Date: 20200528

File: 566-02-8934

Citation: 2020 FPSLREB 61

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

GEORGE HILL

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Hill v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: David P. Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: David Tarasoff, counsel

For the Respondent: Richard Fader, counsel

Heard at Victoria, British Columbia,
November 7 and 8, 2019.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] George Hill ("the grievor") was a maintenance plumber at the Correctional Service of Canada's (CSC or "the employer") William Head Institution in Victoria, British Columbia. He claims that he is disabled and that the employer harassed him in its attempts to accommodate him. As a result, he filed a harassment complaint, which the employer dismissed as untimely. On August 24, 2012, he grieved the employer's decision to dismiss the harassment complaint.

[2] The grievance specifically stated the following: "Relative to the arbitrary and wrongful dismissal of my Harassment Complaint, I grieve that the employer has violated Article 19 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada …".

[3] By way of corrective action, he requested that all leave and benefits lost as a result of the employer's actions be reimbursed to him in full with interest, that he receive compensation for the pain and suffering he had to endure as a result of those actions, and that he be made whole.

[4] The employer replied at the final level of the grievance process. It denied the grievance. Its reply read in part as follows:

> …
>
> *As per the* Treasury Board policy on the Prevention and Resolution of Harassment in the Workplace, *the written complaint must be submitted within 12 months of the last incident or event of alleged harassment. Your harassment complaint was filed on February 16, 2012. The most recent allegation of harassment occurred on July 31, 2009. Accordingly, the content of your file was reviewed and it was found that the complaint was filed outside the timeframe under the Treasury Board policy and the file was closed.*
>
> *In addition, it should also be noted that your harassment complaint referred to a matter related to grievance # 33080, which was resolved by way of a settlement agreement. The Terms of Agreement, dated August 31, 2011, included the statement that you shall* "not commence any further administrative action in relation to any matter connected to or related in any way with this grievance. This includes but is not limited to, any form of grievance or complaint before the National Joint Council, Human Rights Commission or Public Service Labour Relations Board".

> *Therefore, this inclusion of this matter in the harassment complaint is considered a breach of the Terms of Settlement.*

[5] Mr. Hill referred the grievance to the Public Service Labour Relations Board (PSLRB) on August 22, 2013. On November 1, 2014, the Federal Public Sector Labour Relations and Employment Board ("the Board") was created and was mandated to take up and continue proceedings that had been commenced before the PSLRB.

[6] The basic issue before the Board in the present case is whether the employer contravened the non-discrimination clause of the collective agreement by dismissing Mr. Hill's harassment complaint on the grounds that it was untimely, without determining whether there were extenuating circumstances for the delay due to his disability and without considering them.

[7] For the reasons set out below, I find that the grievance was not substantiated and that it should be dismissed.

II. The evidence

[8] The Public Service Alliance of Canada ("the bargaining agent") called these two witnesses:

- the grievor; and
- Dann Cook, one of its shop stewards.

[9] The employer did not call any witnesses.

A. For the grievor

1. Mr. Hill

[10] Mr. Hill is a journeyman plumber and has been engaged in that trade for 36 years. He commenced employment as a maintenance plumber at William Head Institution in June 1993.

[11] He was responsible for infrastructure, waste-water, gas, water, sewage, and fire systems as well as the safety and security of William Head Institution and ensuring that work done was up to code.

[12] He trained inmates in waste-water management. He could have them work with him for training purposes. He was also responsible for ensuring that they obeyed the

rules of William Head Institution. He engaged with inmates both in the shop and on the units.

[13] He would warn them and charge them if they committed infractions. He would find knives and shivs under sinks. He could not use handcuffs or guns. Most of the other trades did not go on the units.

[14] He was referred to a report dated May 26, 2006, on a Health Canada fitness-to-work evaluation carried out on May 23, 2006. He was asked what had led to the evaluation. He stated that he could not remember all of it.

[15] One time, he had been involved with a corpse being fished out of the ocean by Royal Canadian Mounted Police divers in circumstances in which an inmate had gone missing. The corpse had been tied to the dock.

[16] Another time, he had caught an inmate out of bounds and had challenged him. The inmate, who had been convicted of murder, held the grievor hostage. The inmate shook a meat hook at the grievor that the inmate had taped to his wrist.

[17] In another incident at the sewage plant, an inmate threatened to kill him. The inmate wore a balaclava and carried an axe. The grievor alleged that management at William Head Institution had done nothing. A supervisor had come around the corner; the inmate then rolled over a bush and disappeared.

[18] He was asked for the relationship between the incidents and the fitness-to-work evaluation. He stated that he became drawn into himself and that it was up to him to defend himself.

[19] As a result of these incidents, Mr. Hill maintains that he developed a disability.

[20] He was assessed by a number of doctors and psychologists. A report dated March 26, 2007, and prepared by a consulting psychiatrist, diagnosed Mr. Hill as suffering from post-traumatic stress disorder (PTSD) as well as major depression. It was recommended that he not continue to work at William Head Institution.

[21] Mr. Hill stated that he continued to work at William Head Institution until July 2007, when he found a job at the Department of National Defence (DND). He

worked there on a submarine refit. William Head Institution's warden agreed to a two-year secondment there.

[22] He was asked if he stayed at DND for the entire two years. He stated that he did not feel the quality of the work was up to par. He went to the Arctic to work at EKATI, which was a diamond mine where he did not have to work with people.

[23] As of the hearing, he was on leave from the diamond mine, as he had developed a hernia.

[24] He did not return to work in the public service.

[25] He applied for worker's compensation benefits in July 2007 on the grounds of mental stress. He sought the recovery of medical assessment and treatment costs. A case manager denied his claim on November 6, 2007, on the basis that it arose from an April 25, 2006, event and was statute barred, as it had been made out of time. It was also concluded that no special circumstances had precluded the grievor from filing his claim on time.

[26] He asked for a review of the decision. On June 19, 2008, a review officer confirmed the earlier decision that the claim was statute barred.

[27] He appealed the review officer's decision to the British Columbia Workers' Compensation Appeal Tribunal (WCAT).

[28] The WCAT had to determine whether the grievor's compensation application was out of time. On February 3, 2009, the WCAT allowed his appeal. It concluded that special circumstances had existed that had precluded Mr. Hill from filing his application within the one-year filing period.

[29] The WCAT found as follows on the facts:

> *[35] … I am persuaded that special circumstances existed that precluded the worker from filing his application in time. While aware that he was having psychological difficulties, the worker was not aware, until he received the in-depth assessments and opinions of the psychologist and the psychiatrist that his condition was in fact PTSD and Major Depressive Disorder, which they felt were significantly related to the traumatic events at work. As he was not aware that he had suffered a significant psychological*

> *injury until that time, I find he was precluded from filing a timely application for compensation.*

[30] A WorkSafe BC case manager followed up on the WCAT's decision and in a decision dated March 13, 2009, accepted the grievor's PTSD claim and determined that his medical assessment and treatment costs pertaining to his diagnosis were covered .

[31] Mr. Hill referred to a letter dated July 31, 2009, from the Assistant Warden, Management Services, at William Head Institution entitled, "Return to Work on May 20, 2009". The letter referred to the history of the grievor's worker's compensation board (WCB) claims and to the fact that on March 13, WorkSafe BC had accepted his PTSD claim and that his WorkSafe BC case manager was arranging for a psychological assessment.

[32] The letter read in part as follows:

> *You are currently on personal needs leave until August 19, 2009. I am therefore expecting you to either report for duty on August 20, 2009 or submit a leave request, with appropriate documentation for my approval. If you decide to return to work, I require you to provide me with the doctor's note highlighting your restrictions, if any while we await the results of your work safe BC psychological assessment.*
>
> *You must notify me of your intention to return to work on August 20, 2009 and provided appropriate operational, or submit a leave request with appropriate documentation, no later than August 11, 2009.*
>
> *Please feel free to contact me… If you have any comments or questions.*
>
> [*Sic* throughout]

[33] Mr. Hill stated that when he received the letter, he did not want to talk about it. He could not go back to William Head Institution. He said that if inmates know you are wounded, they hound you, punch you, and spit on you.

[34] He underwent another psychiatric assessment by the consulting psychiatrist, whose reporting letter, dated August 14, 2009, summarized the background of Mr. Hill's case as follows:

> *Mr. Hill is an employee of the William Head penitentiary, but at the present time he is on unpaid leave. Due to traumatic incidents which occurred to him while he was on active duty, he became ill, and diagnoses of posttraumatic stress disorder (PTSD) and*

> *concurrent major depression were made. The previous assessments led to the recommendation that he not return to work at the penitentiary, and as a result, Mr. Hill arranged to work with the Department of National Defence on a project related to submarines. Due to a persistence of the symptoms he found that he was unable to work productively in that environment and he left that position. He has not been working with the Government of Canada for approximately 18 months. He is currently working for BHP Billiton at their diamond mine in the NT. He flies in for two weeks, and then is home for two weeks. He reports to me that he is managing well in that job….*

[35] The psychiatrist prepared another psychiatric report for Mr. Hill also dated August 14, 2009. A follow-up psychiatric interview had been held on August 12, 2009.

[36] In the second report, the psychiatrist provided his psychiatric opinion. It reads in part as follows:

> *The depressive symptoms noted on previous assessments have largely but not completely resolved. This is undoubtedly the result of Mr. Hill's attempt to follow the treatment program outlined to him previously to assist him deal with depression. In addition, his absence from the penitentiary has decreased and is ongoing stress level.*
>
> *As related to me, posttraumatic stress disorder from which Mr. G Hill suffers is directly related to events which occurred at William Head penitentiary. It is my opinion that he should not return to the corrections setting where he was previously employed… Furthermore, I do not believe that he should return to any type of correctional facility, nor any situation which requires contacts with inmates. Finally, I do not believe that he should work in any military or quasi military setting; as such settings may again cause particular difficulties for him.*
>
> *Mr. Hill has trade qualifications which in my opinion he can continue to utilize in a productive manner. In terms of his trade no restrictions appear to be necessary. I suspect that he will function optimally in a setting where is able to work independently and where supervision when necessary can be provided in a nonconfrontational manner.*
>
> [*Sic* throughout]

[37] The psychiatrist concluded that the grievor's PTSD was chronic. Consequently, his prognosis was somewhat guarded. However, his opinion was that Mr. Hill appeared highly motivated to engage in the recommended treatment program.

[38] On December 10, 2010, William Head Institution's warden wrote to Mr. Hill, informing him that following the acceptance of his worker's compensation claim on March 13, 2009, and their subsequent correspondence dated December 3, 2010, indicating that he was suffering from permanent limitations, he might be eligible for priority status as an employee who had become disabled.

[39] The letter stated that to be eligible for disability priority, he had to be certified as being ready to return to work by a competent authority, i.e., a medical officer, within a five-year period of the date he was approved for WorkSafe BC benefits, which would end on March 12, 2014.

[40] The letter noted that he had been assessed with two permanent conditions; i.e., he was unable to work in a prison or similar environment, and he was unable to work around inmates or ex-inmates.

[41] He was informed that once the WCB determined that he was capable to return to work, the onus would shift to him to notify the CSC and to provide it with the appropriate documentation from the competent authority. Then, he would be entitled, for two years, to a non-advertised appointment, subject to the provisions of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) and in priority to all other persons, to a position in the public service for which, in the opinion of the Public Service Commission, he was qualified.

[42] He was also advised that on July 16, 2010, William Head Institution's warden had approved his sick leave without pay request to December 31, 2010, and he was advised to submit another leave request for approval.

[43] Mr. Hill understood that the federal government would help him find a job in a location other than a penitentiary environment.

[44] On July 27, 2011, William Head Institution's acting warden wrote to Mr. Hill. The letter referred to the December 10, 2010, letter from the previous warden that stated that if he was found fit to return to work on or before March 12, 2014, he would be declared a disability priority. The letter advised that on June 21, 2011, WorkSafe BC determined that due to a psychological injury claimed on July 19, 2007, he was ready to return to work but not to his pre-injury job with the CSC.

[45] He was again advised that in accordance with the *Public Service Employment Regulations* (SOR 2005/334), he was entitled to a disability priority for two years, effective June 21, 2011, to June 20, 2013. He was advised that a staffing advisor would process the appropriate paperwork and would contact him to explain the priority process.

[46] On June 21, 2012, the Acting Warden again wrote to Mr. Hill, advising him that the Public Service Commission no longer considered WorkSafe BC a competent authority to determine that an employee is ready to return to work and advised him that on June 5, 2012, his doctor determined that he was ready to return to work, effective July 1, 2012.

[47] Mr. Hill was asked whether anything came of this. He stated the following: "No. I tried. I am not very computer smart. It didn't work."

a. The harassment complaint

[48] Mr. Hill made a harassment complaint on February 16, 2012, against members of the William Head Institution management team.

[49] The complaint stated in part as follows:

> *My harassment complaint relates to their knowledge of my psychological distress and their total ignorance toward and calculated attack of my personal rights and well-being in light of same. Their behaviour created a poison work environment, hostile supervision (immediate supervision) for me, and was a primary factor for the deteriorating working relationships that I held with my colleagues and staff members. Equally significant is that it has been the primary cause for a reduced career, promotion and training possibilities as an employee.*
>
> …
>
> *The sustained attack has caused me physical and mental illness due to undue and increased stress. I have lost work time and have been forced to use annual leave entitlements when it should have been sick leave entitlements. It has had an extremely negative impact on my family and friends. I have experienced difficulty in concentrating on simple task due to the stress. I have suffered emotional and financial hardships as a result in seeking employment outside of CSC. As a last resort, a request to confirm hours related to my duties has been withheld by* [the management team] *and CSC. As a result, I lost employment opportunity in the private sector thereby impeding my recovery and my employability outside of CSC.*

[*Sic* throughout]

[50] During his testimony, Mr. Hill was referred to a Section F of the harassment complaint, which set out in detail all the medical, psychiatric and psychological diagnoses that had been made about his condition from March 2005 to August 2009. He asserted in the complaint that a previous warden and the management team had full knowledge of his condition and that they had been provided with the information about it. Despite this evidence, he was ordered back to work by letter dated May 20, 2009. It was determined at the hearing before me that the letter was actually dated July 31, 2009.

[51] As mentioned above, he made his harassment complaint three years later, on February 16, 2012. He testified that he made it because he was "fed up." He did not make it sooner as he waited for the "cogs to mesh and for a common denominator."

[52] On April 16, 2012, he received a letter from the CSC's regional coordinator of harassment prevention that stated in part as follows:

> *In early March 2012 Mr. Dave Clouston, A/Warden William Head Institution provided me with a copy of your complaint submission, dated February 16, 2012. I have reviewed your submission and find that the content is outside the acceptable timelines for filing a harassment complaint under the Treasury Board policy on the prevention and resolution of harassment in the workplace.*
>
> *Should you wish to discuss the above and/or the attached Treasury Board policy please call me at … where my email is ….*

[53] He was asked whether he called the harassment coordinator. He stated that he did not believe that he called that person.

[54] On July 9, 2012, Dann Cook, Mr. Hill's bargaining agent representative, wrote to the Regional Deputy Commissioner on his behalf. The letter read in part as follows:

> *As an employee my life has been forever negatively altered you have failed to protect me from ongoing harassment, disrespect and dismissal. I am advised by my doctor that I suffered from chronic PTSD and will so for the rest of my life. Your organization cannot protect its own people from its own management….*
>
> *In an arbitrary decision from your harassment prevention specialist I see the definition is one of prevent from investigation. I would think from an organization that constantly tells the world they are transparent and process that they would show such*

> *confidence by holding same up to the scrutiny of assessment, not to arbitrary dismissal. As you can see by the enclosure your department has done so with the contradictory phrase of "outside the acceptable time frames for filing" Ms. Shepherd's letter advises that I could talk with her; I did when I asked for a fax copy of her letter for my lawyer on 12th/07/05. In discussions with my peers and union representatives, that seems to be your objective to wear me down but I'm not going away. The last six years of mistreatment have already cost me money hi my mental health friends quite possibly my marriage.*
>
> [*Sic* throughout]

[55] On July 26, 2012, the Regional Deputy Commissioner wrote to Mr. Hill, stating in part as follows:

> *Treasury board provides policy direction to departments for the management of harassment complaints. This policy clearly stipulates that complaints must be filed within one year of the alleged harassment leading to the complaint otherwise the complaint cannot be accepted. This limitation supports the policy objective of prompt resolution and early intervention is necessary in preventing and resolving harassment in the workplace.*
>
> *Although your complaint was outside the policy time frames and could have been rejected at that point, the regional coordinator, harassment prevention felt it was important to thoroughly review your submission in light of the number and complexity of the issues. This was done to ensure that if there were issues raised by you which were outside of the harassment policy these could be appropriately addressed another matter the time from the date of receipt of the complaint to the date of the response percent is not considered to be excessive, given the timeframe required to gather and review the information in your complaint.*
>
> *You may wish to utilize the services of our specialist in the office of informal conflict management in the Pacific region as they may be able to offer suggestions to bring resolution to your outstanding issues and concerns.*
>
> [*Sic* throughout]

[56] He filed the present grievance about the rejection of his harassment complaint the following month, on August 24, 2012.

[57] In the meantime, Mr. Hill remained on disability priority status from July 12, 2012, to June 30, 2014, and was registered in the Public Service Commission's priority information management system. A limitation was that he was not able to work in a correctional setting, a correctional institution, or around inmates.

[58] Mr. Hill was referred to his email of February 14, 2014, to CSC management, in which he advised that he would broaden his work options outside Victoria, namely, to DND locations in Edmonton, Alberta, and in Trenton, Ontario, or any other federal government position in those areas (including Victoria) that could use his abilities.

[59] He stated that management did not match him to a position.

[60] He referred to an email chain that concluded on May 17, 2014, in which he confirmed to the CSC that he would retire on June 30, 2014.

[61] On June 17, 2013, he was advised in writing that Treasury Board guidelines required terminating leaves without pay within two years by a return to work, resignation, retirement on medical grounds, or non-disciplinary termination for cause, according to the *Financial Administration Act* (R.S.C., 1985, c. F-11).

[62] He stated that he selected retirement.

[63] He stated that he still suffers from PTSD and takes medication. He sees a psychiatrist in Penticton, B.C., although he could not remember the psychiatrist's name. He has unsuccessfully tried to go off the medication.

b. Cross-examination

[64] He acknowledged that he had access to his bargaining agent until his harassment complaint was made.

[65] He identified the three bargaining agent representatives that were assigned to him, including his local president and Eric Nygard, who was dealing with his matter before and since July 2007, as well as Mr. Cook, who was a shop steward.

[66] They helped him draft his grievance, as he had mixed up the facts.

[67] Mr. Nygard had signed an approval to file a grievance on November 9, 2006, which the grievor signed, grieving a five-day disciplinary suspension without pay that had been imposed on him on October 12, 2006, on the basis that the penalty was excessive. Mr. Nygard assisted him with respect to the grievance.

[68] The grievance was settled on September 26, 2011, by a memorandum of agreement in which he was reimbursed for the five-day suspension. One of the terms

of the settlement was that Mr. Hill would not commence any further administrative action in relation to any matter connected to or related in any way to the grievance. Mr. Cook signed the agreement in a bargaining agent representative capacity.

[69] Mr. Hill was asked about the extent to which he engaged with representatives of the Employee Assistance Plan. He was asked what he had received from the WCB. He stated that it consisted of some assistance, that he had spoken with the psychologist, and that he had consulted with Dr. Malcolm and Dr. Pendergast.

[70] The bargaining agent handled making his harassment complaint as at the time, he was not allowed on the site of William Head Institution.

[71] The bargaining agent did not engage with the Public Service Commission with respect to the grievor's priority designation. He assumed that the CSC's Human Resources branch had engaged with the Public Service Commission.

2. Dann Cook

[72] Mr. Cook was a parole officer from 1996 to 2016. He was a correctional officer before 1996. He worked at William Head Institution.

[73] He was a steward with the Union of Solicitor General Employees component of the bargaining agent.

[74] As a steward, he had dealings with Mr. Hill.

[75] Mr. Cook attended a meeting on Friday, August 28, 2009, with management about seeking an accommodation for Mr. Hill not at the William Head Institution, given the medical assessment, but in an alternative position that was within range of his home, capable of meeting his restrictions, and satisfactory to Mr. Hill, his doctor, the employer, and the bargaining agent.

[76] He recognized his signature on the terms of settlement of Mr. Hill's grievance with respect to his five-day suspension. Initially, management agreed to a three-day suspension. After further negotiations, the Acting Director General agreed to reimburse Mr. Hill for the full five-day suspension.

[77] He was asked for the understanding with respect to the undertaking not to commence any further administrative action related to any matter connected or related

in any way to the grievance. He stated that it was limited to just the five-day suspension. He met with Mr. Hill off-site. Mr. Hill agreed to sign it.

[78] He delivered the harassment complaint to management on February 22, 2012, for which he was given a receipt. He advised the grievor with respect to it.

[79] He was asked whether he knew why the harassment complaint was made so late. He stated that it was done in conjunction with decisions in Mr. Hill's case. It had evolved from the decision in 2011 to him being declared a disability priority. After six or seven months of inactivity, the bargaining agent and Mr. Hill made the complaint. After that was done, no attempts were made to place Mr. Hill in an alternate position.

c. Cross-examination

[80] The meeting on August 28, 2009, centred on Mr. Hill's well-being. His five-day suspension concerned his inability to deal with stress. The bargaining agent took the matter quite seriously. A national Bargaining agent representative had wanted to fly out to Victoria for the meeting but was unable to. He sent an email, which Mr. Cook presented at the meeting.

[81] Mr. Cook's purpose in attending the meeting was to observe and learn. The employer discussed the priority system and whether Mr. Hill's position would be staffed while he was on leave. The department had to appoint persons with priority status where required but the process was driven more by the Public Service Commission It was independent of the CSC.

[82] The difficulty with finding a suitable position for Mr. Hill was that given his history, potential employers were concerned about his reliability.

B. For the employer

[83] It was agreed that no adverse inference would be drawn from the employer's failure to call the author of the letter of April 16, 2012, rejecting Mr. Hill's harassment complaint on the basis of timeliness, as the author is deceased.

III. Summary of the arguments

A. For the grievor

[84] The issue before the Federal Public Sector Labour Relations and Employment Board ("the Board") is whether the employer violated article 19 of the collective agreement when it refused to investigate and consider Mr. Hill's harassment complaint on its merits and instead dismissed it as untimely.

[85] The decision was made pursuant to the Treasury Board's "Policy on Prevention and Resolution of Harassment in the Workplace" ("the Treasury Board policy").

[86] The Treasury Board policy sets out the steps involved in filing, screening, and acknowledging a complaint as follows:

> ***Step 1 - Filing a complaint***
>
> *The complainant submits a complaint in writing to the delegated manager, or to the next person in the hierarchy if the delegated manager is the subject of the complaint, within one year of the alleged harassment leading to the complaint. The complaint must include the nature of the allegations; the name of the respondent; the relationship of the respondent to the complainant (e.g., supervisor, colleague); the date and a description of the incident(s); and, if applicable, the names of the witnesses. The information provided should be as precise and concise as possible.*
>
> ***Step 2 - Screening and acknowledgement of complaint***
>
> *Upon receipt of the complaint, the delegated manager screens and acknowledges receipt of the complaint. The criteria used in screening are that the complaint:*
>
> - *must be filed within one year of the alleged harassment leading to the complaint, unless there are extenuating circumstances; and*
> - *must include the information noted in Step 1.*
>
> …

[87] Whether there were extenuating circumstances is at the heart of the case.

[88] With Mr. Cook's assistance, the grievor made the complaint on February 22, 2012. He conceded that that was more than one year after the most recent incident noted in it.

[89] Section F of the harassment complaint referred to the fact that "[d]espite this evidence and only because Workmen's Compensation accepted my disability on

February 3, 2009, I was ordered back to work by Ms. Jacques in a letter dated May 20, 2009 cc'd to Mr. Langer who would be her senior staffing consultant."

[90] That is the most recent incident in the complaint. The date of the letter is in error; it should be July 31, 2009.

[91] The second-level grievance response, dated December 4, 2012, reads in part, "Your harassment complaint was submitted on February 16, 2012, over two and one-half years after the last contentious communication you experienced with the employer on July 31, 2009."

[92] There were extenuating circumstances in which Mr. Hill's disability was implicated. They explain the late making of the complaint such that the employer discriminated against him when it dismissed the complaint as untimely.

[93] The test for *prima facie* discrimination is set out in the Supreme Court of Canada's decision in *Moore v. British Columbia (Education)*, 2012 SCC 61.

[94] See also *McLaughlin v. Canada Revenue Agency*, 2015 PSLREB 83.

[95] This case is of general interest as it involves an analysis of when article 19 is in play.

[96] To apply *Moore* to this case, Mr. Hill has a disability in that he suffers from PTSD. He experienced adverse treatment; namely, his harassment complaint was tossed out as untimely. And there was a nexus between his disability and the adverse treatment.

[97] The bargaining agent stated that the adverse treatment and the disability are linked in two ways. PTSD was a factor in Mr. Hill's delay making his harassment complaint. It causes him to delay confronting issues related to his work and to withdraw, as he is wary of his PTSD being triggered.

[98] This is shown in Dr. Ripley's report of August 14, 2009, which reads, "He finds that he is simply unable to do some things such as driving down the road which leads to the William Head penitentiary. Simply the thought of doing so brings on pronounced anxiety for him."

[99] Although an objection was raised to the reports being hearsay, the bargaining agent did not rely on them for a hearsay purpose. They were not put into evidence to establish the truth of their contents but to show that the reports were made.

[100] The reports were provided to the employer. Mr. Hill gave evidence to that effect when looking at the list of practitioners. The employer did not call evidence to state that it did not have the reports.

[101] By way of analogy, suppose that an employee requests a medical leave of absence and provides a doctor's note. The employer denies the request. The employee files a grievance, and at arbitration, the employee's union puts into evidence the doctor's note. The note is not put into evidence to establish the truth of its contents but to show that the statement was made, to call into question the employer's decision to deny the leave.

[102] Unless the employer can show a reason to doubt the note's veracity, such as it is suspect or disingenuous, there is no reason to doubt its contents.

[103] In this case, the employer had the reports. There is no reason to doubt their contents, which give rise to a reasonable inference that PTSD was at least a factor in the delay making the complaint and that it was an extenuating circumstance. So was the disability. The employer was required to recognize as much on the basis of the consulting physician's report.

[104] A real-life example is found in Mr. Cook's evidence, when he referred to the email from the national bargaining agent representative, which he presented at the August 28, 2009, meeting concerning Mr. Hill's accommodation. The national representative wrote that the grievor would be unable to attend as he was adhering to his doctor's directive, which had him avoiding stressful situations that he felt would exacerbate his medical condition.

[105] He also wrote the following:

> *While we may not appreciate why George would not be capable of doing that, the fact is that the medical report addresses that, and I would think that George is simply being cautious for everyone's sake, but more significantly following the course set out by his physician in terms of maintaining his health and moving forward in ways that do not ameliorate his condition or exacerbate it.*

[106] Bluntly, when the employer received the harassment complaint, it knew that the grievor had a disability and that he had trouble with confrontation. It did not state that PTSD is an extenuating circumstance, despite that the information was available to it. In fact, there is no evidence that it ever turned its mind to extenuating circumstances.

[107] The letter to Mr. Hill of April 16, 2012, from the Regional Coordinator, Harassment Prevention, did not state that his submission and content were outside acceptable time frames and that there were no extenuating circumstances. The letter did not mention extenuating circumstances. The Regional Coordinator was supposed to look at whether there were extenuating circumstances but certainly did not state that there were any. The employer never thought about them.

[108] The same may be said about the Regional Deputy Commissioner's letter of July 26, 2012, sent in response to the grievor's letter of July 9, 2012, in which he alleged mistreatment and the arbitrary dismissal of his complaint, which was summarily rejected.

[109] The grievor's PTSD was a factor in the delay. This is similar to the situation in *Santawirya v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 58. In that case, the employer failed to accommodate the grievor, who had been laid off and had been designated surplus priority, by imposing an unreasonable deadline for considering her employment application, despite being aware of her disability and mobility restrictions. It should be noted that the Federal Court of Appeal later held that the Board did not have jurisdiction to deal with the grievance in that case (*Canada (Attorney General) v. Santawirya*, 2019 FCA 248).

[110] In this case the PTSD and the filing of the harassment complaint were linked. The employer also delayed addressing his PTSD. Mr. Hill should not suffer in face of his forbearance. It should not have precluded further investigation.

[111] After Mr. Hill was placed on disability priority, nothing happened. He faced *prima facie* discrimination. The onus now shifts to the employer to establish whether a *prima facie* discriminatory standard is a *bona fide* occupational requirement. See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3.

[112] The bargaining agent accepted that the general purpose of the Treasury Board policy is to encourage prompt resolution and early intervention, to prevent harassment.

[113] The bargaining agent accepted that the timeliness standard was adopted in an honest and good-faith belief that it was necessary to fulfil a legitimate work-related purpose.

[114] The bargaining agent did not accept that the timeliness standard can be enforced without greater flexibility and without the employer experiencing undue hardship.

[115] The employer did not even try to address undue hardship.

[116] The employer discriminated against Mr. Hill on the basis of his disability, and it violated article 19 of the collective agreement.

[117] The employer exercised its management rights in a discriminatory fashion and failed to maintain a safe workplace by failing to investigate the harassment allegations.

1. Damages

[118] Mr. Hill asked for $65 000 for the loss of opportunity to be heard, listened to, and treated with dignity.

[119] Candidly, the bargaining agent did not find cases involving a failure to investigate, in the labour context. It stated that labour cases dealing with management-union consultation are relevant as they deal with the opportunity to gain the other party's ear.

[120] The leading case is the arbitral award in *Burrard Yarrows Corporation, Vancouver Division, v. International Brotherhood of Painters, Local 138 (1981), 30 L.A.C. (2d) 331*. In that case, the arbitration board concluded that the company breached the collective agreement by not contacting the union before contracting out work.

[121] Attempting to quantify the damages, the arbitration board observed, "In this context, as the Courts have suggested, the quantification of damages is readily little more than a guess, but that does not excuse us from quantifying damages if we are satisfied that damages are real and not merely nominal."

[122] In that case, the obligation to consult arose out of the collective agreement. In this case, the employer was obligated to hear Mr. Hill; not doing so was a violation of his human rights. Had it heard him, it is not possible to know what the outcome would have been.

[123] The loss of the opportunity to be heard is real.

[124] The quantification of damages is little more than a guess. So is the likelihood that they would have been obtained. The grievor asked for $65 000, which accords with what he would have earned in a year.

B. For the employer

[125] The issue is quite narrow. It consists of whether the decision to not advance the harassment complaint contravened article 19 of the collective agreement.

[126] It was a personal harassment complaint made under the Treasury Board policy. Such complaints are not normally adjudicable.

[127] The bargaining agent could have sought to include a provision dealing with personal harassment into article 19 of the collective agreement but did not.

[128] The Board does not have jurisdiction to adjudicate the merits of a personal harassment complaint under the Treasury Board policy. See *Green v. Canada (Indigenous and Northern Affairs)*, 2017 FC 1122. Personal harassment complaints go directly to the final level of the grievance process.

[129] The Treasury Board policy is clear. When someone makes a complaint, the policy requires a very detailed description of the allegations, including the date of and a description of the incident or incidents.

[130] The bargaining agent's argument presumes that the employer knew of the allegations. For the most part, the incidents relied upon were from 2006.

[131] The issue is whether there is a nexus between Mr. Hill's PTSD and the time taken to make his harassment complaint, given the six-year delay.

[132] This is a collective agreement case. The bargaining agent had the burden of establishing a nexus.

[133] The bargaining agent argues that the employer should have known, the employer in this instance being the harassment coordinator, who was the decision-maker.

[134] The bargaining agent must establish that the disability was a factor in the adverse treatment. This is a factual question which is primarily medical where the delay is six years, in circumstances where the grievor had access to multiple union representatives.

[135] The grievor's first problem meeting this burden was that when he was asked about the reasons for the delay making the harassment complaint, he did not mention any incapacity or medical reason. He stated that he was frustrated, wanted something done, and was running out of patience.

[136] Mr. Cook did not mention any difficulty receiving instructions from Mr. Hill to make the harassment complaint.

[137] The two witnesses were both asked about the delay point-blank, and neither mentioned incapacity or a medical reason.

[138] This evidence is dispositive of the case. It was not open to counsel to state that there was a nexus. It was up to the witnesses.

[139] The second problem is that the nexus was a medical question. To establish a nexus, the bargaining agent would have had to adduce medical evidence to that effect.

[140] The medical reports entered into evidence were introduced not to establish the truth of their contents but instead to establish that the statements were made.

[141] Even had they been introduced to establish the truth of their contents, the reports do not stand for the proposition that every person with PTSD is incapable of making a complaint or giving instructions to make one.

[142] One physician's report, dated May 26, 2006, stated that Mr. Hill was medically capable of performing the full range of duties of his substantive job and that he had full capacity to do other things. Nothing was proffered about his inability to make a complaint.

[143] A report from another physician, of December 22, 2006, assessed Mr. Hill. It was a global assessment of his functioning. The report concluded that the grievor had moderate difficulty with occupational and social functioning. It also concluded that he was well qualified and that he could easily find employment in his field.

[144] The failure to provide medical evidence is dispositive of this case. It is not fair to suggest that the harassment coordinator should have speculated about the grievor's condition.

[145] The third problem when assessing the grievor's capacity to make a timely harassment complaint is that he had continual bargaining agent support, and it still supports him. It helped him draft his original grievance against the five-day suspension, which he signed on November 9, 2006. As of August 28, 2009, both a local representative and one of its national representatives helped him with respect to accommodating him by urging the employer to make serious efforts at canvassing its work requirements and job postings with a view to locating a position that would be appropriate for him. Clearly, the bargaining agent took the case very seriously.

[146] Not only the grievor but also four bargaining agent representatives could have made a harassment complaint on his behalf, as was done in February 2012.

[147] Mr. Hill's grievance against the five-day suspension was pursued through the grievance process and was settled on October 31, 2011. Mr. Hill signed the settlement, which demonstrated that he had capacity. Since he was able to execute the minutes of settlement, he had the ability to make a harassment complaint.

[148] Moreover, the grievor worked the entire time. At any time, he could have instructed bargaining agent representatives to make a harassment complaint.

[149] When it comes to the second part of the nexus, which is that the employer should have known that there were exceptional circumstances that would have justified the delay making the complaint, the decision was that of the harassment coordinator. There was no positive obligation on the harassment coordinator's part to fish for support for an argument that was never made.

[150] The harassment complaint referred to PTSD, but the extenuating circumstances argument was never made. No request was made for an extension of time.

[151] The suggestion that the employer was indifferent was not a basis for not making the complaint on time.

[152] Employees have a myriad of rights. If Mr. Hill felt that he had undergone harassment from 1996 to 2006, he should have made a timely complaint.

[153] In the alternative, if one looks at whether the employer acted reasonably, the grievor left the CSC in 2007. The Employee Assistance Program was provided to him, and he used it. In this case, the worker's compensation process under the *Government Employees Compensation Act* (R.S.C., 1985, c. G-5), which was designed to address workplace injuries, was used extensively.

[154] When the employer received the letters advising that Mr. Hill should not work with inmates, it approved his two-year DND secondment. He was in no rush to normalize the situation.

[155] The grievor received priority status and a staffing officer's assistance. The Public Service Commission was to refer him to positions in other government departments. It was not the CSC's responsibility.

[156] He was still an employee on leave from the CSC.

[157] It was argued that the July 31, 2009, letter from the assistant warden, management services, to Mr. Hill was an order for him to return to work and that it constituted harassment.

[158] That letter was far from an order to return to work as it contemplated that Mr. Hill could remain on leave.

[159] If the grievance is allowed, the appropriate remedy would be an order to the employer to conduct a harassment investigation.

[160] With respect to the suggestion that it would have been reasonable for the employer to assume that PTSD was a factor in the delay making the complaint, then why did the bargaining agent not bring it up?

[161] The bargaining agent's national representative's email of August 28, 2009, set out that the grievor would not be able to attend a meeting with management with

respect to accommodating him. Nevertheless, the bargaining agent still represented his interests.

[162] Any suggestion that the employer contravened articles 6 and 22 of the collective agreement would contravene the principle in *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), as neither the grievance nor the reference to adjudication mentions them.

1. The bargaining agent's reply

[163] The fact that in his evidence, the grievor did not mention incapacity as a reason for the delay making the harassment complaint does not detract from the fact that he was suffering from PTSD, as described by the consulting psychiatrist. The answer does not preclude the fact that he was not dealing with matters effectively, and his overall evidence should be considered.

[164] Mr. Cook gave his evidence from his perspective as a steward who saw the grievor's disability priority status not bearing fruit and concluded that it was time to act.

[165] The medical reports from 2006 stating that Mr. Hill could perform his duties working at his trade and taking on the employer are different things. The psychiatrist says that it was the events at William Head that triggered the PTSD.

[166] There is a little bit of irony for the employer to argue that there is no medical evidence yet points to the reports to say that Mr. Hill can act in a timely way.

[167] The employer's argument that it did not have a positive obligation to fish for an explanation for the complaint's delay was an abdication of its responsibility.

[168] The Treasury Board policy expressly requires examining the extenuating circumstances. In his complaint, Mr. Hill listed his practitioners and reports. The employer did not have to fish for details. Had it examined the complaint, it would have concluded that PTSD was a factor in the delay, although it was not the only reason.

[169] It is not clear that a reference to articles 6 and 22 would broaden the scope of the grievance. It was raised in advance of the hearing.

IV. Reasons

[170] The issue to be determined is whether the employer contravened article 19 of the collective agreement by dismissing Mr. Hill's harassment complaint on the grounds that it was untimely, without determining that there were extenuating circumstances for the delay based on his disability and without considering them.

A. The law

[171] The bargaining agent contended that the employer violated article 19 of the collective agreement when it refused to investigate and consider Mr. Hill's harassment complaint on its merits and instead dismissed it as untimely.

[172] Article 19 reads as follows:

> *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation,, mental or physical disability, membership or activity in the alliance, marital status or a conviction for which pardon has been granted.*

B. The Board has no jurisdiction to review the employer's decision on a harassment complaint on the basis that on its merits, the decision was not reasonable

[173] In *Canada (Attorney General) v. Lâm*, 2008 FC 874, the Federal Court upheld a decision in which the adjudicator had determined that article 19 did not apply to a grievance seeking to review the employer's decision rejecting a harassment complaint because that article did not mention personal harassment.

[174] The Court also determined that the adjudicator exceeded his jurisdiction and that he was unreasonable in deciding that the purpose clause in the collective agreement, stating that the parties "… share a desire to improve the quality of the Public Service of Canada and to promote the well-being … of its employees …", could support a finding that it was meant to include the Treasury Board policy.

[175] However, a decision determining that there was no harassment within the meaning of the Treasury Board policy may be judicially reviewed on its merits in the

Federal Court on the standard of review of the decision maker's reasonableness. See *Green*.

[176] The issue presented in this case is not founded on the grounds of harassment as set out in article 19 but rather on the grounds that the employer discriminated against Mr. Hill by dismissing his harassment complaint without determining that there were extenuating circumstances for the delay by reason of his disability and without considering them.

[177] In my view, the Board has jurisdiction to hear and determine this grievance.

[178] To prove that an employer engaged in a discriminatory practice, the complainant must first establish a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the employer (*Ontario Human Rights Commission v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 at para. 28)

[179] In *Moore*, the Supreme Court of Canada stated as follows at paragraph 33:

> *[33] As the tribunal properly recognized, to demonstrate* prima facie *discrimination, complainants are required to show that they have a characteristic protected from discrimination under the* Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a* prima facie *case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.*

[180] The bargaining agent argued that Mr. Hill has a disability, PTSD, that he experienced adverse treatment in that his harassment complaint was tossed out as untimely, and that there was a nexus between his disability and the adverse treatment as his PTSD was a factor in the delay making his complaint.

[181] The employer argued that the bargaining agent had to establish that the grievor's disability was a factor in the adverse treatment, that this is a factual question, and that the nexus is a medical question. The employer argued that the evidence does not support the grievor on either question.

[182] I make the following findings of fact on the evidence.

C. The harassment complaint

[183] With Mr. Cook's assistance, the grievor made his harassment complaint with the employer on February 22, 2012. The most recent incident of alleged harassment recited in it was that of the letter to him, dated July 31, 2009, which he contended ordered him back to work and constituted harassment.

[184] The Treasury Board policy stipulates that the criteria used in screening complaints are that in addition to setting out the nature of the allegations, "… **the complaint must be filed within one year of the alleged harassment leading to the complaint, unless there are extenuating circumstances** …".

[185] On April 16, 2012, the Regional Coordinator, Harassment Prevention, CSC, wrote to Mr. Hill, advising him that she had reviewed his submission and that she had found that it was outside the acceptable time frames for making a harassment complaint under the Treasury Board policy. She advised him that should he wish to discuss it or the policy, he should call or email her.

[186] Mr. Hill did not call or email her.

[187] The complaint was made over 2½ years after the most recent alleged harassment incident. The grievor conceded that it was not timely.

[188] The complaint does not include submissions to establish that there were extenuating circumstances for the delay making the complaint.

D. Did Mr. Hill have a characteristic (a disability) protected from discrimination under the collective agreement?

[189] Based on the evidence adduced at the hearing on the balance of probabilities has the bargaining agent established that Mr. Hill suffered from posttraumatic stress disorder?

1. The medical reports

[190] A number of medical reports were filed at the hearing. In particular, Dr. Ripley's report of March 26, 2007, diagnosed Mr. Hill as suffering from PTSD and major depression. Dr. Ripley was not called as a witness. The bargaining agent acknowledged

that the report was hearsay and that it introduced the report into evidence not to establish the truth of its contents but to establish that the statement was made.

[191] While it was not argued, I observe that s. 40 of the *Canada Evidence Act* (R.S.C., 1985, c. C-5) provides that in all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are held apply.

[192] Section 10 of the British Columbia *Evidence Act* ([RSBC 1996] Chapter 124) deals with experts' evidence and provides that a written statement setting out an expert's opinion is admissible in evidence in a proceeding, without proof of the expert's signature, if at least 30 days before the statement is given in evidence, a copy of the written statement is given to parties adverse in interest. Any party to the proceeding may require the expert to be called as a witness.

[193] There is no evidence that the bargaining agent complied with the requirements of that s. 10, although it claimed generally that the reports were provided to the employer but not in the context of this hearing.

[194] While the Board has statutory authority to accept evidence that would not be admitted in a court of law (s, 20(b) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), nevertheless, it would be an error to found a critical issue in the case solely on the basis of hearsay evidence. Is there other cogent evidence establishing that Mr. Hill suffered from PTSD?

2. The worker's compensation application

[195] Mr. Hill applied for worker's compensation for mental stress on July 19, 2007, the same day he left William Head Institution for the DND secondment.

[196] Initially, the case manager denied his claim on the basis that it was statute barred as it arose from an April 25, 2006, event (the grievor being brushed by an inmate). The application was made more than one year after the event, and the officer determined that no special circumstances had precluded the grievor from filing his claim on time. The application was approximately three months late.

[197] Mr. Hill sought a review of that decision. When it was denied, he appealed the decision to the WCAT, which determined that special circumstances had existed that had precluded him from filing his application on time.

[198] The WCAT reasoned that as Mr. Hill was not aware that he had suffered a significant psychological injury until he received the in-depth assessments and opinions of the psychologist and psychiatrist that his conditions were PTSD and major depressive disorder, until then, he was precluded from filing a timely application.

[199] The WCAT's decision recites that the grievor said that he was first formally diagnosed with PTSD in December 2006 and that the diagnosis and its relationship to his exposure to traumatic events at work was confirmed by the psychiatrist in March 2007, although he did not receive that report until late June or early July 2007.

[200] The WCAT is a quasi-judicial tribunal that heard evidence and legal submissions and made a finding of fact that Mr. Hill was first formally diagnosed with PTSD in December 2006, which the psychiatrist confirmed in March 2007, although he did not receive the report until late June or early July 2007.

[201] I am prepared to take official notice of the WCAT's decision on this factual matter.

[202] Based on the grievor's evidence that he was diagnosed with PTSD, the medical reports, and the WCAT's decision, I conclude on a balance of probabilities that he suffers from PTSD, which is a disability within the meaning of article 19 of the collective agreement.

E. Characteristic protected from discrimination

[203] The bargaining agent has therefore established that Mr. Hill had a characteristic protected from discrimination under article 19.

F. Adverse impact

[204] I am also prepared to accept that Mr. Hill experienced an adverse impact with respect to his employment when his harassment complaint was rejected as untimely.

G. Was the grievor's disability a factor in the adverse treatment?

1. The testimonies of Mr. Hill and Mr. Cook

[205] Mr. Hill testified that he made his complaint on February 22, 2012. He was fed up. He did not make it sooner as he waited for the cogs to mesh and for a common denominator.

[206] Mr. Cook testified that he advised Mr. Hill with respect to the harassment complaint. He stated that the reason it was made later on (using his words) was that it followed six or seven months of inactivity after the grievor was declared a disability priority in 2011. It was made after no attempts were made to place him in another position.

2. The five-day suspension

[207] Mr. Hill was disciplined with a five-day suspension on October 12, 2006. He signed a grievance on November 9, 2006, with the assistance of Mr. Nygard of the bargaining agent, grieving the suspension on the basis that the penalty was excessive.

[208] The grievance was settled on September 26, 2011, by a memorandum of agreement in which the grievor was reimbursed for the five-day suspension. Mr. Cook signed the agreement in his capacity as a bargaining agent representative. Mr. Hill personally signed the memorandum of agreement.

3. The WCAT's decision

[209] The WCAT determined that special circumstances existed that precluded Mr. Hill from filing his compensation application within one year from the date on which his claim arose. He had applied for compensation for mental stress in July 2007. His claim arose from an April 25, 2006, incident when an inmate brushed against his shoulder.

[210] The WCAT determined that special circumstances had precluded him from filing his application in time and stated the following:

> …
>
> *… While aware that he was having psychological difficulties, the worker was not aware, until he received the in-depth assessments and opinions of the psychologist and the psychiatrist that his condition was in fact PTSD and Major Depressive Disorder, which*

> *they felt were significantly related to the traumatic events at work. As he was not aware that he had suffered a significant psychological injury* ***until that time****, I find he was precluded from filing a timely application for compensation.*
>
> …
>
> [Emphasis added]

4. Access to bargaining agent representatives

[211] He had access to bargaining agent representatives throughout the entirety of the relevant period.

[212] He was continually employed throughout the entire period.

V. Conclusion

[213] The complaint was made on February 16, 2012. The most recent harassment allegation occurred on July 31, 2009, which means that the claim was made more than a year-and-a-half beyond the one-year time limit.

[214] I am not persuaded by the totality of the evidence that the bargaining agent established on a *prima facie* basis that the grievor's disability was a factor in the delay making the harassment complaint.

[215] The fundamental reason for this conclusion is that when he was asked during his testimony about the reasons for the delay, the grievor did not mention his disability. He stated that he was frustrated and that he had been waiting for the cogs to mesh in the context, as Mr. Cook explained, of his frustration with the employer's inactivity with respect to finding another position for him after he was declared a surplus priority.

[216] Nor is there any information in the medical evidence that connects his disability with the delay making his harassment complaint.

[217] In the context of the worker's compensation claim, the WCAT was prepared to accept that there were extenuating circumstances in the delay filing that claim **until** he was formally diagnosed with PTSD in June or July of 2007.

[218] The bargaining agent represented him continually. Clearly, he was able instruct it with respect to settling the grievance about his five-day suspension in August 2009. He signed the settlement.

[219] The email of August 27, 2009, made it clear that the bargaining agent represented him with respect to the employer's efforts to find him another position, and those efforts would of necessity have involved Mr. Hill directly.

[220] Nor do I accept the submission that the employer should have known of a nexus between Mr. Hill's PTSD and his delay making the complaint. In my view, it was incumbent on him and his bargaining agent to establish grounds to finding that there were exceptional circumstances that excused the lengthy delay making the complaint. It has not been established that at the operational level, the employer was privy to any of the medical diagnoses. Ordinarily, for privacy reasons, an employer is not entitled to be advised of a medical diagnosis. In any event, I have already concluded that no information in the medical reports filed at the hearing established a nexus between Mr. Hill's disability and the delay making the complaint.

[221] Applying these findings to the tests established by the Supreme Court of Canada in O'Malley and Moore, I find that the grievor has not established a *prima facie* case of discrimination because even if believed, it was not a factor in the delay. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the employer (Ontario Human Rights Commission v. Simpsons-Sears, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 at para. 28)

[222] In *Moore*, the Supreme Court of Canada stated as follows at paragraph 33:

> *[33] As the tribunal properly recognized, to demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.*

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

(The Order appears on the next page)

VI. Order

[224] The grievance is dismissed.

May 28, 2020.

David P. Olsen,
a panel of the Federal Public Sector
Labour Relations and Employment Board