk in such a way that it made it look as though he would be gone only briefly, but he never returned that day. She was worried that something might have happened to him, and she testified to speaking with him privately the next day. She told him that if he did

that sort of thing, he should at least tell someone he would not return so that no one would worry.

[39] Mr. Thomas was the Unit's manager at that time and was the grievor's first manager at SSC. He did not testify at this hearing.

[40] Mr. Thomas sent the grievor several emails warning him about possible disciplinary action for unauthorized absences. On May 16, 2012, shortly after he began working at SSC, Mr. Thomas emailed him, outlining hours of work, the need to email upon his arrival and departure each day, the requirement to have annual leave requests approved beforehand, and the procedure for phoning in should he be late for work.

[41] The grievor testified to his many discussions with Mr. Thomas about his personal life, financial state, and medical condition. He also testified to sharing Dr. Hébert's Health Canada assessment with Mr. Thomas.

[42] When the Letter of Instruction was issued to the grievor on August 24, 2012, he told Mr. Thomas about how his anxiety was sometimes so intense, it prevented him from speaking. He asked if he could text or email instead of being obliged to phone when he was late or absent. Mr. Thomas refused the request; he said it had to be done by telephone. The grievor recalled his local bargaining agent representative, who was present, telling Mr. Thomas, "You are setting him up to fail."

[43] The August 24, 2012, Letter of Instruction contained the following directive:

> …
>
> *If you are to be away from the office for any reason, it is expected that you will contact me in advance or, if this is not possible, you will call me between 8:45 a.m. and 9:15 a.m. at* [telephone number omitted] *the day you will be absent. If I am not available, you are to contact Lyne Gascon at* [telephone number omitted]. *If neither one of us is available to speak to you directly, please leave me a detailed voice message at* [telephone number omitted], *explaining why you will not be at work, your anticipated return date as well as the time of your call.*
>
> …

[44] As for the obligation to phone rather than texting or emailing, Ms. Forget said this was imposed deliberately: it was preferable to oblige the grievor to phone and to speak directly to a supervisor, because texting or emailing was "just too easy". To

paraphrase her, “Having to provide a reason to someone on the other end of the phone has more weight than simply writing a text message. It might make him think twice about being absent and make him decide to simply come in to work instead.”

[45] On August 30, 2012, following an incident of absenteeism, Mr. Thomas emailed the grievor a warning of disciplinary consequences “… up to and including termination of employment”.

[46] The grievor testified to increasing feelings of despair and helplessness, both on and off the job. He had suicidal thoughts, and in September of 2012, he voluntarily checked himself into the hospital, for a psychiatric assessment. He advised Mr. Thomas of all this. Mr. Thomas visited him there.

[47] On November 23, 2012, Mr. Thomas issued the grievor the following written reprimand for failing to abide by the terms of the Letter of Instruction: “Firstly, you did not advise me of your absence between the designated hours of 8:45am and 9:15am; and furthermore, you elected to send me an email informing me of your absence rather than telephone as requested in the written instructions.”

[48] On January 4, 2013, Ms. Gascon, the director, imposed a one-day suspension without pay for having failed to follow the Letter of Instruction with respect to his lateness or absenteeism on December 6, 7, 12, and 14, 2012.

[49] She testified to regular meetings being held with the grievor and his director (first Mr. Thomas, and then, as of January 2013, Ms. Forget). Ms. Gascon described the situation as heartbreaking because in their discussions, it appeared to her as though he truly wanted to comply, and then in a matter of days, it seemed that his absenteeism patterns would repeat.

[50] Ms. Gascon was sympathetic to the concerns of both Mr. Thomas and Ms. Forget, knowing the pressures the Unit was facing and how crucial it was that the grievor be present to support the team.

[51] On January 8, 2013, Ms. Gascon imposed a three-day suspension without pay for failing to follow the Letter of Instruction on December 24, 27, and 28, 2012.

[52] On January 29, 2013, Ms. Gascon imposed a five-day suspension without pay for his failure to follow the Letter of Instruction on January 16, 2013, when he left the

workplace early in the afternoon and neither returned nor called with an explanation. In addition, on January 17, 18, 21, and 22, 2013, he did not adhere to the Letter of Instruction. Her letter of suspension read in part as follows:

> …
>
> *… Your letter of instruction clearly states that if you are to be away from the office you are required to call Michael Thomas and if he's not available, to contact myself by phone … You failed to comply with this instruction, as you only left voice messages on Michael Thomas' voice mail [sic].*
>
> …

[53] The grievor did not file specific grievances against these suspensions, but he referred to them in his discrimination grievance filed on February 12, 2013, as follows:

> *I grieve that because of a medical condition that I suffer and that my employer his aware of. The representatives have discriminated, intimidated against me in an ongoing manner thus this employer violating the Canadian Human Rights Act, as well as article 1.01, 19 and all other related articles of our collective agreement (PA group).*
>
> *I grieve because my employer Shared Services Canada representatives are demanding that each time I'm off work that I call not only my immediate supervisor but now my director. I consider this differential treatment from other employees of this department.*
>
> *I grieve because this creates additional stress on me, thus provoking more absences from work and aggravated my ongoing medical condition and now my employer is penalizing me by of this by suspending me and causing me financial hardship.*
>
> *I grieve that this could cause my employer to terminate my employment because of this since it has been mentioned to me already and consider this an abuse of power.*
>
> …
>
> [*Sic* throughout]

[54] This grievance was denied. It is one of the two grievances that are the subjects of this hearing (the discrimination grievance, as opposed to the termination grievance, which was filed later).

[55] Before those suspensions were imposed, on December 14, 2012, Mr. Thomas wrote to Dr. Louis M. Grondin, seeking an FTWE. Mr. Thomas referred to Dr. Hébert's Health Canada assessment in the following terms: "[The grievor] has also mentioned to me that he had previously had a work-related Health Canada work fitness assessment

but I do not have access to it. It is possible that this assessment is still available to Health Canada."

[56] In the letter, Mr. Thomas described how the grievor had been placed on suicide watch at the hospital on September 13, 2012. When he returned to work, he brought a doctor's note from the hospital diagnosing his condition as depression.

[57] Mr. Thomas's letter to Dr. Grondin offers considerable detail of the grievor's work absences. He wrote as follows:

> …
>
> *… I have repeatedly explained to him that his lack of reliability is having serious impacts on his colleagues. However, his continued pattern of behavior [sic] leads me to wonder whether he is conscious of the consequences of his actions.*
>
> *I am sincerely concerned about* [the grievor]*'s well-being. On two occasions I have invited him to contact the Employee Assistance Program but he has assured me that he has already taken steps on his own to deal with his problems….*
>
> …
>
> *We are requesting your services in conducting a fitness to work evaluation to determine the following:*
>
> - *Is* [the grievor] *currently fit to work?*
> - *What is the extent of his medical condition (i.e. long term, short term, indefinite)?*
> - *What are the limitations, if any, that would prevent him from fulfilling his duties such as working a productive 37.5 hours per week?*
> - *If he is fit for work is he capable to perform, on a regular basis, the tasks of his position? If not, what specific restrictions are preventing him from meeting the performance expectations?*
> - *Are there any specific strategies that can be used by management to help* [the grievor] *cope with his work situation (i.e. dealing in the workplace with the stresses of his personal life, the need to meet deadlines and to turn up reliably and regularly to work)?*
> - *If he is currently not fit to resume work, when do you expect him to be able to work?*
> - *Please offer any additional comments and insights that would be helpful.*
>
> …

[58] Dr. Grondin replied on February 28, 2013. He wrote in part as follows (the original text is in French):

> [Translation]
>
> …
>
> *For your first question* [the grievor] *is certainly able to return to work. According to him, since February 5, 2013, he has been fit to work and did work full-time 5 days a week. He had to be absent 3 times for back pain.*
>
> *As for his medical condition, it consists of major depression that was already severe but that is rather mild to moderate at this time, code 296.23 according to the DSM-4, with no psychotic episodes. Another diagnosis is for adjustment disorders with anxiety, code 309.28, and general anxiety, code 300.00. It is clear that* [he] *was subjected to several stressors, including difficult separations and the lack of contact with his 3 children.*
>
> *His medical condition seems under control at the moment. However, we are disappointed because we prescribed him anti-depressants and other medications that seem to have helped him, but unfortunately, he did not continue with his medications due to a lack of funds.*
>
> *I think that the worst is behind him and that his depression should not become chronic.*
>
> *For your question 3, no limitation might prevent him from doing his job 37.5 hours per week.*
>
> *For your question 4, he has no restrictions with respect to performing in his position.*
>
> *As for question 5,* [he] *states that he will email and advise you of any tardiness or absence from work, via email, within a reasonable time.*
>
> *For question 6, as of today,* [the grievor] *is certainly able to do his work and was so on February 5. I think that* [he] *wants a positive work environment. He met with other members of his department. He seems to want to share his vision of things for the department, and it appears that he has been well received.*
>
> …

[59] The grievor testified to in-depth discussions with Drs. Hébert and Grondin, and later Dr. Tannenbaum, about the paralysis he experiences at times while suffering from a panic attack and his inability to speak. According to the grievor, this is why in the letter, Dr. Grondin expressly referred to the grievor's commitment to emailing to notify management of a lateness or absence.

[60] The grievor had also previously discussed this with Mr. Thomas. It is why he was disappointed to have been expressly denied the opportunity to email and instead was obliged to phone and speak to his manager about an absence. Sometimes, he was simply unable to, which is why he felt that the Letter of Instruction was unfair in that respect. In his view, his speech paralysis was directly responsible for him breaching the letter's terms and conditions, which resulted in his suspension.

[61] Ms. Gascon did not alter the terms and conditions of the grievor's Letter of Instruction following Dr. Grondin's comments on emailing about lateness or absence from work. Ms. Gascon noted that Dr. Grondin did not mention a disability or spell out any necessary accommodations. She testified that therefore, she felt the grievor had no disability. No accommodation was necessary.

[62] On March 20, 2013, the grievor was given a 10-day suspension without pay for his absences on February 28 and March 14, 2013. He testified to having been involved in a motor vehicle accident on his way to a training session at Asticou, a federal government training centre. He testified to calling Asticou to report his absence. Ms. Gascon said that there was no record of such a call being placed.

[63] The grievor testified that on March 14, 2013, he had to go to a lawyer's office. Ms. Gascon maintained that an absence from work for such a meeting required advance approval and stated, "No one goes to see a lawyer at the last minute."

[64] Before she took over from Mr. Thomas as the director, Ms. Forget was well aware of the grievor's history of attendance issues going back to his time with DND, and she was aware of the salary recovery issues pertaining to unauthorized leave that had followed him when he came to SSC from DND. She also knew of the Letter of Instruction.

[65] On May 7, 2013, Ms. Forget wrote to the grievor's personal physician, Dr. Tannenbaum. She referred to Dr. Grondin's conclusion that the grievor was "able to work without restrictions." In her letter, Ms. Forget advised as follows:

> …
>
> *Although* [the grievor] *has stated verbally on numerous occasions that he is able to work without restrictions, he has expressed that he may need some form of accommodation to help him fulfill [sic]*

> *his work and has asked that a second medical opinion be sought from his family doctor, and he has identified you as such.…*
>
> *…*

[66] On May 15, 2013, Dr. Tannenbaum replied, stating that she did not agree with Dr. Grondin's assessment. She responded as follows to a question to provide information on the grievor's functional abilities, limitations, or restrictions:

> *…*
>
> *… While being functional in some capacity, there are times he is still unable to carry out his duties due to cognitive issues related to concentration, energy and mood. He does not have any physical restrictions. His judgement has been quite flawed in the past due to these restrictions (by not advising the appropriate persons of his absences), and I believe his insight into his condition to be limited.*
>
> *…*

[67] Dr. Tannenbaum went on to comment on the grievor's condition with respect to the workplace context as follows:

> *…*
>
> *… As mentioned, I had not seen* [the grievor] *in some time prior to May 7, 2013. He is an interesting man who has had some extreme challenges in his life. For a different individual, these experiences may have even caused some significant disability. In* [his] *case, he has persisted in his work as a distraction to his mood, which is also a financial necessity for him. In my opinion, he would do as well to have taken some time off to deal with his condition, but that is not his way to cope. Essentially, I would have to say that he has enough ongoing disability to require accommodations at work that include the ability to email (rather than call) in if unable to attend, and perhaps some more leniency in terms of shifting hours when appropriate. His desire to work appears to be genuine and I have contracted with him to continue his medical care with me until such time as he is more stable.*
>
> *…*

[68] Dr. Tannenbaum's letter did not result in any amendments being made to the Letter of Instruction. Neither Ms. Forget nor Ms. Gascon felt that Dr. Tannenbaum's letter ordered any specific accommodations. Both knew of the FTWEs from the different doctors, but until the letter of September 13, 2013, from Dr. Maureen Baxter of Health Canada, the evaluations placed no clear accommodation obligations on the employer. Thus, until Dr. Baxter's letter was received, they both operated from the premise that the grievor had no medical accommodation needs. Dr. Baxter's letter

caused the employer to modify the Letter of Instruction's terms and conditions to allow him to email or text rather than phoning to report a lateness or absence.

[69] The Director General imposed a 15-day suspension without pay on September 6, 2013, for failing to provide a physician's certificate following an absence on July 18, 2013. The notice of suspension adds the following:

> …
>
> *Further, you have confirmed that you called your attending physician on the day of the absence, July 18, 2013, but that she was not in that day. The employer, upon verification of this information, received a different version. In fact, the clinic where your attending physician works confirmed that Dr. Tannenbaum, your Doctor, was in all day on July 18. I therefore conclude that you lied to your employer.*
>
> …

[70] The September 6, 2013, suspension letter refers to another incident, on August 28, 2013, in which the grievor was absent and did not provide notification in the manner dictated by the Letter of Instruction.

[71] On November 5, 2013, the Director General imposed a 25-day suspension, again for lying about an absence from work. On October 2, 2013, the grievor informed Ms. Forget that his son was sick and that he had to stay home, to provide care. He offered no proof of his son's illness. In a subsequent fact-finding meeting, the grievor claimed that he had been sick on October 2, 2013, and offered proof from a witness. Ms. Forget testified that she would not have given the proof any weight, because, "A friend of the grievor's would just say whatever the grievor wanted them to say."

[72] The grievor testified that he had a panic attack on the morning of October 2, 2013, and that he could not attend work. He said he did, in fact, have his child with him that morning. He went to see Dr. Tannenbaum the next day. She then wrote a medical note, dated October 3, 2013, which reads, "Please be advised that [the grievor] is being followed for medical conditions including depression and anxiety and requires accommodations for these conditions as required".

[73] Neither Ms. Gascon nor Ms. Forget changed anything about how they dealt with the grievor after receiving Dr. Tannenbaum's note because it contained no detailed accommodation measures. Neither the employer nor the grievor followed up with Dr. Tannenbaum to learn more about any possible accommodation measures.

[74] The grievor testified to three fact-finding meetings being held about his absences from work on October 2 and 3, 2013.

[75] The grievor's distrust of Ms. Forget reached a critical point. He felt she was twisting or altering the facts to provide her with grounds for dismissal. As a result, he began to surreptitiously record their conversations.

C. The recordings and transcripts as evidence

[76] The grievor sought to introduce the recordings and transcripts as evidence in the proceedings. The employer objected, stating that they compromised privacy and undermined the trust relationship that is an essential component of labour relations.

[77] The employer submitted two cases in support of the objection. In *Baun v. Statistics Survey Operations*, 2014 PSLRB 26, an employee had made a recording of a conference call and sought to introduce it as evidence. At paragraph 114, the adjudicator noted that counsel for the employer argued "… that there can be no reliance on a recording made surreptitiously, as in this case, because of the possibility that a recording made under such circumstances might have been altered." In addition, she argued about strong policy reasons for not admitting a recording made without notice to other participants in the conversation. She said that a climate of candour is to be encouraged in discussions of labour-management issues and that the desirable level of frankness would unlikely be achieved if parties to a conversation feared that someone might be recording it. She argued that the recording that the grievor in that case proposed to introduce was in a different category from the recorded voicemails that the employer had introduced because someone leaving a voicemail expects it to be recorded.

[78] The decision states as follows at paragraphs 115 and 116:

> *[115] The grievor argued that the fact that a conversation was recorded would not increase mistrust among the parties. She said that in fact she did not trust the other participants to recall the conversation accurately, so she felt it necessary to have a record of it.*
>
> *[116] I accepted the argument put forward by counsel for the employer that aside from the concerns about the reliability of a tape recording in a technical sense, there are strong policy reasons for not admitting a recording that has been made surreptitiously by a party to a conversation. Meetings of the kind that occurred on*

> *July 24 are of critical importance as efforts to resolve labour-management issues and to exchange information and opinions in a forthright way. I declined to admit the recording.*

[79] In *Tuquabo v. Canada Revenue Agency*, 2006 PSLRB 128 at para. 4, the Public Service Labour Relations Board (PSLRB) stated: "Generally, the surreptitious recording of conversations in the workplace should not be encouraged."

[80] The grievor submitted an arbitration decision, British Columbia Government and Service Employees' Union v. British Columbia Public Service Agency, on behalf of Ministry of Forests, Lands and Natural Resource Operations, B.C. Wildlife Service, 2016 CanLII 77600, which at paragraph 13 acknowledged the "… possible deleterious and chilling effect admissibility of such recordings will have on workplace cooperation, collaboration, open settlement discussion and frank exchange in problem solving."

[81] However, the decision stated as follows at paragraph 14:

> *[14] The exceptions when surreptitious recording [sic] are considered to have been warranted and are admissible include circumstances when persons in the employment or broader relationship making and tendering the recording had to resort to surreptitious recording to deal with a relationship power imbalance in order to objectively establish their credibility in the face of being accused of being a perpetrator or liar, rather than a victim.*

[82] The grievor argued that this was precisely his situation. Ms. Forget thought he was a liar, and he recorded their conversations to protect himself. He described feeling as though he had a target painted on him, and Ms. Forget was looking for a way to get him fired. He felt that he was being "set up" or "entrapped" in their meetings. The recordings, and the transcripts of the recorded conversations, are crucial to his position that the employer did not act in good faith in its dealings with him.

1. Decision with respect to the admissibility of the recordings and transcripts

[83] The labour relations environment can function properly only if it is characterized by openness, honesty, and trust. The surreptitious recording of private conversations is not illegal, but it goes against these principles.

[84] However, I can appreciate the situation the grievor found himself in when he considered recording his conversations with Ms. Forget. Although he did not grieve the decision to suspend him for lying, he clearly did not appreciate being called a liar. To acknowledge receipt of his 15-day suspension, he wrote on the suspension letter, in

capital letters, “I acknowledge reception of this letter but refute as no time to review and consult with proper union counseling. Furthermore, the mention of lying is to be removed” [*sic* throughout].

[85] I am loath to do anything that can be construed as endorsing recording conversations surreptitiously. However, under these circumstances, and to allow the grievor to fully make his case and be heard, I admitted these recordings into evidence. Ultimately, both the grievor and Ms. Forget testified about the meetings, and I find their testimonies consistent with the transcripts of the recorded meetings.

[86] The grievor surreptitiously recorded the three fact-finding meetings with Ms. Forget that were held about his absence from work on October 2, 2013. Afterward, she emailed him a summary of what they had talked about. He replayed the recordings when he read the summary and disagreed with her characterizations of some facts.

[87] Ms. Forget and the grievor exchanged messages over the details of their October 9, 2013, fact-finding meeting. She wrote to him, stating, “You said that you have another appointment with Dr. Tannenbaum, and that she would be specifying some accommodation measures and I told you that this was between her and Health Canada at this point.”

[88] The grievor responded with the following: “You did not say that it was between my doctor and Health Canada at this point.” She came back with, “I maintain that I did”. He replied, “You said that my doctor had to say specifically what the accommodations need to be. You said all you need to know are which accommodations were required independently from their condition.” She responded, “True.” He continued with, “I also told you that we would talk before my next appointment about what you need to know.” She responded, “The information that I need to know was requested of, and provided by, Health Canada, and there are no accommodation measures required. There is no need for you and I to talk before your next medical appointment.” The grievor replied, “You said that you only need to know what accommodation is required. You said that my doctor and Health Canada: [translation] must agree [end translation]. So if Labor [*sic*] relations will ask [*sic*] clarification, my doctor will provide them.” Ms. Forget ended with, “The medical evaluation received from Health Canada, which is dated September 2013, is clear.”

[89] Ms. Forget believed there were clear discrepancies between what Drs. Grondin and Tannenbaum stated about the grievor's condition and its impact upon his work, so she requested another FTWE from Health Canada on June 7, 2013. Her request was lengthy and detailed, and it included information from previous medical assessments as well as a paragraph on him having been on suicide watch the previous September.

[90] Ms. Forget wrote the following:

> …
>
> *Because the second doctor's report is contradictory to the initial doctor's assessment, and does not mention any functional limitations, we are now requesting your services (third expertise) in conducting a fitness to work evaluation to determine the following:*
>
> *<u>Questions:</u>*
>
> 1. *Does the employee have a disability that must be accommodated within the workplace?*
> 2. *Based on your medical assessment, is* [the grievor] *fit to carry out the full duties of his substantive position at this time, such as 37.50 hours per week? Or on a part-time basis? If part-time hours are being considered, what are they?*
> 3. *Does the employee have any functional limitations that must be accommodated in the workplace? If so, please provide details of any functional limitations* [he] *may have.*
> 4. *Are the functional limitations identified by you permanent or temporary in nature? If temporary, please provide timeframes [sic].*
> 5. *What medical limitations and/or restrictions prevent* [him] *from calling/speaking directly over the phone to his supervisor when he cannot report to work?*
> 6. *If he should not be at work presently, when can the Department expect him to return to work and accomplish the full duties of his position?*
> 7. *We are requesting information with regards to* [his] *ability to attend work, on time, on a daily basis, and carry out the all [sic] responsibilities of his position.*
> 8. *Based on your medical assessment, does* [he] *possess a medical condition that precludes him from making rational decisions?*
> 9. *Is* [he] *capable of comprehending the seriousness of his actions and the resulting consequences?*
> 10. *If any functional limitations have been identified, which accommodation measures would you suggest, within the*

> *workplace, in order to ensure that he can work (perform the duties of his position) to the best of his ability.*
>
> …

[91] The grievor testified to meeting with Dr. Baxter for approximately 10 minutes.

[92] Dr. Baxter's reply, as follows, is dated September 13, 2013, and is brief:

> [Translation]
>
> …
>
> *I reviewed all the available medical documentation as well as the Specialist Consultant's report.* [The grievor] *is still involved in therapeutic initiatives, and his chronic medical conditions are presently stable. He is fit for full-time work and is able to perform all his duties.*
>
> *The Specialist Consultant and the Attending Health Professional recommend that for medical reasons, management allow* [the grievor] *to advise his supervisor by email of any tardiness or unforeseen absences.*
>
> *His medical conditions do not hinder his ability to make decisions autonomously or his understanding of the consequences of his decisions.*
>
> …

[93] Ms. Forget and Ms. Gascon both testified to Dr. Baxter's letter as their definitive guide in dealing with the grievor. Since it did not refer expressly to any functional limitations, restrictions, or accommodations, none was considered, save for the express provision that he be permitted to text or email his lateness or absence notifications rather than phone them in.

D. The termination

[94] Following the fact-finding meetings in mid-October 2013, the grievor felt increasing despair in the workplace and once again began having suicidal thoughts. He saw his family physician who, on November 4, 2013, wrote, "Please note [the grievor] will be absent from work from October 29, 2013 to March 3, 2014 as he is medically incapacitated during this time".

[95] In March of 2014, the grievor made his return. However, he was not permitted in the workplace because he was obliged to satisfy the terms of his 25-day suspension.

[96] After he served his suspension, he was placed on a graduated return-to-work program. He began by working a few hours a week; then, over a few weeks, he built up to a full 37.5 hours per week.

[97] On May 24, 2014, Ms. Forget documented instances of the grievor's absences from the workplace on May 3 and 17, for which he requested annual leave. As per the Letter of Instruction, annual leave had to be pre-approved. So, she did not approve it for those two absences and treated them as unauthorized. As was the case with DND, SSC deducted the wages earned on these days from his salary.

[98] On Monday, June 9, 2014, at 8:01 a.m., the grievor texted to Ms. Forget, "[translation] Claire, I have to take family-related [leave] for a family member, thanks". She responded at 9:00 a.m. with, "[translation] Before approving it, I would like to know the circumstances and for which family member? Thank you." The grievor replied at 10:34 a.m. with, "[translation] My common-law spouse Catherine Mayrand, who lives with me under the same roof at the same address, is sick and needs a family caregiver. Thank you. Do you need any more personal information. Thank you." At 11:42 a.m., Ms. Forget responded, "[translation] Thank you for the information. In the future, the reasons must be stated when you make the request. Leave for family reasons is granted for [these] specific reasons. Have a good day."

[99] Later that week, on the morning of June 12, 2014, the grievor discovered his smashed windshield. He testified to his fear that it had been the work of a former room-and-board client who had left on very angry terms. Both the grievor and his spouse were upset, and they wondered whether they should call the police. The grievor testified to their decision to go to work, to consider the matter further, and to talk to some of their neighbours after work before calling the police.

[100] That same morning, the grievor experienced sudden bleeding, which was an adverse reaction to surgery he had undergone a couple of months before. He texted Ms. Forget, "[translation] Claire, I will arrive at the office just a little after 9:00 this morning. Thanks".

[101] He and his spouse then left for work. The grievor testified to noting the time on the clock in his office building foyer when he walked in; it was 9:10. As soon as he got to his desk and on his computer, he sent a work-related message to Ms. Forget. The timestamp on the email was 9:23.

[102] Ms. Forget testified to being in a meeting that morning, and at 12:03 p.m., she emailed him, asking, "[translation] At what time did you arrive today? Thanks." At 12:05 p.m., or two minutes later, he responded, "[translation] At 9:10 and I plan to leave at 5:10." At 4:38 p.m. that afternoon, she sent him the following message:

> [Translation]
>
> …
>
> *We will have to review your Letter of Instruction because there are rules to follow when someone is late. Tardiness and unforeseen absences must be clearly explained and justified and proof provided. You also have to email me upon your arrival.*
>
> *We will discuss this during your bi-lat.*
>
> …

[103] Both the grievor and Ms. Forget testified to what happened at his "bi-lat" (bilateral meeting) held the next day. In addition to their testimonies, a transcript was entered into evidence of his surreptitious recording of their meeting on June 13, 2014.

[104] The meeting opened with a discussion of work-related matters. Then, at one point, the grievor asked, "[translation] You want to know why I arrived late?" Ms. Forget answered, "[translation] No, but … when you change your hours like that, you have to justify it, okay?" He responded by explaining that in fact, neighbourhood kids had accidentally broken his windshield. She could confirm this with Ms. Mayrand. Ms. Forget replied she would not do that because Ms. Mayrand was also an SSC employee.

[105] The grievor went on to explain to Ms. Forget the post-surgery complications that had resulted in his bedclothes being covered in blood. She told him, "[translation] You don't need to go into details about the medical condition, but for the tardiness, the unforeseen absences, they have to be valid and then justified." She then told him that he had to supply information sufficient to justify his absence at the moment he requested time off.

[106] The grievor referred to the earlier incident, on June 9, 2014, when he sent a text asking for a family related leave day. On that occasion, Ms. Forget responded with a request for more details, which he provided, and the leave request was approved. He asked her why she simply did not do the same yesterday, if she needed more details about why he would be late for work.

[107] Ms. Forget then referred to amending the Letter of Instruction to reflect a change to work hours and said, "[translation] … come to work every day; we will get a lot done, then [end translation] everything is gonna [*sic*] be good."

[108] For the remainder of the June 13, 2014, meeting, the events of June 12 were not discussed.

[109] Then, on June 26, 2014, Ms. Forget invited the grievor to a fact-finding meeting on his tardiness of June 12, 2014. The message reads as follows, in part: "**This is further to our conversation held June 13, 2014. The purpose of the fact-finding meeting is to gather more information regarding your lateness of June 12th**" (emphasis in the original).

[110] The grievor responded with the following:

> *May I ask what fact-finding is required and what other additional information to be provided? I have nothing to add.*
>
> *In our bi-lat meeting of June 13th, we talked about this and our car windshield was vandalized and I said that you can verify with my partner as the same was for her and she is a witness and you stated that you would not verify with another employee.*
>
> *This employee, my partner is a witness to this event. How am I to prove anything if my witnesses are not recognized or contacted. I seem to recall that Staff relations once called at my doctor's clinic to verify information. I should have the same liberty to provide a witness to confirm a fact. Should this not be the case, I am unable to have a fair treatment.*
>
> …
>
> *We then reviewed the letter of instructions and we signed and you said,* [translation] *We sign both, and then we move on!*
>
> *No additional proof or requirements was required from you after that meeting. So based on our meeting of June 13th, the explanation was accepted by you and you did not require additional proof after this meeting until this morning.*
>
> …
>
> *I also stated that due to my medical condition, I often have complications in the morning due to the surgery. You stated that I did not have to go into details should this be the case. There is a double standard here.*
>
> …
>
> [*Sic* throughout]

[111] Later that day, Ms. Forget responded, in part, as follows: "The fact-finding meeting will take place to discuss the Letter of Instruction, and specifically, its measures to address instances of tardiness, and not the actual reasons for the tardiness in question here."

[112] The grievor, Ms. Forget, a representative of SSC's Human Resources directorate, and a Labour Relations representative attended the meeting.

[113] The grievor surreptitiously recorded the meeting. A transcript of the discussion was entered into evidence. To open the meeting, Ms. Forget said, in part, "[Translation] We are here to talk about your tardiness on June 12, and because the instructions in your Letter of Instruction were not followed that day to report your tardiness once at the office, this is what I would like to discuss."

[114] The grievor was confused by this. He reminded Ms. Forget of their lengthy email exchange of the previous day, which had made it clear to him that the purpose of the meeting was **not** to discuss the reasons for his tardiness on June 12, 2014.

[115] Ms. Forget reminded him that his text message, sent at 7:35 a.m. on June 12, did not provide any proof, justification, or explanation as to why he would be late.

[116] The grievor said that he was confused by these mixed messages because on June 13, 2014, when he attempted to describe the bleeding that had occurred due to a complication of his recent surgery, Ms. Forget told him that kind of detail was unnecessary. He added that when he had requested family leave earlier that same week, on Monday, June 9, she had asked for additional details. He provided them and she granted the leave. Why, he insisted, could the same not have been done on June 12? If she felt she needed additional information, all she had to do was ask for it.

[117] Ms. Forget responded that this give-and-take was not what the Letter of Instruction articulated. She said the letter was clear in that his initial notice of tardiness had to provide reasons, proof, and justification. The meeting was held not to discuss why he had been late on June 12, 2014, but to discuss why he did not obey the Letter of Instruction.

[118] The Letter of Instruction had been amended on October 15, 2013, to allow the grievor to email or text to report lateness or an absence, and he had to provide reasons. In addition, the following sentence was added: "For lateness, you must also

send me an email upon your arrival to indicate the time that you arrived" [emphasis in the original].

[119] The grievor again expressed his frustration and confusion at the situation and stated that he felt that he was being harassed. He felt that he was being targeted and entrapped. He had not had occasion to re-examine the most recent amendments to the Letter of Instruction since signing it the previous October. After the give-and-take of June 9, 2014, he felt that the same leeway could be extended on June 12.

[120] The grievor stated that due to the urgency of the events of the morning of June 12, he had not been immediately in a position to provide greater detail. His priorities were his safety, security, and health, and all he had wanted to do was give notice that he would be a little late that morning.

[121] Ms. Forget and the grievor then discussed whether he had consciously decided to ignore the Letter of Instruction's terms and conditions. He reiterated that he had been simply unable to provide details at the time and that when he tried to provide details on the following day at their meeting of June 13, 2014, she told him that she did not need to know the details.

[122] The focus of the meeting then turned to the grievor not emailing management upon his arrival, in the form of something like, "I arrived at the office at such-and-such a time." He replied to Ms. Forget that as soon as he arrived that morning, he got on his computer and sent her a work-related email. She then asked him, "[translation] So, you think that when you arrive late, you don't have to advise me, contrary to what is stated in the Letter of Instruction?"

[123] The grievor replied that this was not at all what had he meant or thought and that the inquisition was a form of harassment. He felt that the email he sent to Ms. Forget at 9:23 a.m. on June 12, 2014, had satisfied the terms of his Letter of Instruction. He felt that the email's timestamp had confirmed his arrival time.

[124] The bargaining agent representative, who was also present at the June 27, 2014, meeting, then asked for permission to speak. He suggested that the grievor had honoured the spirit of the Letter of Instruction when he notified Ms. Forget of his unforeseen absence and then emailed her as soon as he arrived at the office.

[125] The Letter of Instruction was then reviewed, and the June 27, 2014, meeting ended.

[126] The grievor testified to feeling more depressed, confused, and frustrated than ever, due to the meeting. He went straight to Dr. Tannenbaum for a consultation.

[127] On July 2, 2014, Dr. Tannenbaum wrote the following to the employer:

> …
>
> *After multiple medical visits and optimal treatment with good response, it has been determined that* [the grievor] *suffers from medical symptoms stemming from a toxic work environment. Even with continued treatment and accommodations, I fear that* [he] *will continue to have difficulty in the workplace in his current position being directly supervised by Claire Forget and Lyne Gascon. For this reason I am recommending that he have direct supervision under a different manager. He will be off work until such time as these accommodations can be made. He will continue to be medically supervised during the transition and accommodations will be discussed and determined at the time of return to work.*
>
> …

[128] Both Ms. Forget and Ms. Gascon testified to being aware of Dr. Tannenbaum's letter, but neither had had any intention of acting on it.

[129] Throughout the relevant period, Ms. Tromp was Senior Assistant Deputy Minister, Corporate Services, as well as Chief Financial Officer, SSC. She was the appropriate level of authority to terminate the grievor's employment. She did not write the termination letter, but testified to having been briefed by SSC's Human Resources directorate about the grievor's file before she signed the letter.

[130] The grievor was personally served with the termination letter on July 22, 2014. It reads as follows:

> …
>
> *This letter is further to the fact finding meeting of June 27, 2014 during which we discussed the events pertaining to your lateness of June 12, 2014. The explanation you provided was not satisfactory. In addition, you did not send an e-mail to your supervisor upon your arrival to indicate the time that you arrived (as per your letter of instruction dated August 24, 2012).*
>
> *There have been numerous attempts to have you correct your behaviour with regard to your failure to follow direction [sic] as per your letter of instruction. Most recently, you received a 25 day*

> *suspension for failure to follow direction [sic] with regards to unforeseen absences. The letter of suspension dated March 5, 2014 warned you that failure to correct your behaviour may subject you to more severe disciplinary actions, up to and including termination of employment for cause.*
>
> *I have carefully considered supporting documentation that demonstrates that the measures taken to correct your behaviour have not succeeded. Management attempted to correct your conduct by putting in place administrative procedures for you to follow in reporting and justifying your absences from the office. However, you continued to ignore the procedure put in place, even though it had been communicated numerous times and agreed upon by all parties. This resulted in management having to impose disciplinary measures on seven (7) different occasions in the hope that it would correct your conduct.*
>
> *In accordance with Section 12 (1) (c) of the Financial Administration Act, I am hereby terminating your employment effective close of business on July 21, 2014. Should you consider this action to be unjustified, you have the right to file a grievance.*
>
> *Should you require personal support, you can contact the Employee Assistance Program ….*
>
> …

[131] Ms. Tromp testified to having reviewed the Letter of Instruction's several iterations but admitted that she was unaware that the initial version, dated August 24, 2012, did not contain any provision to email absences and that the related amendment was made much later.

[132] Ms. Tromp testified to reviewing the grievor's file before signing the termination letter, but she did not recall any information on his medical condition. She stated that she did not take his medical condition into account when she terminated his employment. When she was asked about any other mitigating factors that might have been considered, she could provide none.

[133] When Ms. Tromp was asked about aggravating factors, she referred to the grievor's extensive disciplinary history that did not result in any change in his behaviour. She felt that given all the circumstances of the case, termination was appropriate.

[134] Ms. Tromp was questioned about her experience in employment termination cases. She stated that in her public service career, this is the only termination she has ever dealt with.

III. Submissions

A. For the employer, on the termination grievance

[135] The witness testimony took up all five hearing days, so time did not permit oral submissions. Written submissions were ordered, and on December 5, 2019, the employer provided its submissions on the termination grievance.

[136] The employer considered the grievor's repeated pattern of absenteeism and lateness as insubordination. According to *Cavanagh v. Canada Revenue Agency*, 2015 PSLREB 7, and in Brown and Beatty, *Canadian Labour Arbitration* (5th ed.), chapter 7:3612, a finding of insubordination requires proof of these four things:

1) that the employer gave an order;
2) that the order was clearly communicated to the employee;
3) that the person giving the order had the proper authority to give it; and
4) that the employee did not comply.

[137] The employer maintained that all four elements have been met in this case. A protocol on absence and lateness, in the form of the Letter of Instruction as well as being stated at numerous face-to-face meetings, very clearly set out the employer's expectations. The grievor was to notify his managers of his absences or tardiness by way of email, text, or voicemail. He was to include details explaining the absence or lateness and to state his anticipated return date or expected arrival time. For tardiness, he was to email upon his arrival at work, to indicate when he arrived.

[138] Many times, the grievor acknowledged his awareness of the Letter of Instruction's terms and conditions.

[139] Monitoring absences from work is a *bona fide* work requirement. An employee's failure to advise of or seek authorization for absences gives the employer just and reasonable cause to impose discipline, per *Desrochers v. Treasury Board (Solicitor General of Canada)*, PSSRB File No. 166-02-26340 (19980116), [1998] C.P.S.S.R.B. No. 4 (QL); upheld in [2000] F.C.J. No. 505 (QL).

[140] *Samson v. Deputy Head (Department of Justice)*, 2019 FPSLREB 40, held that requiring the employee to report arrivals and departures to a specific manager was reasonable. Failing to would give the employer just and reasonable cause to impose discipline.

[141] The reporting conditions were imposed in good faith, according to the employer, and were not unreasonable or harsh; nor were they difficult to satisfy.

[142] The employer maintained that the grievor lacked credibility with respect to his testimony as to how he was required to advise of his arrivals at the office when he was late. On June 12, 2014, he emailed about a work-related issue at 9:23 a.m. but did not send a specific email indicating his arrival time. The employer maintained that he provided conflicting versions of why he did not comply with the Letter of Instruction; in the fact-finding meeting on June 27, 2014, he said that he had simply forgotten, while on the witness stand, he testified to his belief that the email he sent at 9:23 satisfied the letter's terms.

[143] The evidence contained many examples of the grievor emailing Mr. Thomas to specifically advise of his arrival times, in an era when he was required to do just that. According to the employer, this proves that he consciously acted in contravention of the Letter of Instruction, which amounted to insubordination.

[144] The employer submitted that the termination was the appropriate disciplinary penalty under all the circumstances. The grievor's tardiness and failure to report his arrival at work on June 12, 2014, cannot be considered in isolation and must be seen as the culminating incident following a lengthy pattern of similar misconduct.

[145] *Reid-Moncrieffe v. Deputy Head (Department of Citizenship and Immigration)*, 2014 PSLRB 25, stands for the proposition that the principle of progressive discipline justifies a termination for a culminating incident following a series of escalating sanctions for similar misconduct, even if the culminating incident, when considered in isolation, would not call for termination. In that case, the employee was terminated for making unauthorized long-distance telephone calls from her office as well as being absent from work. The validity of the discharge depends upon the employee's entire disciplinary record and not just the gravity of the culminating incident.

[146] The employer submitted the following additional cases in support of this line of argument:

- *Charinos v. Deputy Head (Statistics Canada)*, 2016 PSLREB 74;
- *Samson*;
- *Phillips v. Deputy Head (Canada Border Services Agency)*, 2013 PSLRB 67;
- *Desrochers*;

- *Westroc Industries Ltd. v. Teamsters Local Union No. 213*, [2001] B.C.C.A.A.A. No. 112 (QL); and
- *Syndicat canadien de la function publique (Syndicat des employés de Vidéotron ltée, section locale 2815) v. Vidéotron ltée*, [2008] D.A.T.C. No. 193 (QL).

[147] The employer submitted as an aggravating factor the grievor's disciplinary record, which indicated a pattern of insubordination and a continuous and wilful disregard for the Letter of Instruction.

[148] Another aggravating factor, according to the employer, was that three days before the culminating incident, the grievor was reminded of the requirement to provide sufficient information to justify his absences and to notify management. Despite this reminder, made just days before June 12, 2014, he still disobeyed the Letter of Instruction.

[149] For these reasons, argued the employer, the grievances should be dismissed.

B. For the grievor, on the termination grievance and on the discrimination

[150] The grievor submitted that his actions of June 12, 2014, did not amount to insubordination. If the contrary is found, then the termination was disproportionately harsh, and a lesser sanction should be substituted.

[151] The grievor's disability was not considered as a mitigating factor when his employment was terminated. This, according to him, is the most obvious proof that his disability was a factor in the adverse treatment he received.

[152] The following cases were submitted for consideration in support of the grievor's contention that he was not insubordinate in his behaviour. If he is found to have been insubordinate, then the termination was a disproportionately harsh response:

- *William Scott & Co. Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can. L.R.B.R. 1 ("*William Scott*");
- *Ford Motor Co. of Canada Ltd. v. U.A.W., Local 707*, 1974 CarswellOnt 1367, (1974) 5 L.A.C. (2d) 5;
- *MacNaughton v. Sears Canada Inc.*, 1997 CanLII 9530;
- *Kinsey v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 30;
- *Doucette v. Treasury Board (Department of National Defence)*, 2003 PSSRB 66;
- *Wentges v. Deputy Head (Department of Health)*, 2010 PSLRB 24.

[153] In support of the grievor's argument that he was the victim of discrimination on the basis of his disability and that his disability was a factor in the adverse treatment he received, the following cases were submitted:

- *Ontario Human Rights Commission v. Simpsons-Sears*, 1985 2 S.C.R. 536;
- *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35;
- *Boehringer Ingelheim (Canada) Ltd. v. Kerr*, 2011 BCCA 266; and
- *Nicol v. Treasury Board (Service Canada),* 2014 PSLREB 3.

[154] Ms. Gascon testified that although the grievor had been diagnosed with depression and displacement disorder with generalized anxiety, she did not consider him disabled because the Health Canada assessment did not specify any functional limitations. When his Letter of Instruction was amended to allow him to text or email his absences, she took no steps to revisit previous discipline in light of the new accommodations.

[155] The 25-day suspension had a negative impact on the grievor's mental health. He consulted his physician, who issued a medical note for a period of absence from work. He was off work from October 29, 2013, to March 3, 2014. During this period, he once again attempted suicide.

[156] When he returned to work, the terms of his Letter of Instruction were reviewed. However, he argued that Ms. Forget's approach in early June, in the week leading to the culminating event that resulted in his termination, had led him to believe that a reasonable approach was being taken with respect to his obligation to provide reasons for his lateness or absences. Specifically, on Monday, June 9, 2014, he texted his need to take a day's leave for family related reasons. Ms. Forget replied via text, requesting more information about the circumstances and the family member involved. He immediately supplied the information, and the leave was approved.

[157] This, according to the grievor, led him to believe that Ms. Forget was taking a reasonably flexible approach. On June 12, when he signalled his impending lateness, he did not provide any details. The following day, he offered information about the sudden bleeding he had experienced and was told that that degree of detail was unnecessary. He was under the impression that the incident had been forgiven when Ms. Forget said words to the effect that "we sign the agreement and we move on".

[158] In the fact-finding meeting of June 27, 2014, which took the grievor by surprise, he was not permitted to provide any reasons explaining why he was late.

[159] The grievor submitted that he was not insubordinate on June 12, 2014. The essential characteristic of insubordination is the notion of a challenge to authority.

Cavanagh v. Canada Revenue Agency, 2015 PSLREB 7 at para. 236, states: "An employer's authority may be challenged in many ways. The refusal to obey a direct order that is clearly understood, without good reason, clearly constitutes such a challenge."

[160] The grievor acknowledged that he did not provide details on June 12, 2014, about the reasons behind his lateness. He had a very good reason for not providing details at the time. Also, he had expected a flexible approach, since three days earlier, when Ms. Forget needed more information, she asked for it and got it. That was reasonable, and the grievor had a legitimate expectation that the reasonable approach would continue.

[161] In addition, the grievor acknowledged that he did not send a separate and specific email when he arrived at work on June 12, 2014, the unique purpose of which was to signal the time of his arrival, but he feels that he complied with the Letter of Instruction, which obliged him to "… send … an email upon [his] arrival to indicate the time that [he] arrived."

[162] On that basis, the grievor submitted that his termination was unjustified.

[163] In the alternative, the grievor argued that if he is found to have been insubordinate, the surrounding circumstances must be considered strong mitigating factors, and that termination was a disproportionate disciplinary measure.

[164] The grievor maintained that he suffered discrimination on the basis of his disability.

[165] The medical assessments of Dr. Grondin and Dr. Tannenbaum attested to the grievor's medical condition. They diagnosed depression, adjustment disorder, and generalized anxiety, which are recognized as mental disorders in the *Diagnostics and Statistical Manual of Mental Disorders, 5th Edition* (commonly, the "DSM 5"). The grievor discussed his condition with several managers, including Ms. Forget, who, in her testimony, acknowledged that he has a disability.

[166] The grievor submitted that he suffered adverse treatment at the hands of the employer and that his disability was a factor in it. Ms. Gascon testified to a deliberate imposition of the requirement to phone the supervisor in instances of lateness or absence from work because it was "too easy" to simply text or email. He submitted

that it is commonplace for employees to text or email their supervisors with respect to most issues, including lateness or absence.

[167] The employer was made aware of the inappropriateness of this requirement as early as February 28, 2013, through Dr. Grondin's assessment. However, it was more interested in discouraging the grievor from taking time off than in trying to find an appropriate and reasonable arrangement. As a result, he was disciplined many times, which he argued constituted adverse treatment, and it was directly attributable to his disability.

[168] In addition, Ms. Forget imposed arbitrary and unreasonable rules as to how absences were to be justified. She required a separate medical note for each day the grievor would be absent from work for medical reasons. A single doctor's note covering a two-day absence would be rejected.

[169] Ms. Forget revealed her bias against the grievor in her refusal to accept corroboration from a witness of the reasons for his absence from work. When he was absent on October 3, 2013, he provided contact information for someone who could vouch for the fact that he had been ill that day. However, she rejected it because she could trust neither the grievor nor the person speaking on his behalf.

[170] This particular aspect of the employer's mistrust, according to the grievor, was most pronounced with respect to the events of June 12, 2014. The employer had no intention of contacting Ms. Mayrand to confirm his explanation for his tardiness, which resulted in his termination.

[171] The grievor submitted that Ms. Forget's negative attitude toward him was revealed in her approach to the medical assessments and the accommodation issue. Dr. Tannenbaum's note of October 3, 2013, clearly stated that he required an accommodation, but Ms. Forget took no steps to learn more about what it implied.

[172] The grievor referred to *Cyr*, in which the PSLRB held that employers must examine how accommodation can be provided. *Cyr* states as follows at paragraph 46:

> *[46] The duty to accommodate also includes procedural aspects in the sense that an employer must seriously examine how it can accommodate a given employee. To that end, the employer must first obtain all relevant information about the employee's disability. It must then work with the employee to see how he or*

> *she can be accommodated. As the adjudicator wrote in* Panacci, *failing to give any thought or consideration to accommodation is failing to satisfy the duty to accommodate.*

C. The employer's arguments with respect to discrimination

[173] The employer responded to the grievor's discrimination arguments in written submissions filed on January 24, 2020. It did not accept that he made out a *prima facie* case of discrimination.

[174] To begin with, contended the employer, the grievor did not establish that he has a disability. No expert testimony was received justifying his inability to comply with the Letter of Instruction because of a disability. On the contrary, maintained the employer, the Health Canada assessment of September 13, 2013, concluded that he was fit for work and that his medical conditions were stable and did not impact his decision making or his understanding of the consequences of his decisions.

[175] There must be some evidence beyond the grievor's bald assertion that the misconduct in question was attributable to a disability. *Chatfield v. Deputy Head (Correctional Service Canada)*, 2017 PSLREB 2, held as follows that the disabilities of the grievor in that case (depression and alcoholism) were factors in the circumstances that led to her dismissal:

> *[56] … No evidence was adduced from anyone, other than the grievor's own bare assertion, that the disabilities were such that they made her create a false story about her father's death in order to deceive the employer and obtain paid leave while she was on vacation in Mexico. Neither Dr. Sommers nor any of her other treating health professionals testified at the hearing. Aside from the grievor's claim that her disabilities made her stop "thinking straight", there is no evidence to support her assertion that her disability caused her to lie to her employer or even more, to continue to construct false stories even after she claims to have stopped drinking and in the face of clear evidence that she had been caught in her lie. The physician's letters do not in any way indicate that her disabilities had any bearing on her decision to deceive the employer.*

[176] The employer contended that it did not discriminate against the grievor by seeking clarification on the FTWE medical assessments. Dr. Grondin stated that the grievor would email to advise of tardiness or an absence from work. Dr. Grondin did not actually make this recommendation, so the Letter of Instruction was not amended at that time.

[177] Dr. Tannenbaum's assessment, submitted only two months after Dr. Grondin's, was sufficiently contradictory to Dr. Grondin's, according to the employer, to cause it to seek a third evaluation, which was completed. It received the third one on September 13, 2013.

[178] The third evaluation recommended that the grievor be allowed to email to notify the employer of a lateness or absence, and the Letter of Instruction was amended accordingly, on October 15, 2013. The employer offered *Halfacree v. Canada (Attorney General)*, 2014 FC 360, for the proposition that it was reasonable for the employer to await the receipt of additional clarifications on the extent of the grievor's limitations before implementing accommodations. According to the employer, this is also consistent with the principle that an employee is not entitled to an instant or perfect but to a reasonable accommodation, as articulated in *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97.

[179] The employer asserted the grievor did not suffer adverse treatment. The Letter of Instruction and its amendments were all clearly explained and were discussed many times. Other than the attendance issues, his relationships with his supervisors were cordial and professional.

[180] Furthermore, the employer contended there was no obligation to (and that no request was made to) re-evaluate the earlier suspension terms after the Letter of Instruction was modified to allow the grievor to email a notification of his lateness or tardiness. None of the previous disciplinary measures had been grieved or referred to adjudication.

[181] The employer asserted that the Board does not have jurisdiction to assess the validity of previous disciplinary measures not properly referred to adjudication.

[182] Should a *prima facie* case of discrimination be established, the employer asserted that it accommodated the grievor to the point of undue hardship.

[183] As a general rule, the duty to accommodate arises for issues that an employee cannot control, and employers are not under a duty to accommodate issues that an employee is able to control. The only accommodation recommended by a medical professional pertained to how the grievor could notify management of his lateness or absence, and the employer expanded the absence notification modes accordingly.

[184] In a meeting on October 9, 2013, Ms. Forget and the grievor discussed Dr. Tannenbaum's letter. The grievor advised Ms. Forget that he had an upcoming appointment with Dr. Tannenbaum and that he would seek clarification on the accommodations required. The evidence indicates that no such clarification was obtained. He had to cooperate in the accommodation process, and he did not. The employer maintained that it cannot be held accountable for his lack of cooperation.

D. The employer's rebuttal on the termination

[185] Contrary to the grievor's assertion, the employer maintained that the elements of insubordination have been met in this case. He was given an order, which was clearly explained to him, with which he did not comply. His failure to abide by the Letter of Instruction constituted insubordination. The letter clearly indicated that he had to provide reasons to justify his absences and that he had to email management to indicate his arrival times. He failed to abide by both provisions and to justify why he was unable to.

[186] The employer maintained that no mitigating factors justify overturning the termination. It argued that the grievor's alleged disability was not a mitigating factor because there was no evidence that his failure to comply with the Letter of Instruction was attributable to any disability.

[187] The grievor has a long history of defying managerial authority. He repeatedly failed to abide by the terms of the Letter of Instruction despite numerous attempts to ensure that he was able to comply with it, including supplying him with a work telephone, repeatedly reminding him of the letter's provisions, and allowing him to notify management by telephone, email, or text. He was repeatedly warned that failing to comply could lead to the termination of his employment. He showed no remorse at any time. Rather, in the fact-finding meeting of June 27, 2014, he demanded that the Letter of Instruction be removed, stated that the meeting was a waste of time, and accused management of harassing him.

[188] For all of the above reasons, the employer submitted that the grievances be dismissed.

E. The grievor's reply on the issue of discrimination

[189] The grievor maintained that his disability, his absences, and the Letter of Instruction are connected. The employer's argument that he was terminated because he failed to respect the directions in the Letter of Instruction, not because of the frequency of his work absences, is an artificial distinction. The Letter of Instruction was put in place because of his attendance issues, which were caused by his disability. There would be no Letter of Instruction had he not been struggling with attendance due to his health issues.

[190] Furthermore, the evidence shows a link between the grievor's disability and his inability to consistently comply with the Letter of Instruction. The employer contended that he should have supported his testimony with medical evidence, which he submitted he provided, in the form of many medical notes. Dr. Tannenbaum's May 15, 2013, note specifically states that the grievor's medical condition affected his judgement and that it prevented him from advising the appropriate persons of his absences. His disability affected his ability to abide by the Letter of Instruction because he lacked insight into his condition and had impaired judgement, which led him to not advise the appropriate persons of his absences. Similarly, the cases the employer relied on differ from the present case because in them, the medical evidence did not link the misconduct with the disability.

[191] For the discipline to have been free from discrimination, the employer should have taken into account the grievor's disability and how it might be related to his misconduct when it determined whether to impose discipline. Its failure to accommodate him between when it first learned about the request to amend the Letter of Instruction to allow him to email his absences in March 2013 and when it implemented it in October 2013 is inexcusable and amounts to adverse treatment.

[192] The grievor argued that during this period, it was discriminatory for the employer to discipline him while it awaited medical information it had requested. The entire disciplinary process was discriminatory as the employer failed to consider the role that his disability played in his actions before disciplining him and especially before terminating his employment.

[193] The grievor disagreed with the employer's argument that it accommodated him to the point of undue hardship. It ignored references to other possible

accommodations, including Dr. Tannenbaum's recommendation of leniency in terms of shifting hours when appropriate. Furthermore, immediately before terminating the grievor, the employer ignored Dr. Tannenbaum's note advising that he would be off work until accommodations were implemented. By ignoring these references to additional accommodations, the employer failed to accommodate him to the point of undue hardship. It should not have terminated him without receiving all the relevant medical information, and it decided on the termination without even considering the role of his disability.

IV. Decision and reasons

[194] I am tasked with rendering decisions on two grievances, one on the termination for disciplinary reasons, and the other on the discrimination allegation on the basis of disability. The circumstances and the facts underlying the two grievances are closely related.

[195] The employer argued that I cannot review the merits of disciplinary decisions that were never grieved or referred to adjudication. However, my understanding of the grievor's position is that he does not seek to revisit the merits of the individual disciplinary sanctions imposed before his termination. He did not request that those sanctions be quashed or substituted. Rather, he alleged that the sanctions formed part of a campaign of progressive discipline, all of which was taken into account as a powerful aggravating factor in the decision to ultimately terminate his employment. He argued that this was discriminatory. In that context, the prior disciplinary decisions must form part of my analysis of the grievances.

A. The termination grievance

[196] The grievor has correctly referred me to *William Scott*, which sets out the parameters for reviewing an employer's disciplinary decision. The paragraphs are not numbered but the parameters are well known, and they appear as follows at page 4 of the copy in the employer's book of authorities:

> *… [A]rbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?*

[197] As per *William Scott*, the first step in this analysis is determining whether the circumstances of June 12, 2014, provided just and reasonable cause for some form of discipline.

[198] On June 12, 2014, and for a couple of years before then, the grievor was very much aware that his work attendance was under scrutiny. He was also well aware of his obligation to notify management when he would be late or absent and to notify management of his arrival time if he were late.

[199] The employer called the grievor's credibility into question because of what were termed "shifting explanations". The grievor suggested that he did not comply with his obligation to provide notification as per the Letter of Instruction because he did not review the letter after it was modified on October 15, 2013. Then, in the fact-finding meeting of June 27, 2014, he advised Ms. Forget that he had simply forgotten. Finally, in cross-examination, he admitted to knowing that in the past, Mr. Thomas had directed him to send a specific email, the sole purpose of which was to state his arrival time at work. Many examples of his messages to Mr. Thomas were produced in evidence to demonstrate his compliance with this obligation.

[200] However, I find the grievor's explanations provided in his testimony were consistent with documentary evidence and were not necessarily contradictory. The requirement to email to advise of his arrival time was added to the Letter of Instruction on October 15, 2013, which was about eight months before the events of June 12, 2014, the only time he had had to send such a notification under the terms of the Letter of Instruction. True, he had been under a similar obligation with Mr. Thomas, but it had ceased by the time Ms. Forget became the grievor's supervisor.

[201] I am well aware of the framework available to decision makers to analyze witness credibility, and the employer correctly referred to the following from *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.): "[i]n short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[202] I do not find that the grievor lacked credibility in this or in any other aspect of his testimony. On the witness stand, he was candid, forthright, and ready to admit his mistakes and weaknesses. He was not defensive or argumentative in

his responses, and he willingly shared information that he knew would paint him in a less-than-favourable light. He knew that his attendance record was dreadful because he paid the price for it, both in terms of his suspensions without pay and the clawback of his salary for many unauthorized absences. He knew that his attendance was under scrutiny, to the point that he felt that management was looking for a way to terminate him for attendance-related reasons.

[203] At issue in the June 12, 2014, incident is how he provided his notification. According to the employer, the Letter of Instruction was breached twice, first by failing to provide a detailed explanation in the notice of tardiness and then by failing to send an email advising of his arrival time. I will deal with each alleged breach separately.

1. No details explaining why the grievor would be late on June 12, 2014

[204] Knowing what the grievor knows about his precarious situation as far as absences and tardiness are concerned, what would a practical and informed person have expected him to do when he woke up in pain and bleeding because of complications from a recent surgery? When on that same morning, he saw that his car's windshield had been smashed, and both he and his spouse feared that it was an act of violent retribution at the hands of a former room-and-board client who had recently stormed out of the residence in a fit of anger?

[205] The first thing the reasonable person would expect him to do, once the immediate safety of his family was verified, would be to send a message that he would be late. He did so at 7:35 that morning. The message was brief and did not include an explanation but stated only that he would be in a little after 9:00.

[206] I find that the grievor's explanation for not having provided a fulsome set of reasons at 7:35 that morning was entirely credible. He testified to being in a state of panic. Under the circumstances, any reasonable person could certainly understand why. After talking things over with his spouse for a while, the panic subsided, and he decided to go to work, which he said he did with considerable assistance from her.

[207] That afternoon, the grievor attempted to explain to Ms. Forget why he had been late, but she told him to wait until their meeting scheduled for the next day.

[208] The next day, the grievor began to offer an explanation, but when he reached the part about the bleeding, Ms. Forget made it clear that this was too much information. She said she did not need the details.

[209] This was consistent with Ms. Forget's approach to the grievor's June 9, 2014, absence. Just a few days earlier, on the Monday of that same week, he requested a day's leave for family related reasons, and she responded with a request for more information about the family member in question. He provided the information she needed, and the request was immediately approved. However, she did remind him of the need to provide an explanation in his initial leave request. No disciplinary action arose from his failure to provide sufficient details on June 9, 2014.

[210] On June 13, 2014, the grievor attempted to provide details and was told that it was too much information. How much information is too much? True, on the morning of June 12, he supplied no information at all, but he provided a satisfactory explanation. His explanation should have been taken into account when the decision was made to impose discipline. It was not.

[211] As a matter of fact, no explanation was ever sought for the grievor's lateness on June 12, 2014. The "fact-finding meeting" of June 27, 2014, was wrongly named because no attempt was made to find any facts.

[212] In that meeting, the grievor referred to the civil-law concept of "force majeure", by means of which, as he explained in his testimony, he wished to convey that unforeseen circumstances, beyond his control, prevented him from providing the requisite explanation in his email at 7:35 a.m. Whether he used the term "force majeure" accurately is of no import. Crucial is that he tried to offer an explanation as to why his 7:35 a.m. email of June 12, 2014, did not contain any details.

[213] Ms. Forget's message states, in bold text, "**The purpose of the fact-finding meeting is to gather more information regarding your lateness of June 12th**." Her email is entitled, "Fact-finding Meeting - Tardiness of June 12, 2014". How does one reconcile her invitation with the refusal to hear his explanation at the fact-finding meeting?

[214] "No", the grievor was told; "We are not here to discuss why you were late for work. We are here to discuss why you did not honour the terms and conditions of your

Letter of Instruction." I cannot imagine how he could have been expected to do that **without** talking about why he was late in the first place.

[215] The logic is difficult to follow. The employer opened the grievor's termination letter with, "This letter is further to the fact-finding meeting of June 27, 2014, during which we discussed the events pertaining to your lateness of June 12, 2014. The explanation you provided was not satisfactory." This is not true; the events pertaining to the grievor's lateness were never discussed on June 27, 2014, and he was never allowed to provide an explanation.

[216] The Letter of Instruction made it clear that an explanation for the lateness had to accompany the notice. None was provided in the grievor's 7:35 a.m. email, which was contrary to the Letter of Instruction. However, I find that he had a reasonable explanation for not providing details of his lateness in his notice. Having considered his explanation and all the surrounding circumstances, I find that his actions in this respect did not amount to misconduct warranting discipline. Therefore, the decision to impose disciplinary measures was not reasonable.

2. The grievor's failure to advise of his arrival time

[217] The second aspect of the employer's decision to impose discipline was the grievor's failure to send an email advising of his arrival time. But, in examining the circumstances of this case, I find that he did.

[218] When he arrived at the office and got his computer up and running on the morning of June 12, 2014, the first thing he did was send Ms. Forget a work-related email, at 9:23 a.m. This fact has never been in dispute.

[219] The Letter of Instruction states, "For lateness, you must also send me an email upon your arrival to indicate the time that you arrived". The precise wording of the email is not spelled out. Every email has a timestamp, and his was sent at 9:23 a.m. This was shortly after 9:00, as promised in his initial notification at 7:35. He could not have arrived at the office later than 9:23 on the morning of June 12, 2014.

[220] At the hearing, a great deal of effort was spent trying to draw a distinction between the 9:23 a.m. email of June 12, 2014, and the many other emails the grievor sent, years earlier, to Mr. Thomas. Mr. Thomas had apparently specified that for a certain period, the grievor was obliged to send a stand-alone email containing words to

the effect of, "It is now 8:00 [or whatever the arrival time was] and I am now in the office." This practice seems to have ended at some point, but by all accounts, it was certainly no longer in vogue when Ms. Forget took over as the grievor's supervisor.

[221] If the intent behind the Letter of Instruction was to oblige a specifically worded "Mr. Thomas-era" type of email, separate and distinct from any old run-of-the mill work-related email, then the Letter of Instruction should have said so. This is especially true if the grievor's job was on the line.

[222] The fair and just imposition of discipline for failing to obey an order requires that the order itself be clear. In this case, the Letter of Instruction's terms seemed clear to the employer, but apparently, the grievor's interpretation of this particular term was not precisely what the employer had in mind. This can hardly be the grievor's fault.

[223] I find that the grievor satisfied the Letter of Instruction's terms and conditions with his 9:23 email on June 12, 2014, and that discipline was not warranted.

3. The termination was excessive

[224] In the event that I am wrong about this, and if disciplinary measures were in fact warranted for either or both of these incidents, I find that the sanction imposed was excessive. In arriving at a fair and just sanction, all the circumstances must be considered, especially the aggravating and mitigating factors. As *William Scott* suggests, the factors used to assess the disciplinary sanction include the seriousness of the offence, the premeditated or spontaneous nature of the offence, whether the employee had a good record and long service, and whether progressive disciplinary action was taken.

[225] The events of June 12, 2104, were not premeditated. They arose as a result of some calamitous circumstances.

[226] The employer admits that the events of June 12, 2014, were not serious and that they would not have provided sufficient grounds for termination in the absence of very strong aggravating factors.

[227] I accept that from the moment the grievor set foot inside SSC, he was under an intense program of attendance management. I also accept that he has a history of attendance-related disciplinary measures that were never grieved or referred to

adjudication. I agree with the employer; these are aggravating factors, and they were properly taken into account when deciding whether to terminate his employment.

[228] However, it was unfair to consider only the aggravating factors. The termination letter makes no mention of mitigating factors, and Ms. Tromp made it clear in her testimony that none were considered in the termination decision. If the transgressions did indeed deserve discipline, then the mitigating factors, which were numerous and significant, should have been taken into account.

[229] The most obvious mitigating factors reside in the reasons underlying the grievor's tardiness on the morning of June 12, 2014. He was in distress, given the bleeding. He was also concerned about his family's safety, given the vandalism. A lot was going on in his life on that morning, none of it good, and if he could not be forgiven for failing to include those details in his 7:35 a.m. email, then they surely should have been taken into account after the fact as mitigating factors to explain why he was late. Until this hearing took place, he was never afforded the opportunity.

[230] If the grievor could not be forgiven for failing to read the employer's mind to ascertain the precise wording of his arrival-time email (or to know if a separate email was required), then surely some mitigating factors should have been taken into account if discipline was to be imposed for this transgression.

[231] The most obvious mitigating factor was the same one noted earlier. Less than two hours had elapsed from 7:35 a.m. to 9:23 a.m. The grievor was still in the midst of a very stressful morning, and it is easy to understand how his judgement and performance would have been affected. Another mitigating factor is that it was the only time he had ever found himself under the scope of this particular aspect of his Letter of Instruction. Not performing the task in precisely the way the employer had in mind would have been an ideal opportunity to clarify things. Instead, the employer fired him.

[232] The most powerful mitigating factors have yet to be discussed, because they pertain to the grievor's disability, of which the employer was keenly aware. On the witness stand, Ms. Tromp was unequivocal when she stated that his disability was not taken into account when the decision was made to terminate his employment. I find this fatal to the employer's decision to terminate, for the reasons that follow.

B. The discrimination grievance

[233] The grievor's unchallenged testimony is that he told Mr. Thomas about the effects of his panic attacks. He would sometimes be unable to speak. Knowing this, and obliging him to speak on the phone when he would be late or absent was an insensitive approach to attendance management that truly "set him up to fail". I deliberately use quotation marks for this phrase because words to this effect were spoken to Mr. Thomas when this condition was imposed; namely, the grievor's requirement to phone in his absences rather than just sending a text or an email.

[234] In his letter to Dr. Grondin of December 14, 2012, Mr. Thomas referred to the grievor's mental health issues and their impact upon his attendance at work. Mr. Thomas told Dr. Grondin that the grievor had been on a suicide watch while hospitalized on September 13, 2012, and that upon his return to work a few days later, he brought a doctor's note assessing his condition as being "due to depression". In relating to Dr. Grondin the grievor's long history of attendance issues, Mr. Thomas stated that he wondered "… whether [the grievor] is conscious of the consequences of his actions." The next sentence of this letter stated, "I am sincerely concerned about [the grievor's] well-being."

[235] I find it difficult to reconcile Mr. Thomas's apparent concern for the grievor's well-being with the imposition of discipline for attendance-related issues that the grievor told him were related to a medical condition.

[236] Dr. Grondin's February 28, 2013, reply provided the DSM-5 codes along with Dr. Grondin's diagnoses of major depressive disorder, adjustment disorder, and generalized anxiety. In her letter to Ms. Forget dated May 15, 2013, Dr. Tannenbaum stated the following about the grievor:

…

> … [He] *is, in my opinion, still very affected by his condition. While being functional in some capacity, there are times he is still unable to carry out his duties due to cognitive issues related to concentration, energy and mood. He does not have any physical restrictions. His judgement has been quite flawed in the past due to these restrictions (by not advising the appropriate persons of his absence), and I believe his insight into his condition to be limited.*

…

[237] With those words, Dr. Tannenbaum clearly indicated to the employer that the grievor had a disability that could be a factor in his attendance-related issues.

[238] After several medical assessments, the grievor was finally permitted to text or email notices of his lateness or absences. One might think that this would have given the employer cause to revisit the discipline that had been imposed, at least in part, as a consequence of **not** allowing him to text or email his notices. At the very least, the employer's knowledge of the grievor's disability, and the role it might have played in some of the previous instances of discipline, should have been considered before terminating his employment.

[239] To be clear, the grievor's disciplinary history, in which phoning rather than texting was at least partly at issue, includes the following:

- the formal warning dated August 30, 2012;
- the written reprimand dated November 23, 2012;
- the one-day suspension dated January 4, 2013;
- the three-day suspension dated January 8, 2013; and
- the five-day suspension dated January 29, 2013.

[240] In February 2013, Dr. Grondin first signalled the importance of allowing the grievor to text or email his attendance notifications rather than obliging him to call in. The employer ignored Dr. Grondin because, according to Ms. Forget and Ms. Gascon, Dr. Grondin did not formally specify this accommodation.

[241] A few months later, on May 15, 2013, Dr. Tannenbaum repeated this accommodation requirement in more concrete terms: "… I would have to say that he has enough ongoing disability to require accommodations at work that include the ability to email (rather than call) in if unable to attend …".

[242] First of all, I find it difficult to imagine how Ms. Gascon refused to acknowledge that the grievor suffered from a disability. It is also difficult to see what the employer failed to understand about Dr. Tannenbaum's instructions, but for whatever reason, no change to the Letter of Instruction was made until Dr. Baxter's letter of September 13, 2013.

[243] I find this very odd, because Dr. Baxter said nothing new. She simply repeated Dr. Grondin's and Dr. Tannenbaum's earlier recommendation, as follows: "[translation] the Specialist Consultant and the Attending Health Professional recommend that

management allow [the grievor] to advise his supervisor by email of lateness or an absence …". The third time was a charm, I suppose, because the Letter of Instruction was finally amended after Dr. Baxter's letter was received.

[244] The employer should have considered the grievor's disability as a mitigating factor in deciding whether his employment should be terminated. It would have meant taking a second look at the sanctions that were imposed on him before the accommodation was in place. Instead, the early attendance-related sanctions formed part of what was termed "positive and progressive discipline", which gave the employer licence to ramp up the sanction every time an attendance issue was in play.

[245] As mentioned, I will not revisit the merits of the disciplinary suspensions, but since they formed, collectively, a weighty aggravating factor, mention must be made of how some were imposed.

[246] On January 4, 2013, the grievor received the one-day suspension for his unauthorized absences on December 6, 7, 12, and 14, 2012. Four days later, he received the three-day suspension for other absences that also occurred in December 2012, namely, on December 24, 27, and 28. Then, on January 29, 2013, he received the five-day suspension for absences that occurred on January 17, 18, 21, and 22, 2013.

[247] Over approximately three weeks, the grievor was disciplined three times, with increasing sanctions each time. The first two suspensions were for two periods of absence in the previous month. The employer's witnesses referred to this as positive and progressive discipline. I do not disagree with that principle, but to be effective, the recipient has to be aware of what he or she did wrong before he or she commits the same infraction again.

[248] On January 4, 2013, the grievor was called to account for unauthorized absences in the previous month. The rationale behind positive and progressive discipline is that transgressors now know precisely what they did wrong and know that they will be sanctioned more harshly if they do it again. A mere four days later, the grievor received a stiffer sanction for unauthorized absences that took place before the January 4 suspension was imposed! The employer knew about the December 24, 27, and 28 absences on January 4, but it deliberately chose not to sanction him for them

until a first sanction was already in place. This is not positive and progressive discipline; it is a form of piling on.

[249] One final mitigating factor related to the grievor's disability that should have been taken into account when considering the termination of employment was the dysfunctional nature of the employer-employee relationship. I refer to the grievor's relationships with Ms. Forget and Ms. Gascon.

[250] Comparing the reporting of absences of June 9 and 12, 2014, I find that Ms. Forget gave the grievor mixed signals about the need for detail when reporting attendance issues and the consequences of not doing so. I find that she appeared to forgive him for the events of June 12 when she said, in their meeting on June 13, words to the effect of, "We simply sign the letter and move on." They did not move on. He was fired.

[251] Dr. Tannenbaum took action on the negative effect the dysfunctional working environment was having on the grievor's mental health. Just a few days after the "fact-finding meeting" of June 27, 2014, Dr. Tannenbaum issued the following accommodation direction, which the employer completely and utterly ignored:

> …
>
> *After multiple medical visits and optimal treatment with good response, it has been determined that* [the grievor] *suffers from medical symptoms stemming from a toxic work environment. Even with continued treatment and accommodations, I fear that* [he] *will continue to have difficulty in the workplace in his current position being directly supervised by Claire Forget and Lyne Gascon. For this reason I am recommending that he have direct supervision under a different manager. He will be off work until such time as these accommodations can be made. He will continue to be medically supervised during the transition and accommodations will be discussed and determined at the time of return to work.*
>
> …

[252] The grievor did not return to work. The employer took no action on these accommodation recommendations and instead terminated his employment. I will return to Dr. Tannenbaum's July 2, 2014, medical note when I consider the discrimination issues, but for the purposes of evaluating whether the termination was justified, I find that the toxic work environment is another mitigating factor related to his disability that was not taken into account and should have been.

[253] For all the above reasons, I find that no discipline was warranted for the events of June 12, 2014, and that therefore, terminating the grievor was unreasonable and improper. Even if discipline was warranted, then termination was an excessive sanction because only aggravating and no mitigating factors were considered.

[254] The parties correctly referred me to the proper analytical framework, as set out by the Supreme Court of Canada, for considering discrimination. The grievor had to make a *prima facie* case as follows:

1) that he has a disability;
2) that he suffered adverse treatment; and
3) that his disability was a factor in the adverse treatment.

[255] The employer argued that the grievor did not make out a *prima facie* case and that he produced no evidence to show that his disability factored into the measures management took to deal with his attendance issues. I disagree, for the reasons that I have already stated.

[256] Section 226(2)(a) of the *FPSLRA* provides that in relation to any matter referred to adjudication, the Board may interpret and apply the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). The definition of "disability" at s. 25 of the *CHRA* includes any previous or existing mental disability. I find that that the grievor has such a disability. In his December 14, 2012, letter, Mr. Thomas went on at length about how the grievor's mental state affected his work. Dr. Grondin provided an explicit diagnosis in his letter of February 28, 2013. Dr. Tannenbaum provided greater clarification of the impact of the grievor's disability on his functional capacity in her letter of May 15, 2013. Dr. Baxter did not use the word "disability" in her letter of September 13, 2013, but she did order a specific accommodation for medical reasons.

[257] On October 3, 2013, Dr. Tannenbaum advised that "… [the grievor] is being followed for medical conditions including depression and anxiety and requires accommodations for these conditions as required". Her medical note was a clear indication that the grievor suffered from a disability that required accommodation.

[258] I find it interesting that although Dr. Tannenbaum referred to the grievor's disability and ordered unspecified accommodations, the employer made no attempt to learn what the accommodations might entail. I appreciate that the grievor said that he would speak to Dr. Tannenbaum about this, but no new information was brought to

the employer's attention. The responsibility to gather more information about accommodation measures does not rest entirely with the grievor. The employer had no qualms about requesting clarification earlier, so why did it not do so this time?

[259] I also find that the grievor suffered adverse treatment at the hands of the employer and that his disability was a factor in that treatment. For reasons directly linked to his disability, he required accommodation in the form of being permitted to text or email his absence or lateness notifications. Implementing the accommodation took a long time; it was put in place only after a third consecutive doctor called for it. In the meantime, the grievor had been disciplined five separate times, in part for issues surrounding notifying the employer of his workplace absences.

[260] Soon after the grievor's arrival at SSC, the employer entered into a continuing dialogue with medical professionals about his medical condition and the impact it was having on his performance at work. While awaiting clarification on the accommodation, the employer imposed discipline many times for attendance-related issues.

[261] As I have indicated, Mr. Thomas's letter to Dr. Grondin and Ms. Forget's letter to Dr. Tannenbaum openly acknowledge the employer's concerns about the grievor's mental health and the impact of his disability on his work. Imposing discipline for attendance-related issues, knowing that they could in part be linked to his disability, was adverse treatment and constitutes discrimination on a prohibited ground.

[262] The most obvious example of adverse treatment is his termination, which occurred less than two weeks after Dr. Tannenbaum stated explicitly that his medical symptoms stemmed from a toxic work environment and ordered accommodation in the form of a change to his reporting structure. Both Ms. Forget and Ms. Gascon acknowledged receipt of this letter. There is no evidence that Dr. Tannenbaum's accommodation order was even considered.

[263] To make matters worse, the grievor's employment was terminated while he was on sick leave due to his disability, which had been aggravated by what Dr. Tannenbaum described as a toxic work environment.

[264] I find that the grievor has established that he was *prima facie* discriminated against on the prohibited ground of his disability. With a *prima facie* case of

discrimination now in place, the burden shifts to the employer to demonstrate that it accommodated the grievor to the point of undue hardship.

[265] As the employer submitted, and as the grievor did not contest, reporting for work or explaining why that is not possible is a basic employment obligation. Nor did the grievor contest the employer's right to establish and enforce rules concerning attendance at work, including implementing the Letter of Instruction. However, for the employer's actions to have been based on a *bona fide* occupational requirement as it claims, s. 15(2) of the *CHRA* provides that it had to establish that accommodating the grievor's needs would have imposed undue hardship on it, considering health, safety, and cost.

[266] After repeated calls, the employer eventually accommodated the grievor's need to be permitted to provide notifications of his lateness or absences by text or email rather than by calling a supervisor. This was the only accommodation provided, and I find it insufficient to establish that all reasonable means of accommodation were exhausted, and only unreasonable or impracticable accommodation options remained.

[267] After Dr. Tannenbaum advised on October 3, 2013, that "… [the grievor] is being followed for medical conditions including depression and anxiety and requires accommodations for these conditions as required", the employer made no efforts to inquire further about what the accommodations might entail. It relied exclusively on the grievor to clarify the accommodations. When he failed to clarify them, the employer did not raise the subject again. No explanation was offered as to how following up with the doctor would have amounted to undue hardship. There was certainly no evidence of the grievor's refusal to participate in such discussions.

[268] The employer has an obligation to make reasonable efforts to determine the extent of a necessary accommodation, as set out as follows at paragraphs 45 and 46 of *Cyr*:

> *[45] The Supreme Court established in* Simpsons-Sears *that employers have a duty to take reasonable steps to accommodate employees' functional limitations, provided that the steps do not cause it undue hardship. The Supreme Court also specified in* Meiorin *that employers must make sustained and prolonged efforts to find a solution that enables employees to remain at work in spite of their medical constraints.…*

> *[46] The duty to accommodate also includes procedural aspects in the sense that an employer must seriously examine how it can accommodate a given employee. To that end, the employer must first obtain all relevant information about the employee's disability. It must then work with the employee to see how he or she can be accommodated. As the adjudicator wrote in* Panacci*, failing to give any thought or consideration to accommodation is failing to satisfy the duty to accommodate.*

[269] The employer at least acknowledged Dr. Tannenbaum's accommodation orders dated October 3, 2013, but I do not find that it made reasonable efforts to obtain all relevant information pertaining to the accommodation measures. Therefore, the employer has not established that it accommodated the grievor's needs to the point of undue hardship.

[270] It is very significant that the employer did not even consider the accommodations ordered by Dr. Tannenbaum on July 2, 2014. She ordered them immediately after the so-called "fact-finding" meeting of June 21, 2014. I find that the meeting was the most tangible indication of what Dr. Tannenbaum described as a "toxic work environment". The grievor was understandably frustrated and confused by the meeting, and it aggravated his depression and anxiety to the point that Dr. Tannenbaum ordered yet another extended absence from work. The accommodation ordered on July 2, 2014, could not have been more clearly spelled out, but the employer ignored it completely.

[271] Therefore, the grievance with respect to discrimination on the basis of disability is upheld.

V. Remedy

[272] In the event that the grievances were upheld, the employer requested an opportunity to provide additional submissions on remedy.

[273] For his part, the grievor submitted that the termination should be quashed and that he ought not to have been disciplined. Alternatively, he asked that the termination be substituted with a written reprimand or, at most, a 30-day suspension, considering all the mitigating circumstances. He asked that the Board reserve jurisdiction on any award with respect to discrimination and that it leave the issue of his ability to return to the workplace to the parties to resolve.

[274] Given my finding that no discipline was warranted for the actions leading to the grievor's termination, I order his termination quashed. I will reserve jurisdiction on any further remedial orders to allow the parties time to attempt to resolve those issues and, if they are unable to reach a settlement, to return to the Board for a determination on any outstanding remedies.

[275] For all of the above reasons, I make the following order:

(The Order appears on the next page)

VI. Order

[276] The grievances are allowed.

[277] The grievor's termination is quashed.

[278] Under normal circumstances, the Board's practice is to provide the parties with a 90-day window within which to attempt to resolve the remedial issues. Our present circumstances find us in the midst of a global pandemic, with normal working conditions greatly compromised, and in some cases, interrupted completely.

[279] Therefore, a 90-day window is not realistic. I will remain seized of this matter for one year from the date of this decision, to retain jurisdiction in the event that the parties are unable to reach a settlement.

April 24, 2020.

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