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File: 566-02-14771

Citation: 2020 FPSLREB 54

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

IOULIA GALLINGER

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Gallinger v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Eric Langlais and Justine Lacroix, Professional Institute of the Public Service of Canada

For the Respondent: Kieran Dyer, counsel

Heard at Ottawa, Ontario,
February 4-7, 2020.

REASONS FOR DECISION

I. Introduction

[1] Ioulia Gallinger ("the grievor") was a Computer Systems (CS) employee working for the Canada Border Services Agency ("CBSA" or "the employer") before being terminated from employment due to medical incapacity in September 2017.

[2] Following a maternity leave, the grievor was unable to return to work in February of 2015, due to illness. Therefore, she started a sick leave without pay ("sick LWOP"). In accordance with Treasury Board policy, following two years of sick LWOP, her employer began taking steps to resolve her leave situation. It did so by sending her a letter on March 15, 2017 ("*Options Letter #1*"), with three options: (1) return to active duty, (2) take steps to medically retire, or (3) resign from the public service. It gave her approximately six weeks to make a choice.

[3] After Ms. Gallinger provided a medical note stating that she was seeking to meet with a specialist, the CBSA concluded that she would not return to work in the foreseeable future, and on May 18, 2017, it issued a second options letter ("*Options Letter #2*") with only two choices: either she (1) take steps to medically retire, or (2) she resign from the public service. Following a series of extensions to the deadline in the second letter, eventually, the CBSA gave her a deadline of September 15, 2017, to make a decision. When it did not hear from her by that date, it terminated her employment for medical incapacity, effective September 22, 2017.

[4] For the employer, the key issue in this case is whether it was reasonable for it to terminate Ms. Gallinger's employment on the basis of the information it had at the time. It argued that her inability to provide information promising a return to work in the foreseeable future justified the termination.

[5] For the grievor, the key issue is whether the employer's actions leading to and including her termination were discriminatory on the basis of disability. She argued that the employer did not take the necessary steps to establish whether she could return to work, acted unreasonably in the options it provided to her, and should not have terminated her employment. When it was provided with clear evidence that she could return to work shortly after issuing her the termination letter, it refused to reconsider the termination.

[6] It is well-established law that when it comes to accommodating employees with a disability, a multi-party effort is required on the part of the employer, the employee, and (if applicable) the employee's union. After hearing the evidence in this case, I find that each of the three parties — the employer, Ms. Gallinger, and her union — demonstrated failures to act at crucial moments when they could and should have. However, the key issue before me is whether the employer established that it could not accommodate Ms. Gallinger's needs without imposing undue hardship on itself.

[7] For the reasons that follow, I conclude that the CBSA did not establish that it met that test, and therefore, it discriminated against Ms. Gallinger by terminating her employment. This conclusion is reinforced by the fact that the CBSA refused to reconsider its decision in light of information provided to it during the grievance process. Therefore, I order that the CBSA's decision to terminate her employment be rescinded.

[8] At the same time, given the evidence provided to me at the hearing, the grievor did not clearly establish exactly when she was able to fully return to work. Therefore, I do not find myself able to reinstate her retroactively as requested. I find that she established a readiness to return to work sufficient to actively resume the accommodation process, and to start the return-to-work process, which my order provides for.

[9] In addition, given my analysis of the CBSA's discriminatory actions, I make two awards under the provisions of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

II. Individual grievance referred to adjudication

[10] The grievance was filed with the employer on October 30, 2017, and read as follows:

> *I grieve the decision of my Employer to terminate my employment, as well as the contents of the termination letter dated September 22, 2017 received September 26, 2017. The decision, as well as the letter, are contrary to the CS collective agreement and any other applicable policies and/or laws. Furthermore, the decision is discriminatory.*

[11] As remedy, the grievor requested that the termination be rescinded and that she be provided with any other measure deemed necessary to remedy the situation, including damages and compensation as provided for under the *CHRA*.

[12] The grievance was presented directly to the final level of the grievance process on November 24, 2017.

[13] The employer's final-level reply to the grievance was issued on March 20, 2018, and read in part as follows:

> …
>
> *At the date of your termination, your sick leave without pay had been ongoing for more than two years and you had not demonstrated that you would be able to return work [sic] in the foreseeable future. As such, your inability to work frustrated the employment contract.*
>
> …

[14] The grievance was referred to the Federal Public Sector Labour Relations and Employment Board ("the Board") on February 9, 2018, under s. 209(1)(c)(i) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). It was accompanied by a notice of a reference to the Canadian Human Rights Commission (CHRC).

[15] The Board addressed a number of pre-hearing production issues.

[16] At the employer's request, on January 14, 2020, I ordered the grievor to provide the employer with the pre-hearing disclosure of the following:

> (1) her disability insurance (DI) file;
>
> (2) all medical records related to her disability claim as of her termination and to her readiness to return to work from the start of her sick LWOP to the end of the hearing; and
>
> (3) all documents related to her mitigation efforts since her termination, including any jobs applied for, income received, and tax returns.

[17] My order followed the reasoning in *Canada (Attorney General) v. Quadrini*, 2011 FCA 115 at para. 37, where it is stated that the threshold test for an order to produce

documents is that "… the party seeking production must establish a realistic possibility that the documents may be relevant to an issue in dispute in proceedings before the Board."

[18] During the hearing, the employer's counsel asked the grievor many questions about her efforts to produce these documents, alleging that in many instances, what was produced fell short of the Board's order or represented a refusal to follow it. For her part, the grievor described making significant efforts to produce the materials in a short time and while she admitted that some information had been left out or redacted, she believed that she provided what was required.

[19] According to the employer's counsel, the production order generated about 1000 pages of arguably relevant materials. Questions about the production process took up a significant part of the hearing. In the end, very little of the material covered by the production order ended up in evidence from either the employer or the grievor.

[20] Given my conclusions about the case and the remedy ordered, I do not attach any significant prejudice to the problems encountered with the production order. As I do not award compensation for lost wages up to the date of this decision, any shortcomings in her mitigation disclosure is of no consequence. Similarly, since I am ordering that she be returned to work following the release of this decision, any insufficiencies in the information up to this point is of no consequence. This will be made more evident in the reasons that follow.

[21] The Board also received a request from the grievor for an order that the employer produce seven documents for which it claimed labour-relations privilege. On the basis of a detailed description of the documents, I denied the request, satisfied that the documents in question met the four-part "*Wigmore"* test. These have been expressed in Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at para 3:4340. In the ruling, I indicated that I was guided by the reasoning in *Horne v. Parks Canada Agency*, 2014 PSLRB 30 at paras. 61 and 62, and *Rodrigue v. Deputy Head (Department of Veterans Affairs)*, 2016 PSLREB 9 at paras. 66 to 76. The grievor did not address the issue further at the hearing.

III. Summary of the evidence

[22] The employer called two witnesses, Chantal G. Lacroix, who signed the four options letters provided to the grievor during the March to September 2017 period, and Daniel Tremblay, who signed the termination letter. As of the events in question, Ms. Lacroix was Director, Travellers Systems Division, and therefore was responsible for the team of employees that developed front-line information technology applications for the CBSA. Mr. Tremblay was Director General of Business Applications Services, CBSA, and had the delegated authority for the decision to terminate the grievor's employment.

[23] Only the grievor testified for herself.

[24] Approximately 60 documents were entered on consent of the parties. They consisted primarily of letters and emails. As such, much of the evidence is not in dispute. In the summary that follows, I summarize most of the evidence without referring in detail to each witness's testimony. For any conflict in the evidence, I make specific reference to what I heard from different witnesses.

A. Background

[25] Ms. Gallinger began her career at the CBSA in April 2007 classified at the CS-01 group and level. In August 2008, her daughter was born with a serious disability, and she experienced some challenges returning to work. However, in 2010, she was promoted to the CS-02 group and level, and she took on a database development role. She testified that it was a positive role that reflected her educational background, which includes a bachelor's degree from Trent University and a master's degree from Simon Fraser University.

[26] In 2014, Ms. Gallinger took maternity leave, from which she was expected to return in February 2015.

[27] However, on the advice of her physician, Ms. Gallinger did not return to work in February 2015, due to illness. Between January of 2015 and February of 2017, no fewer than nine notes were provided by the grievor's physicians indicating that she was not ready to return to work at the given times and that her progress would be reassessed. Most notes were provided by her family physician. However, in January of 2016, she

experienced a concussion, which involved seeing a different doctor, from whom she also received an absence-from-work note.

[28] The last of these series of notes, dated February 22, 2017, stated that Ms. Gallinger would be reassessed in June of 2017.

[29] The grievor submitted these notes to her direct supervisor. Throughout this two-year period, Ms. Gallinger was on sick LWOP for medical reasons. She testified that at no time during her sick LWOP did her direct supervisor ever question the medical notes or request additional information from her or her physician.

B. The options letters (March to September 2017)

[30] On March 15, 2017, the employer issued *Options Letter #1*, the first of several options letters to Ms. Gallinger. It was signed by Ms. Lacroix and referenced *Appendix B* of the Treasury Board's *Directive on Leave and Special Working Arrangements* ("the *Directive*"). The letter explained that the *Directive* requires that "… leave without pay situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances."

[31] The letter noted that Ms. Gallinger had been on leave without pay for illness or injury since February 3, 2015. It explained that the leave "must be terminated eventually" through one of three options: (1) a return to duty, (2) medical retirement, or (3) a resignation. The letter required that she make a decision before April 24, 2017 (a period of approximately 40 calendar days, or just under 6 weeks).

[32] In outlining the first option, the letter stated that the employer would need the following:

> …
>
> *… a new medical certificate which will specify the expected return-to-work date. Your doctor must also outline your professional capabilities, your functional limitations and your restrictions. The medical diagnostic is strictly confidential and is not required for this assessment… In absence of such information, I may request that you undergo a fitness to work evaluation. Such assessment will be used to determine the likelihood of a return to work in the near future and to establish if any modifications to work duties or other types of accommodations may be required upon your return to work.*
>
> …

[33] The letter warned that if the CBSA did not hear from her before the deadline, it might consider a termination for reasons other than a breach of discipline or misconduct. It ended by inviting Ms. Gallinger to call if she had any questions.

[34] Ms. Lacroix testified that she sent the letter because of her responsibility under the *Directive*. She testified to her expectation that if the grievor wanted to return to work, she would have to submit a medical certificate confirming her ability to return and identify what functional limitations and restrictions the employer would have to consider.

[35] Ms. Gallinger testified that she had no prior knowledge that such a letter might come or prior knowledge of the *Directive*. She described being shocked at receiving the letter. She testified that she did not know who Ms. Lacroix was at the time. She did not reach out to ask Ms. Lacroix any questions. She testified that the option she wanted was to return to work, so she decided to see her physician.

[36] The result was a medical note from her family physician, dated April 19, 2017. As its content becomes a key point of discussion in the reasons that follow, I reproduce it in full as follows:

> *I am writing in reply to your letter to Ms. Gallinger dated March 15 2017. She has finally received an appointment with a specialist in the next few weeks. I believe that specialist's opinion will provide further advice on diagnosis and management and would propose that I update you no later than July 1 2017 with the information you have requested in your letter.*

[37] The employer responded with *Options Letter #2*, again signed by Ms. Lacroix. It started as follows by acknowledging receipt of the April 19, 2017, medical note:

> *… [I]n which your physician indicated that you have received an appointment with a specialist in the incoming [sic] weeks that could further advise on your diagnosis and management. Unfortunately, no possible return to work date has been indicated in his [sic] letter.*
>
> …

[38] Ms. Lacroix's letter then went on to state, "It is thus my conclusion that, regrettably, your medical condition does not allow you to return to work within the foreseeable future."

[39] In her testimony, Ms. Lacroix confirmed that she reached that conclusion after seeing the April 19, 2017, medical note because it said nothing about a return to work. In cross-examination, she agreed that she reached her conclusion on the "absence of a medical note" confirming an ability to return to work on the grievor's part.

[40] Unlike *Options Letter #1*, *Options Letter #2* provided just two options: (1) medical retirement, or (2) resignation. It set a deadline to respond of June 2, 2017 (15 days).

[41] Another change was made to the options letter. *Options Letter #1* contained a statement indicating that Ms. Gallinger had the right to grieve if she did not agree with the letter. This statement was not included in *Options Letter #2*.

[42] Ms. Lacroix testified that after sending *Options Letter #2*, she still would have considered a request from the grievor to return to work. She testified that she would have required a medical note that met the CBSA's requirements as set out in *Options Letter #1*. She testified that this was reinforced by the statement in *Options Letter #2* that the CBSA's consideration of a termination "… would only be taken in the event where you do not return to work or take the necessary steps for separation from the Public Service." I note, however, that this clause appears towards the end of the letter among a series of more generic paragraphs such as those providing links to pension advisors, employment assistance programs and so on. The earlier part of the letter clearly outlined the two options being offered.

[43] Ms. Gallinger testified that in her assessment, the letter clearly stated that her employer had concluded that she could not return to work, that it would have to sever her employment, and that the only two options for doing so were clearly outlined. This point is reinforced by Ms. Lacroix's statement in the letter's second paragraph that given her conclusion that Ms. Gallinger will not be returning to work in the foreseeable future, the latter would have to "make the necessary personal adjustments and preparations for separation from the Public Service on medical grounds."

[44] After receiving *Options Letter #2*, the grievor sought the assistance of her union. On May 26, 2017, Jean Ouellette, a staff representative with the Professional Institute of the Public Service of Canada ("PIPSC" or "the union"), requested that the employer provide Ms. Gallinger with an extension to the first week of July 2017, to "… exercise one of the three options referred to in the March 15 letter." An employer

representative responded by email on May 29, granting the extension to "… exercise one of the options presented to her," and setting July 10, 2017, as the deadline.

[45] In her testimony, Ms. Lacroix stated that this email meant that all three options were open to the grievor. Ms. Gallinger testified that she did not feel that the email confirmed that the employer was offering her a return to work.

[46] On July 5, 2017, Ms. Gallinger requested three months of leave without pay for the care of immediate family (as per clause 17.09 of her collective agreement), starting on July 6, 2017. She provided as a rationale her requirement to care for two of her children. She also submitted that the leave would suspend the effects of the options letters.

[47] Almost immediately, the CBSA responded and denied the leave. Both Ms. Lacroix and Ms. Gallinger testified that the reason given for the denial was that the employer needed to resolve the sick LWOP issue before considering any other type of leave request.

[48] In its written response to the request for leave without pay for the care of immediate family, the CBSA issued a new options letter dated July 7, 2017 ("*Options Letter #3*"). It confirmed its denial of the leave request (without providing reasons) and stated, "As a result, I must inform you that you have to make the necessary personal adjustments and preparation for separation from the Public Service on medical grounds."

[49] The remainder of *Options Letter #3* was, for most intents and purposes, identical to *Options Letter #2*. It provided Ms. Gallinger with two options: (1) medical retirement, or (2) resignation. It set a deadline to respond of July 14, 2017 (7 days). However, the sentence in the latter part of the letter that advised her about the possibility of termination now stated that the CBSA would only consider it if she did not "take the necessary steps for separation from the Public Service." There was no longer any mention of her possibly returning to work.

[50] In an email sent on July 10, 2017, Ms. Lacroix stated, "As you are unable to return to work in the foreseeable future, you cannot transition from sick leave to another type of leave, as this does not resolve our [*sic*] sick leave status."

[51] Ms. Gallinger filed a grievance about the denial of her leave application. The parties confirmed that that grievance has been held in abeyance at the departmental level. I am not seized with it.

[52] On the July 14, 2017, deadline, Ms. Gallinger emailed Ms. Lacroix, stating that she was still waiting for information from a specialist. She wrote, "I need to request an extension so as to have enough time to make an informed decision about when I will be able to return to work." On July 17, Ms. Lacroix replied, asking Ms. Gallinger how much time she was requesting. On July 20, Ms. Gallinger said that she was dealing with a number of constraints beyond her control and that the best information she had was that approximately 8 to 10 weeks were required to make an informed decision.

[53] In response, Ms. Lacroix sent an email to "… acknowledge receipt of your request to obtain an extension in order for you to make an informed decision of the options that were sent to you on July 7, 2007." She stated that the extension request was approved until September 15, 2017. The confirmation came with a fourth (and what turned out to be final) options letter dated July 31, 2017 ("*Options Letter #4*"). It was, for all intents and purposes, identical to the third letter. It detailed the same two options: (1) medical retirement, or (2) resignation, and it confirmed the September 15 deadline. Like the *Options Letter #3,* it said that termination would be considered it if she did not "take the necessary steps for separation from the Public Service." There was again no mention of her possibly returning to work.

[54] A meeting was held on August 3, 2017, between the employer and Ms. Gallinger's union representatives. Originally scheduled to discuss the grievance against the employer's denial of her leave request, instead it appears to have been focused on her employment situation. In cross-examination, Ms. Lacroix testified that she remembered the meeting and that she recalled a discussion of extending the timeline for Ms. Gallinger's sick LWOP. She could not recall a discussion about Ms. Gallinger's challenges in obtaining medical information.

[55] Ms. Gallinger did not attend the August 3, 2017, meeting, and no union representatives were called to testify. However, in an email dated August 4, 2017 (and entered on consent), Mr. Ouellette reported to Ms. Gallinger on the meeting. He told her that the employer would not extend the deadline beyond September 15, 2017. He stated that he had informed the employer of her challenges in obtaining and

submitting a medical assessment. He said that he advised the employer that there would be a grievance and a complaint to the CHRC if it proceeded to terminate the grievor. Finally, he advised her that it was "imperative" to try to meet the September 15 deadline, and he offered to assist her in asking for the doctor's assistance to meet it.

[56] Ms. Gallinger received a new note from her family physician dated September 13, 2017, which read as follows:

> *Please be advised I have seen Ioulia in the office today. She will be unable to return to work at this time. Ioulia will be having a course of treatment over the fall and then will be more able to predict her return to work. I anticipate she will definitely require gradual return to work. If her treatment goes well, this will be in the early months of 2018.*

[57] Ms. Gallinger did not provide this medical note to her employer before the September 15 deadline.

[58] The employer objected to the introduction of this note into evidence on the basis that it was "post-termination evidence" and that it was hearsay as the physician was not called to testify. The grievor's representatives argued that they were seeking to have the grievor recognize it as having been received and sent. I allowed it to be entered and said that I would consider the parties' arguments as to what weight to give it as evidence.

[59] As to why the note was not provided to the employer before the September 15 deadline, Ms. Gallinger testified that Mr. Ouellette had instructed her to provide medical information to him and that he would provide it to the employer. She also testified that she experienced technical difficulties scanning the note for him. When she did get through, she learned that he was on vacation leave. She testified that she reached out to another PIPSC representative, Dejan Toncic, and that she asked him to seek from the employer an extension to the September 15 deadline. She submitted email exchanges that indicated that Mr. Toncic said that he had made the request but that he had received no response.

[60] Ms. Lacroix testified that she received a request from Mr. Toncic to extend the deadline only well after the termination letter had been issued. She became aware of such a request only on October 4, when he requested an extension from a different Chantal Lacroix at the CBSA, who had a slightly different email address. Ms. Lacroix

testified that as she and the other person with her name were sometimes mixed up, they would advise each other immediately if they received an email intended for the other. That happened with Mr. Toncic's email; the "wrong" Chantal Lacroix forwarded it to the correct Ms. Lacroix within a few minutes of it having been sent.

C. Termination letter and follow-up (September to November 2017)

[61] As the employer did not hear anything from Ms. Gallinger before the deadline of September 15, 2017, it decided to terminate her employment. Its termination letter was dated September 22, 2017, and was delivered to her on September 26, 2017. It was signed by Mr. Tremblay. It referenced the three options outlined in *Options Letter #1* and summarized them as "… return to duty with relevant medical certification, resignation, or medical retirement subject to Health Canada approval."

[62] The letter also said that she had been provided three consecutive extensions to confirm her decision. It said that she had failed to exercise one of the options within the prescribed time frames and that the only medical information provided had been the April 19, 2017, medical note. It said that no further leave without pay would be approved beyond September 15 and that her employment was terminated effective September 22, 2017.

[63] According to the grievor's testimony, on September 26, 2017, before receiving the termination letter, she was involved in correspondence with Mr. Ouellette of PIPSC. She had succeeded in sending the medical note to PIPSC on September 22, 2017. She asked about the impact a return to work might have on her DI and health benefits. On the morning of September 26, Mr. Ouellette asked her if she had sent the note to the employer. He also indicated that her September 13, 2017, doctor's note was just that, only a note. He asked her about the status of a "final report" and whether her family physician would send a longer letter.

[64] The grievor testified that the report in question was that of her specialist. She said that she had experienced delays in seeing the specialist, delays in obtaining a report, and that there had been delays in the report making its way to her family physician. She testified that she herself had to deliver the specialist report to her family physician, who had not finished her review of it when she wrote the September 13 medical note.

[65] The specialist report was not entered into evidence.

[66] After receiving the termination letter, the evidence shows that Ms. Gallinger sought the assistance of her union in both understanding the impact on it on her DI and health benefits, and whether they had received an answer to the extension request she thought had been submitted.

[67] On October 3, 2017, Ms. Gallinger emailed Ms. Lacroix directly in response to the termination letter. She explained that she had been trying to obtain the appropriate information required to return to work. She explained that PIPSC had told her to pass the information through it, but Mr. Ouellette had been on vacation, and his colleague (Mr. Toncic) was supposed to have asked for an extension but had failed to. She stated that her employment had been terminated "… as a result of the mistakes made by [her] PIPSC representatives". She asked Ms. Lacroix to reconsider the decision and to give her an opportunity to present her medical documentation.

[68] Ms. Gallinger testified that she did not receive a response to this request. Ms. Lacroix testified (in cross-examination) that she did not reconsider the decision to terminate the grievor because there was still no medical documentation. She also testified that she did not request additional information from the grievor.

[69] Ms. Gallinger received a new note from her family physician dated October 11, 2017, which starts as follows:

> *Please be advised I have met with Ms. Gallinger on October 11 and have reviewed her recent progress. She has made some modest recovery in her symptoms, and feels she will be able to return to work on a very gradual basis starting October 30. She is motivated to return to work, although she has not fully recovered from her medical conditions. Due to the severity and duration of her illness, as well as multiple perpetuating factors, I expect the return to work place [sic] will need to occur over a period of several months to be successful.*
>
> …

[70] The note goes on to suggest that Ms. Gallinger start at two half-days per week, followed by gradual increases in time spent at work, and outlines several restrictions and proposed accommodations.

[71] The employer also objected to entering this note into evidence on the basis that it is post-termination evidence and that the physician was not called to testify.

Therefore, it should be treated as hearsay. It was entered during the cross-examination of Mr. Tremblay, who was asked if he recalled receiving it. I agreed to allow it into evidence on that basis and said that I would consider the parties' arguments as to what weight to give it as evidence.

[72] The grievor testified that her physician wrote the note after having had time to review the specialist's report in more detail.

[73] A meeting took place on October 16, 2017, between Mr. Ouellette and the employer, specifically Mr. Tremblay and a representative from Labour Relations. Ms. Gallinger was not at that meeting but received a summary of it from Mr. Ouellette. According to that summary, both the September 13 and October 11 notes were provided to the employer and it was told that it could contact the grievor's doctor if it required more information.

[74] Mr. Tremblay recalled the October 16 meeting and receiving the medical notes. In cross-examination, he testified that he had committed to respond but that once a grievance was filed, he decided not to respond as the issue would be dealt with in the grievance process.

[75] As noted, the grievance was filed on October 30, 2017. It went directly to the final level and was heard on November 24, 2017. A copy of Mr. Ouellette's presentation was entered on consent. In it, PIPSC argued that the two-year rule in the *Directive* represented an "arbitrarily set period of time" which constituted discrimination under the *CHRA*. The presentation reviewed the content and deadlines set out in the four options letters. PIPSC also argued that Ms. Gallinger had demonstrated *prima facie* evidence of discrimination and that the employer was required to demonstrate that maintaining her employment was undue hardship, which it had failed to do.

[76] Ms. Gallinger testified that she attended the grievance hearing and that she recalled the presentation of the grievance and some discussion about case law. She could not recall what level of the hearing it was. She recalled the hearing lasting maybe 45 minutes. She recalled that the September 13 and October 11 medical notes were provided.

[77] The employer issued its final-level reply on March 18, 2018, denying the grievance.

D. Sun Life benefits and assessments

[78] While on sick LWOP, the grievor applied for and received benefits through the Sun Life DI Plan. Several pieces of correspondence from Sun Life were entered into evidence, mostly on consent of the parties.

[79] Sun Life first approved Ms. Gallinger's claim in a November 25, 2015, letter that outlined her benefits as well as her obligations to keep the insurer informed of any changes to her conditions. It also stated the following:

> …
>
> *Based on the specialist's report of October 15, 2015, with the proposed treatment recommendations outlined by the specialist we would not expect the recovery period to be of an extended duration and anticipate a return to work in the near future while continuing with treatment, if required.*
>
> …

[80] In a letter dated October 28, 2016, entered via Ms. Gallinger during cross-examination, Sun Life informed her that her failure to complete an independent medical examination (IME) had resulted in the termination of her DI benefits effective October 31, 2016. She testified that the IME examiner had been rude and had badgered her, and she confirmed that she had retracted her consent for the IME.

[81] In a letter dated July 17, 2017, Sun Life reported that as a result of a new IME, Ms. Gallinger's benefits "… have been temporally [sic] approved beyond October 31, 2016." The letter went on to state that "[b]ased on the findings of the IME, with all of the proposed treatment recommendations implemented, a re-entry to work is expected in the foreseeable future, while continuing with treatment, if required."

[82] In a related letter, dated July 25, 2017, Sun Life communicated with another physician treating the grievor and provided a copy of a report from another medical specialist. The letter stated that "… a re-entry to work is expected …" and asked the doctor's assistance in preparing her to return to work.

[83] No evidence was provided to indicate whether the employer received copies of these letters before making its decision to terminate the grievor.

[84] Some post-termination correspondence with Sun Life was also entered as evidence. A medical report to Sun Life dated February 28, 2018, reported that the

grievor was "… not able to return to work in the short term." In a "Plan Member's Update" that the grievor signed on August 25, 2019, where it asked her, "Has your current medical condition improved?" she checked the "no" box.

[85] A letter from Sun Life to the grievor dated January 17, 2019, confirmed that the total DI payments from April 13, 2015, to January 31, 2019, had been $202 743 but that following the application of retroactive salary increases, it should have been $205 464. This document was entered in cross-examination, and the grievor could not recall having seen it. Her representative objected to it based on the fact the grievor did not recall it and that it was post-termination evidence. I ruled that it could be entered, subject to arguments.

E. Additional testimony of relevance

[86] At several points, Ms. Lacroix was asked, given that *Options Letters #2*, *3*, and *4* offered only two options, what she would have done had Ms. Gallinger approached her about returning to work. Each time, she stated that she would have considered the information provided, consulted with Labour Relations, and possibly considered sending her for a fitness-to-work evaluation (FTWE) by Health Canada. She did not send the grievor to Health Canada because there was never any indication from her physician of a readiness for the grievor to return to work. It is normal practice, she testified, to request Health Canada's intervention only if the doctor recommends a return to work.

[87] Ms. Lacroix also testified that although each options letter informed Ms. Gallinger that she could ask any questions, she never received any inquiry from the grievor.

[88] Like Ms. Lacroix, Mr. Tremblay also testified that he too would have considered any doctor's recommendation that stated that Ms. Gallinger was ready to return to work.

[89] In cross-examination, Mr. Tremblay admitted that in addition to having the delegated authority to terminate the grievor, he also had the delegated authority to reinstate her, although he would have done so only on the advice of Labour Relations.

[90] Ms. Gallinger testified that throughout the process of the options letters, she always wanted to return to work, in spite of the letters' contents. Upon receiving

Options Letter #2, she felt upset and flabbergasted. She did not understand how the employer had concluded that she could not return to work. She acknowledged that she did not ask questions in response to the options letters or reach out to Ms. Lacroix. She explained that she did not know Ms. Lacroix. Because of the contents of *Options Letter #2* and those that followed, she felt that the employer did not want to consider a return to work for her.

[91] She also testified that the employer never reached out to discuss the situation with her. She commented about the lack of communication and that at the relevant time, she did not appreciate how much she was expected to keep everyone apprised of her situation. She testified that she would have done things differently had she known in advance about the two year limit to her sick LWOP.

[92] The grievor testified that she always wanted to return to work provided that her doctors supported it. She expressed frustration with delays in the medical system. Once she knew that her doctor supported a return to work, she started to feel optimistic, but that came at the same time as the employer decided to terminate her. The termination had a negative impact on her health, and it reminded her of negative things she was told about her prospects for a happy life when her disabled daughter was born. She felt shame and isolation and said that the termination had had negative consequences on her mental health, finances, and family relationships.

[93] While since her termination Ms. Gallinger has continued to receive DI benefits, she was turned down for medical retirement (October 2018) on the basis that she is not totally disabled and was turned down for CPP disability benefits (June 2019) on the basis that her disability is not severe and prolonged.

[94] Since her termination, Ms. Gallinger did apply to several government opportunities but was unable to secure the kinds of references required to make it past the initial testing and interviews. She eventually started some volunteer work designed to help IT workers gain the experience required to re-enter the workforce. By the hearing, she had secured a contract position with a small private-sector company and had begun a return to work under the care of her family physician.

[95] The grievor submitted as evidence a January 20, 2020, note from that doctor recommending a gradual return to work, starting with 2 half-days per week and increasing to 5 full days per week over a 14-week period. The employer also objected

to the introduction of that evidence on the basis that it was post-termination evidence not relevant to its September 2017 decision to terminate her.

IV. Summary of the arguments

[96] I will very briefly summarize the employer's and the grievor's arguments; they will be analyzed in detail thematically in the reasons that follow.

[97] The employer's central argument is that it made a reasonable decision to terminate Ms. Gallinger's employment based on the information it had at the time the decision was made. The law is clear: the employer is not obligated to maintain an employment relationship with an employee who is not able to return to work. The CBSA acted reasonably by sending *Options Letter #1* after the grievor's two years of sick LWOP, in accordance with the *Directive*. It was being more than reasonable when it provided her with several extensions. After six months of further waiting, it still had no evidence that she would be able to return to work in the foreseeable future, and therefore, its decision should be found reasonable.

[98] In support of this core argument, the employer also argued as follows:

- the decision to terminate the grievor was not discriminatory under the law;
- even if it were found discriminatory, her inability to return to work in the foreseeable future met the test of undue hardship;
- the September 13 and October 11, 2017, medical notes provided to the employer after the termination should not be considered relevant evidence as they were provided only after the termination and therefore should be excluded;
- those medical notes should also be treated as hearsay evidence;
- in many instances, the grievor's testimony was evasive and contradictory and therefore should not be treated as credible, unlike that of Ms. Lacroix and Mr. Tremblay;
- the Board is without jurisdiction to hear many aspects of the grievor's allegations because they were not covered by her grievance;
- the grievor failed to comply fully and completely with the Board's production order;
- I should draw a negative inference from the fact the grievor did not call any medical evidence or witnesses who could be cross-examined; and
- even if the grievance is allowed, there is no basis for reinstatement or for the damages she seeks under the *CHRA*.

[99] The grievor's core argument was that the employer's decision to terminate her was discriminatory under the relevant collective agreement and the *CHRA* on the basis of her disability and that its decision did not meet the required test of undue hardship. It acted unreasonably and discriminated against her when it removed the option of returning to work from *Options Letter #2* and the subsequent options letters.

[100] The grievor did not refuse to provide information to the employer; she informed it throughout the process that she was awaiting a specialist's results before asking her physician for recommendations about a return to work. The employer's decision to terminate her was made without clear evidence that she would not return to work in the foreseeable future. The employer's witnesses could not clearly define what "foreseeable" meant to them.

[101] While acknowledging that the employer might not have received an updated note or extension request in advance of the deadline of September 15, 2017, by that date, the grievor had received clearance to consider a return to work in the near future. She and her union brought that information forward informally in October, when they asked for a reconsideration of the decision to terminate her. She and her union then formally brought the information forward through the grievance process, culminating in the presentation of the grievance at the final level in November 2017. The grievance process is intended to allow for a review, and its purpose is to give the employer a chance to reconsider its decision. The Board has the power to review and overturn the decision an employer makes in the grievance process.

V. Reasons

A. Termination for medical incapacity, and the ability to return to work in the foreseeable future

[102] This case involves a termination of employment due to the grievor's alleged incapacity to return to work for medical reasons. The employer's authority to terminate comes from the *Financial Administration Act* (R.S.C. 1985, c. F-11; *FAA*) at s. 12(1)(e), which provides that a deputy head may terminate an employee's employment "… for reasons other than breaches of discipline or misconduct …".

[103] The grievance challenged the employer's termination decision on the basis that it was not reasonable and that it discriminated against the grievor on the basis of disability, in contravention of both the relevant collective agreement and the *CHRA*.

[104] The employer's decision to send *Options Letter #1* and to start the process leading to the termination was made under the provisions of the *Directive* , which states as follows:

…

> *Persons with the delegated authority are to regularly re-examine all cases of leave without pay due to illness or injury in the workplace to ensure that continuation of leave without pay is warranted by current medical evidence. Leave without pay situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances.*
>
> …

[105] In the final-level grievance presentation, PIPSC argued that the *Directive* is discriminatory because it provides that situations in which employees have disabilities are to be resolved within an "arbitrarily set period of time" (i.e., the two-year mark). However, this was not the focus of the grievor's arguments at the hearing. Instead, they focused on whether the employer violated its legal obligations in her specific case.

[106] The relevant collective agreement is that between PIPSC and Treasury Board for the CS group, with the expiry date of December 21, 2018. The provision prohibiting discrimination can be found at clause 43.01. It provides that there shall be no discrimination, interference, restriction, or coercion with respect to an employee by reason of, among other grounds, disability.

[107] According to s. 226(2)(a) of the *Act*, an adjudicator or the Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA* (other than its provisions relating to equal pay for work of equal value), whether or not there is a conflict between the *CHRA* and the collective agreement.

[108] The *CHRA* states at s. 7, "It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination." Section 3 states that disability is one of the prohibited grounds of discrimination.

[109] It is up to the grievor to establish on a *prima facie* basis (meaning at first view) that a discriminatory practice has occurred. That is, she must present evidence "… 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 respondent-employer." (*Ontario Human Rights Commission v. Simpson-Sears*, 1985 CanLII 18 (SCC), [1985] 2 SCR 536 at para. 28).

[110] In response, the employer can refute the allegation of *prima facie* discrimination or present a defence based on section 15 of the *CHRA*, for which the relevant provision in this case reads as follows:

> *15(1) It is not a discriminatory practice if*
>
> *(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement ….*

[111] At s. 15(2), the *CHRA* states that for any discriminatory practice to be considered to be based on a *bona fide* occupational requirement (BFOR),

> *… it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

[112] With respect to the question of what would constitute undue hardship, the employer argued that the case law has established that it is not unreasonable for employment to be terminated when an employee cannot demonstrate an ability to return to work within the foreseeable future. The Supreme Court of Canada set out the principles to apply in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, in particular at paragraphs 14 to 19, as follows:

> *[14] … [T]he goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.*
>
> *[15] However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration….*
>
> *[16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.*

> *[17] … However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.*
>
> …
>
> *[19] … The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.*

[113] The employer cited a number of cases in which the Board (or its predecessors) applied these principles in terminations of employment made under s. 12(1)(e) of the *FAA*. Each involved a termination for medical incapacity and the application of the *Directive*.

[114] The case of *Calabretta v. Treasury Board (Department of Public Safety and Emergency Preparedness)*, 2015 PSLREB 85, concerned an employee who had been off work on extended sick leave from July 2010 to January 2013 and who attempted to return to work with an accommodation but returned to sick leave in June 2013. That employer, after extending her leave several times, requested that she participate in an FTWE in February 2014, which concluded that "…a fitness to work assessment could be completed in 6 to 9 months to determine **when and if** a return to work could be attempted" (at paragraph 297, emphasis in the original). On that basis, and having heard additional evidence that the grievor's return was "…by no means a certainty" (at paragraph 298), the Board (known then by its previous name, the Public Service Labour Relations and Employment Board), applied the principles in *Hydro-Québec,* concluded that employer had established undue hardship, and upheld the termination.

[115] In *Belisle v. Deputy Head (Department of Aboriginal Affairs and Northern Development)*, 2016 PSLREB 88, the Board also applied *Hydro-Québec* and determined that what matters is the information the employer had on hand as of the dismissal. In *Belisle*, the grievor had been away from the workplace for 8.5 years as of the termination. Before that point, his physician had submitted a note stating that he was "guardedly optimistic" that a return to work could be accomplished in two years' time (see paragraph 47). In that context, the Board found that it had been reasonable for the deputy head to seriously doubt that a return to work would take place in the foreseeable future, and the grievance was dismissed.

[116] In *St-Denis v. Deputy Head (Department of Public Works and Government Services)*, 2019 FPSLREB 46, the grievor had been on sick LWOP, and like Ms. Gallinger, had been provided with an options letter that set out her choice to return to work, medically retire, or resign. That employer, in the face of a medical note stating that "…there is no plan for return to work in the foreseeable future" (at paragraph 106), concluded that a return to work was not forthcoming, and another options letter was issued, with just two options: medically retire or resign. When the grievor did not make a choice, she was terminated. Once again, applying the principles in *Hydro-Québec*, the Board found that employer's actions reasonable and dismissed the grievance.

[117] Applying these arguments to Ms. Gallinger's situation, the employer argued that it was justified requiring her to provide medical information supporting a return to work, as in *Calabretta*, *Belisle*, and *St-Denis*. When she did not do so within the time frame it set out, it was reasonable for the employer to conclude that a return to work was not forthcoming and to narrow the options outlined in its letters to her, as the employer did in *St-Denis*. It argued that despite repeated extensions of its deadline, Ms. Gallinger never provided any information other than the April 19, 2017, note from her family physician that stated she was waiting to see a specialist.

[118] Eventually, the employer extended the deadline until September 15, 2017, and when that day came and went with no response from either Ms. Gallinger or her union, it prepared and signed the termination letter. As in *Calabretta*, the employer argued that the test of whether its decision was reasonable must be made on the basis of the information it had at the time. It did not have the September 13, 2017, medical note because the grievor had not provided it.

[119] Also following *Belisle* (at paragraph 48), the employer argued the fact that Ms. Gallinger was receiving Sun Life DI benefits and that she continued to receive them from the time she was terminated until the hearing is further proof that she had not been able to return to work within the foreseeable future.

[120] Citing *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970, the employer argued that it is well established that the search for accommodation requires a multi-party inquiry involving the employer, the union, and the employee. In this case, the grievor made no accommodation request. She never provided medical information suggesting a requirement for an accommodation. As in *Belisle*, the employer should not

be faulted for not requesting an FTWE; Ms. Gallinger never provided information to justify requesting one.

[121] The employer also does not have an obligation to act as its own detective, it argued, citing *Maher v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 93. As in the cases cited earlier, *Maher* also involved the application of *Hydro-Québec*. The grievor had been on sick LWOP and had been receiving DI for seven years before her termination. At adjudication, she argued that her employer should have required an FTWE. The Board concluded that "… an employee carries the burden to show that she or he is medically fit to [return to work] …" (at paragraph 59).

[122] In light of this, any suggestion that the employer should have sought more information from Ms. Gallinger would have no merit. The employer gave her many opportunities to ask questions (as stated in each options letter) and many extensions to provide the medical information indicating a possible return to work. Neither questions nor medical information arrived, and thus, its decision to terminate her employment was reasonable, argued the employer.

[123] In response to these arguments, the grievor argued that there are three elements that must be demonstrated to establish a *prima facie* case of discrimination. She cited *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101, which summarizes as follows (at paragraphs 75 to 77) those elements: (1) Does the grievor have a disability (i.e. a prohibited ground of discrimination)? (2) Has she experienced an adverse impact with respect to employment? (3) Can she show that the disability was a factor in that adverse impact? After applying the test, the onus shifts to the employer in this context to establish its BFOR defence by demonstrating that accommodating the grievor's needs would impose undue hardship on it, considering health, safety and cost.

[124] There is no doubt in my mind that the grievor has established a *prima facie* case of discrimination. Firstly, she established that she had a disability. As she argued, the employer did not dispute it, and its *Options Letters #2* to *4* refer to her disability. Her eligibility for DI from November 2015 onwards also established that she had a disability. Secondly, her employment was terminated, and so she experienced an adverse impact. Thirdly, the fact that her employment was terminated due to medical incapacity after more than two years of sick LWOP establishes that her disability was a factor in the termination.

[125] The issue then is whether the employer met the test for undue hardship as outlined in the *CHRA*, *Hydro-Québec*, and the other cases cited earlier.

[126] I do not find that Ms. Gallinger's case is on par with the situation in *Hydro-Québec* or in any of the cases cited by the employer.

[127] The grievor in *Hydro-Québec* had missed 960 days of work in a 7-year period and was on extended sick leave as of the termination. The treating physician had recommended that she stop working "for an indefinite period" (at paragraph 4) and had received a psychiatric assessment concluding that the employee would not be able to return to work without a recurrence of chronic absenteeism. With these facts in mind, the Supreme Court reached its conclusion that her employer had been justified concluding that the employee was unable to fulfill he fundamental obligations arising from the employment relationship.

[128] Similarly, in *Calabretta*, the grievor had been absent from work for almost 4 years, and that employer had in hand at the time of the termination both a Health Canada report and a psychologist's report that indicated a return to work was only a possibility dependent on a future assessment. Likewise, in *Belisle*, the grievor had been away from the workplace for 8.5 years, and that employer had received a doctor's note that was only "guardedly optimistic" about a return to work two years in the future. The grievor in *Maher* had been on sick LWOP for 7 years when that employer received a cryptic note suggesting that the grievor hoped to return to work in about a year's time. The grievor in *St-Denis* was terminated after 3.5 years of sick LWOP on the basis of a physician's note clearly stating that she would "… not be working in the foreseeable future …" (at paragraph 23), which had been submitted almost a year in advance of the termination.

[129] In other words, in all of those cases, the employers in question had in hand clear statements from medical professionals that the grievors' returns to work were "indefinite", "only a possibility", perhaps two years away, or "… not … in the foreseeable future …".

[130] Ms. Gallinger's medical note of April 19, 2017, did not say that. It was **not** a clear, positive statement of her inability to return to work in the foreseeable future, and it did not speculate about a possible return to work at some point in the distant future. It simply said that she was waiting to see a specialist.

[131] I accept that that note fell short of what the employer was seeking in terms of a confirmation of a return to work. I agree that it provided no outline of the functional limitations and the required accommodations. However, I do not accept the employer's argument that its content justified Ms. Lacroix's **conclusion** that Ms. Gallinger could not return to work in the foreseeable future.

[132] In light of that, I do not find it reasonable that the employer removed the first option (a possible return to duty) from the choices offered to Ms. Gallinger in *Options Letters #2* to *4*. I find disingenuous the assertions of Ms. Lacroix and Mr. Tremblay that nevertheless, they would have considered a return to work. Ms. Lacroix testified that because Ms. Gallinger was still an employee, she of course had the right to return to work, and that on page 2 of *Options Letter #2*, the text indicates, in what looks like a standard clause near the end of the letter, that termination would be considered only if she did not return.

[133] I do not find it reasonable that the employer expected Ms. Gallinger, who was still on sick LWOP at the relevant time, to navigate that logic in the face of a letter that clearly stated in its opening paragraphs that she had to choose between one of only two options that were bolded, underlined, and spelled out in those letters: (1) medically retire, or (2) resign. *Options Letters #3 and #4* did not even contain that standard clause, leaving the letters unambiguous that the employer expected her to select from only those two options.

[134] Ms. Gallinger testified that the removal of the option of returning to work in *Options Letter #2* left her feeling "upset and flabbergasted." I find that testimony credible and that it was a normal reaction for someone who was already struggling to overcome her disability.

[135] The employer challenged my jurisdiction to rule on the contents of the three last options letters on the basis that Ms. Gallinger did not grieve their contents or mention them in the grievance she filed and referred to adjudication. I shall return to those arguments later in my reasons.

[136] In reaching this conclusion, I am **not** saying that an employer is obliged to extend sick LWOP indefinitely in the face of uncertain medical information. The issue is whether it established that accommodating Ms. Gallinger by waiting for further medical information would have constituted undue hardship.

[137] I note that Ms. Gallinger was terminated after just 2.5 years of sick LWOP, which is a shorter time than the grievors in each of *Hydro-Québec* (extended absences over 7.5 years), *Calabretta* (4 years), *Belisle* (8.5 years), *Maher* (7 years), and *St-Denis* (3.5 years). I accept the employer's argument that the jurisprudence does not establish that undue hardship is reached when a specific time has passed. In *Hydro-Québec*, the Supreme Court does not say that an employer must wait 2 years or 5 years; the standard is that undue hardship is reached when the employee cannot return "for the foreseeable future." This is necessarily a fluid concept that must be considered on a case-by-case basis. Nevertheless, in each of the five cases just cited, the grievors had clear evidence that they would not return to work in the foreseeable future, combined with employers who had already provided sick LWOP of a greater duration than the CBSA offered Ms. Gallinger.

[138] I also note that in *Options Letter #1*, the employer stated that in the **absence** of the medical information requested, it might do the following:

> *… request that you undergo a fitness to work evaluation … to determine the likelihood of a return to work in the near future and to establish if any modifications to work duties or other types of accommodation may be required upon your return to work.*
>
> …

[139] However, Ms. Lacroix testified that she would have implemented this option only had there been a positive indication of a return to work by the grievor. Since there was none, the employer concluded that the grievor would not return to work in the foreseeable future, and it did not request an FTWE.

[140] I find that it was not reasonable for Ms. Lacroix to tell the grievor that in the **absence** of a medical note, she **might** request an FTWE, and then testify that she would have requested an FTWE only **had** a note been provided. Having said that she might request an FTWE, I find it unreasonable that she then did not request one, given the content of the April 19, 2017, medical note.

[141] I also note that the employer's actions were in contrast to the situations in *Calabretta*, *Maher*, and *St-Denis*, in which the employers in question in reality did request an FTWE or an IME from Health Canada before making their termination decisions.

[142] In *Belisle*, the employer requested no FTWE or IME, which the Board found reasonable in light of clear evidence that no return to work was likely in the foreseeable future (at paragraph 46).

[143] In addition to removing the option of returning to work from *Options Letter #2* onwards, I also find that the employer acted unreasonably by providing the grievor with insufficient extensions to the deadlines it set. *Options Letter #1*, sent on March 15, 2017, set a deadline of 40 days for her to respond. The April 19, 2017, medical note from the family physician said that following the grievor's appointment with a specialist, she hoped to provide an update by July 1. The employer responded with its May 18, 2017, *Options Letter #2*, setting a June 2, 2017 (15-day), deadline for choosing from the two options that had been highlighted. The grievor then had to seek a further extension with the assistance of her union, which the employer set at July 10, 2017.

[144] Following its rejection of her request for leave for the care of immediate family, on July 7, the employer set the next deadline for July 14 (7 days). The grievor then sought a further extension, and on July 20, she estimated that "8-10 weeks" would be required. The employer's July 31 response set a deadline of September 15, 2017, which was, at best, on the short end of that estimate.

[145] In conclusion, I have found that several of the employer's actions in the March 2017 - July 2017 time frame were not reasonable and were discriminatory on the basis of disability; namely, its conclusion about the content of the April 19, 2017, letter, the removal of the "return to work" choice from the second and subsequent options letters, the failure to request an FTWE after having outlined one as a potential course of action, and the short deadlines it set in several of the options letters.

[146] Having reached those conclusions, I will now turn to the issue of the employer's actions after Ms. Gallinger failed to meet the September 15, 2017, deadline.

B. The grievor's failure to respond by September 15, 2017

[147] In *Options Letter #4*, the employer set a clear deadline of September 15, 2017. In addition, it appears to have informed Mr. Ouellette at the August 3, 2017, meeting that it would not grant more extensions beyond that date. Certainly, Mr. Ouellette told the grievor as much in his email report to her of August 4, 2017.

[148] The evidence clearly shows that the grievor did not meet the employer's deadline.

[149] Ms. Gallinger testified that she received the September 13, 2017, medical note from her family physician on that date (which was a Wednesday). She did not forward it to the employer. Instead, she testified that she followed the directions she said her union had given her to provide the medical note through it. She also said that when she tried to send it to the union, she encountered technical difficulties.

[150] The employer questioned why no evidence of PIPSC's direction was provided. Furthermore, it questioned why the grievor managed to deliver the note to her union only on September 22, more than a week later. It questioned the credibility of her testimony that she experienced technical difficulties getting the note to the union. Through cross-examination and a reference to email, it established that at the time, Ms. Gallinger owned an iPad. It argued that as an IT professional with a master's degree, she had the technology and capacity to forward that note to her union — if not to the employer directly — in a more timely fashion.

[151] The grievor testified that after receiving the September 13 note, she tried to reach Mr. Ouellette. When she learned that he was on holiday, she contacted Mr. Toncic, who told her that he would request an extension beyond September 15. Considerable time was devoted in the cross-examinations of both Ms. Lacroix and Ms. Gallinger to whether Mr. Toncic ever made such a request. He was not called to testify. I am left to conclude that no request was made by him before the September 15 deadline. The only evidence of such a request actually having been made is an email that Mr. Toncic sent on October 4, 2017, in which he appears to attempt to revive the request in an email sent to the "wrong" Chantal Lacroix.

[152] The employer argued that it cannot be held responsible for not receiving the September 13, 2017, medical note before deciding to terminate Ms. Gallinger's employment. It was not responsible for the fact that she followed Mr. Ouellette's alleged instructions not to send her medical report directly to the employer. It was not responsible for Mr. Toncic's failure to request an extension. It argued that if the grievor has a cause of action against anyone, it is not the CBSA but her union. As noted earlier, following the Board's decision in *Maher*, the employer argued that it is not its

responsibility to act as a detective and dig for information that the grievor is responsible for providing.

[153] To underline its argument, the employer cited the Federal Court of Appeal's recent decision in *Attorney General of Canada v. Duval*, 2019 FCA 290, concerning the Board's decision in *Duval v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52. In its decision, the Board ruled that the Correctional Service of Canada (CSC) had failed to properly accommodate the grievor in that case and ordered a remedy that included reinstatement to the date on which the grievor's psychiatrist had deemed him fit to return to work. In overturning the Board's decision, the Federal Court of Appeal ruled as follows, at paragraph 24:

> *[24] … However, CSC did not learn of the altered medical opinion until three weeks later and the CSST did not sanction the return to work in an alternate position until mid-March.* ***CSC cannot in any way be faulted for failing to respond to a request for modified duties that had not even been communicated to it.*** *In reasoning as it did, the Board unreasonably conflated the respondent's ability to work with CSC's obligation to compensate and return the respondent to work.*
>
> [Emphasis added]

[154] The grievor's failure to meet the September 15 deadline is one of the most troubling aspects of this case. Clearly, the employer had informed her that failing to exercise an option by that deadline could result in her termination. Her union had informed her that the employer would not grant an extension and that a failure to meet the deadline could result in her termination.

[155] The evidence I heard led me to conclude that after she met with her doctor on September 13, 2017, Ms. Gallinger struggled with the right course of action. She testified that her physician had said that she could support a gradual return to work that could start in early 2018, which the grievor wanted to do. But she believed that her union thought that she should work through it. When she finally got the note to the union, just over a week too late, Mr. Toncic told her that she should consider the impact on her DI benefits. Her correspondence with him indicates that she tried to assess the impact on her health and dental benefits. In the midst of this, the employer's termination letter arrived.

[156] Eventually, she decided to write directly to Ms. Lacroix in the email of October 3, 2017, titled "Request for Assistance." She explained that she had been having difficulty obtaining information from the specialists. She explained the situation with the union and stated that she felt that her employment was terminated "… as a result of the mistakes made by [her] PIPSC representatives." She then appealed directly to Ms. Lacroix in the following ways:

> …
>
> *I have consistently indicated that it is my intention and desire to return to work, and the delay was only in securing the appropriate information to make that return successful. It has been very frustrating trying to get information from the extremely slow health care system, but I assure you that the delays are theirs, not mine.*
>
> …
>
> *I am writing to ask you to please reconsider the decision, and to give me the opportunity to present my medical documentation, so that we can reach a mutually acceptable solution. Please let me know what you are able to do for me to help resolve this.*

[157] Ms. Lacroix provided no response to the email.

[158] I am struck in this case by how much of the process unfolded purely through the exchange of a few letters and emails. Other than the discussion at the August 3, 2017, meeting between Mr. Ouellette, Ms. Lacroix, and others, I have no evidence that any conversations took place between the employer and the grievor about her situation. She never met Ms. Lacroix before the hearing. She met Mr. Tremblay for the first time only at her November 2017 grievance hearing.

[159] This is in contrast to the fact situations in *Belisle* and *Calabretta* in particular, in which those employers engaged in a number of discussions with the affected employees. *St-Denis* is somewhat different in that the grievor refused direct contact with the employer, insisting that they go through her physician or her lawyer. But even then, the employer demonstrated a high degree of diligence in following up with those representatives when information was not forthcoming (see *St-Denis*, at paras. 44 and 54).

[160] In this case, after the grievor told the employer that 8 to 10 weeks might be required, it set the September 15, 2017, deadline. It appears that at the August 3, 2017, meeting, the grievor's union representative informed the employer that she was having

difficulty obtaining a medical opinion. In light of that information, when the September 15 deadline came and went, did the employer take steps to contact either the grievor or her union representatives to inquire as to whether more information was forthcoming? It did not. Instead, it acted purely on the absence of information and issued her termination letter.

[161] I must hold Ms. Gallinger primarily responsible for not meeting the September 15 deadline. However, I find that the employer opted to move directly to termination when it had other reasonable options, i.e., a phone call or an email to either the grievor or her union representative to check if any further information might be forthcoming. In my view, such steps would **not** have represented undue hardship. They would have fulfilled only the employer's share in the multi-party effort to consider Ms. Gallinger's situation.

C. The informal resolution and grievance processes

[162] Having concluded that the employer acted unreasonably in the time leading to the termination and in not following up with her to find out if the additional medical information would be forthcoming, my analysis could end here. The employer has not established that it would have experienced undue hardship if it had not terminated her employment.

[163] But in addition, I want to turn to the question of the employer's responses to the grievor's appeals during the informal resolution and grievance processes that followed the decision to terminate her.

[164] I consider the informal resolution process to include both the grievor's October 3, 2017, personal appeal to Ms. Lacroix to reconsider the termination letter (as just discussed) and Mr. Ouellette's October 16, 2017, meeting with Mr. Tremblay and a labour relations advisor. In the former, the grievor expressed her strong desire to return to work. At the latter, the employer was presented with both the September 13, 2017, medical note and the new one dated October 11, 2017, and Mr. Ouellette asked the employer to reconsider its termination decision and invited it to contact the grievor's doctor if it had any questions.

[165] At that meeting, the employer agreed to listen and to take what was said under advisement, but no response was provided before the grievance was filed. As noted

earlier, Mr. Tremblay testified that he decided not to respond, given the grievance filing.

[166] The grievance was filed on October 30, 2017, and to the credit of all parties, was heard quickly: the final-level hearing was held on November 24, 2017. At it, Ms. Gallinger's medical notes of September 13 and October 11, 2017, were again presented to the employer, along with a request to rescind the termination and a request that she be accommodated and returned to work effective October 30, 2017.

[167] The final-level reply was issued on March 20, 2018, and it stated that the employer's termination decision had been made on the basis of the information it had on hand at the time and that it would not be changed.

[168] During this period, the employer did not request additional information from Ms. Gallinger, her physician, or Sun Life. Nor did it request the FTWE or IME it had said it might order in *Options Letter #1*.

[169] The employer argued that the only question before me is whether its September 22, 2017, decision to terminate Ms. Gallinger's employment was reasonable on the basis of the information it had on hand at the time.

[170] While acknowledging that Mr. Tremblay had the delegated **authority** to reinstate Ms. Gallinger, the employer argued that he did not have a delegated **obligation** to.

[171] The employer went on to argue that had the grievor wanted to challenge Mr. Tremblay's decision not to reconsider the termination, she could have filed a grievance. That said, by the time Mr. Tremblay was asked to reconsider the termination, Ms. Gallinger was no longer an employee. Therefore, the employer argued, the Board would not have jurisdiction over such a grievance, as s. 209 of the *Act* only gives the Board authority to adjudicate grievances filed by **employees**.

[172] The grievor argued that the September 13 and October 11, 2017, medical notes provided the information that the employer required to commence a return to work for her. While acknowledging that the employer did not have them before issuing the termination letter, they were provided to it shortly after that. The requests to reconsider the termination decision were reasonable and were made in an effort to informally resolve the situation before a grievance was filed. The grievance was filed to

protect timelines, and the employer still could have reconsidered its decision. Once the grievance was filed, the employer was obliged to consider the information presented by the grievor. The grievance process allows for a review, and its purpose is to give the employer a chance to reconsider a decision.

[173] In support of this argument, the grievor cited *York Region District School Board v. Ontario Secondary Teachers' Federation (District 16)*, [2005] O.L.A.A. No. 662 (QL) ("*York Region*"). The case involved the termination of a teacher for just cause. The union sought to introduce new allegations at arbitration (that the termination was "tainted by racism"). In weighing the issues, at paragraph 24, Arbitrator Paula Knopf recognized the following:

> ***24*** *… there is almost a presumption against allowing issues to be raised at arbitration that were not canvassed during the grievance process. This is because the value of the grievance process cannot be underestimated. It is critical that parties take the opportunity that the grievance procedure affords to identify their positions, discuss the situation, explore alternative approaches, seek a resolution of their differences or, at the very least, narrow the scope of their disagreement.…*

[174] *York Region* was primarily about the extent to which new allegations can be considered at arbitration, which is an issue I will consider later. The relevant point here is that the grievance process has value because it provides the parties with an opportunity to resolve their differences. In so doing, the decision maker in the grievance process should fully consider the information presented there.

[175] In analyzing these arguments, I point out that the medical note dated October 11, 2017, proposed a graduated return to work starting at the end of that month. Its content was identical to what Ms. Lacroix and Mr. Tremblay testified they were looking to receive before the employer's deadlines expired: a note that proposed a return to work in the near future and that outlined the functional limitations and accommodations measures that the employer needed to consider. It was, in other words, exactly the kind of note that would have advanced the accommodation process to the next stage.

[176] I agree with the grievor's argument and Arbitrator Knopf's reasoning in *York Region*. In my view, the filing of a grievance obligates the employer to reconsider its decision to terminate an employee. The employer's argument that it was not required

to reconsider its decision because Ms. Gallinger was no longer an employee during either the informal meeting process or the grievance hearing is a position that cannot be sustained under the *Act*.

[177] Looking at the *Act*, among other principles, the preamble commits the Government of Canada to a "… fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment …" and sets out the aspiration that effective labour-management relations requires "… collaborative efforts between the parties, through communication and sustained dialogue …".

[178] The *Act* goes on at s. 207 to set out a requirement that every deputy head establish an informal conflict management system (ICMS) to resolve disputes. While I have no evidence to suggest that a departmental ICMS process was offered or accessed in this case, the efforts of the grievor and her union to resolve the issue informally certainly lived up to that spirit of the *Act*.

[179] Finally, the *Act* sets out at s. 208(1)(b) the right of employees to file grievances "… as a result of any occurrence or matter affecting his or her terms and conditions of employment." At section 209(1), it states that an employee "… may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that **has not been dealt with to the employee's satisfaction** …" (emphasis added).

[180] The employer made its decision to terminate Ms. Gallinger's employment on September 22, 2017. She decided to grieve that decision on October 30, 2017. The employer heard the grievance on November 24, 2017. It issued its final-level reply on March 20, 2018. Being challenged in this reference to adjudication is the employer's September 22, 2017, decision and its response to the grievance.

[181] The grievance process as set out in the *Act* relies upon a presumption that employers will fully consider information presented during that process, which in this case included the September 13 and October 11, 2017, medical notes. The employer's witnesses testified that had a note like the one of October 11 come to them before September 15, 2017, they would have called Labour Relations, sought advice, and likely proceeded further with the accommodation process. It might have included sending Ms. Gallinger for an IME or FTWE.

[182] The employer decided not to reconsider its decision. It decided not to seek additional information from Ms. Gallinger's physician after receiving these notes. It decided to stand by its termination decision. Its decision not to assess the additional information and to reconsider the termination of Ms. Gallinger's employment is part and parcel of the grievance before me.

[183] I find that faced with the September 13 and October 11, 2017, medical notes, the reasonable step for the employer would have been to use its discretion to seek additional information from Ms. Gallinger's physician or to send her for an FTWE or IME. Its failure to means that it failed to demonstrate that it could no longer accommodate her without undue hardship.

[184] Nevertheless, I will consider another of the employer's arguments, which is that the September 13 and October 11, 2017, medical notes are "post-termination evidence" that it was not required to consider and that the Board should not accept as evidence in ruling on the grievance.

D. The admissibility of post-termination evidence

[185] The employer argued that the leading case on the admissibility of post-termination evidence is *Cie minière Québec Cartier v. Québec*, [1995] 2 SCR 1095 ("*Cartier*"). The test is that "… such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented" (see paragraph 13). In *Cartier*, an employee dismissed after missing work repeatedly due to alcoholism underwent successful treatment between his dismissal and the arbitration hearing. The arbitrator ordered his reinstatement.

[186] Following two court appeals, the case went to the Supreme Court, which overturned the arbitrator's decision. It reasoned that "[t]o hold otherwise would be to accept that the result of a grievance concerning the dismissal of an employee could vary depending on when it is filed and the time lag between the initial filing and the final hearing by the arbitrator." This would lead to the absurd result that any dismissal could be overturned if an employee, after the shock of being dismissed, decided to rehabilitate himself or herself, the SCC concluded.

[187] *Cartier* was cited in *Casey v. Treasury Board (Public Works and Government Services Canada)*, 2005 PSLRB 46. The grievor in *Casey* had been terminated in September 2001 following a long series of on-duty and off-duty incidents involving drug and alcohol use, which eventually landed him in prison. It its 2005 decision, the former Public Service Labour Relations Board recognized that the grievor had been rehabilitated following his incarceration but applied *Cartier* to dismiss the rehabilitation as post-termination evidence that the employer could not have considered at the time of the termination.

[188] The employer argued that I should apply *Cartier* and rule that the September 13, 2017, medical note is not admissible because it was not in the employer's hands when the decision to terminate the grievor was made. Even more strongly, it argued that the October 11, 2017, medical note (which stated that Ms. Gallinger could commence a return to work by the end of October 2017) falls into the category of post-termination evidence as it was authored after the decision to terminate her was made.

[189] The grievor's response to this argument was that *Cartier* states that it is acceptable to use evidence if it sheds light on the decision to terminate. In this case, evidence given after the termination and during the grievance process illustrated that the decision to terminate should be considered discriminatory. The September 13 medical note satisfies that exception as it was authored before the termination. So does the October 11 note, the grievor argued, as it is based on the family physician's assessment of the specialist report, which was developed before the termination.

[190] The grievor cited *City of Ottawa v. Amalgamated Transit Union, Local 279*, [2012] O.L.A.A. No. 170 (QL) ("*City of Ottawa*"), in which an arbitrator ruled that he would hear the evidence of a psychiatrist who had assessed the grievor, a bus driver, after his dismissal. Arbitrator Brian Sheehan ruled that despite the fact the assessment took place after the grievor's termination, he would allow the testimony because it would "… touch on the grievor's mental state as at the time of the termination of his employment." In other words, he made the decision because the testimony was not restricted to post-termination rehabilitation, as in *Cartier*.

[191] Throughout their testimonies, both Ms. Lacroix and Mr. Tremblay stated that had Ms. Gallinger brought forward medical information indicating a return to work

before the deadline of September 15, 2017, they would have considered it. Both indicated that their response would have been to consult with Labour Relations and that their next step might have been either to ask the physician more questions or to order an IME from Health Canada to conduct an FTWE.

[192] I have already concluded that by deciding to terminate the grievor's employment when it did, the employer failed to demonstrate that it had accommodated the grievor to the point of undue hardship. Therefore, the question of whether these notes were post-termination evidence is moot, since the termination should not have taken place when it did.

[193] I have also concluded that the issue before me is not simply what the employer knew as of the termination on September 22 but what it learned during the grievance process that challenged that decision. At a minimum, this required the employer to consider what was placed before it at the November 24 grievance hearing and arguably extended until it reached its final decision in March 2018.

[194] From those conclusions alone, I find those two medical notes do not constitute post-termination evidence, and I allow them into evidence (subject to considering what weight to place on them, which I will address shortly).

[195] Even if I were to apply the test set out in *Cartier* and *City of Ottawa*, I would have accepted the notes as addressing the state of the grievor's health at the time the employer made its termination decision.

[196] The employer also raised an objection in relation to the January 20, 2020, medical note from the grievor's family physician, on the basis that it was post-termination evidence. The grievor argued that the note indicates an ability to return to work on her part.

[197] In return, the grievor noted that the employer argued that the evidence demonstrated that she has been unable to return to work since her termination and that it relied on several post-termination documents during its cross-examination of her (including the content of an August 2018 application for medical retirement, the content of an August 25, 2019, Plan Member's Update that she submitted to Sun Life, and the content of an October 2019 "disability offset agreement").

[198] The grievor also introduced into evidence a document dated October 12, 2018 (a letter from Health Canada denying her application for medical retirement), and a document dated June 12, 2019 (a letter from Service Canada denying her application for CPP disability benefits).

[199] In my assessment, none of these documents is relevant to my analysis of the decision to terminate the grievor, but they are of relevance in considering the remedy, and so to that extent, I've allowed them into evidence and will consider them in that analysis.

E. This grievance and *Burchill*

[200] The employer argued that the Board lacks jurisdiction to rule on a number of aspects of the issues the grievor raised at the hearing, citing *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), and a recent Board decision, *Smith v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 116. The *Burchill* decision stands for the proposition that a grievor cannot change the nature of a grievance or add different elements to it after it has been referred to adjudication.

[201] The first objection relates to the issue of the employer's denial of the grievor's request for leave without pay for the care of immediate family in July of 2017. She argued that the denial was discriminatory, for which she cited *Edwards v. Treasury Board (Canada Border Services Agency)*, 2019 FPSLREB 62, as the authority.

[202] In *Edwards*, the CBSA had refused to allow two employees to take personal leave without pay while they were on extended sick LWOP, on the basis that they could not start a new kind of leave without pay while they were on sick LWOP. The Board found that the employer had breached the relevant collective agreement and that it had breached the no-discrimination provisions of that agreement and the *CHRA*. At the hearing, the grievor did not ask me to rule on this issue but did cite the denial as an example of the employer's discriminatory treatment of her.

[203] The parties confirmed that Ms. Gallinger filed a grievance on the denial of that leave. Following the hearing, they confirmed that the grievance remains in abeyance at the internal level. I am not seized of it. Consequently, I decline to comment any further on the CBSA's denial of Ms. Gallinger's leave request as I lack jurisdiction over it. Consequently, the first *Burchill* objection is moot.

[204] The employer's second *Burchill* objection relates to the removal of the return-to-work option from *Options Letter #2*, *#3*, and *#4*. It argued that the contents of those letters could have been grieved; they were not. It maintained that the wording of the grievance did not address the contents of the options letters; nor did the union argue the contents at the grievance hearing in November 2017. Consequently, the employer did not address those contents in its final-level reply. The grievor had testified that in late July or early August 2017, Mr. Ouellette advised her to hold off on filing a grievance to see what the employer decided to do. The employer cited an email she sent to her union on July 31, 2017, in response to *Options Letter #4*, in which she stated that she wanted to challenge the fact that the letter contained only two options. No grievance was filed. The union suggested instead that an updated medical assessment was still required and that it would likely determine the action that the employer would take. Therefore, the Board should not make any ruling with respect to the options letters, argued the employer.

[205] The grievor argued that although she did not file grievances about the letters, they were an essential part of the circumstances that led to the termination. They are evidence that the employer's argument that a return-to-work option remained available was flawed. She asked, how can an employee know that she can return to work when the option has been removed, given the employer's control over the process?

[206] I find that the options letters were an essential part of the process that led to the termination, and I reject the employer's *Burchill* objection. Each options letter explained that if Ms. Gallinger did not exercise one of the options offered, she could be terminated. The termination letter, the content of which was clearly grieved, contains a statement that reads as follows:

> *… from the initial letter sent to you March 15, 2007 … you have been offered the following options: return to duty with relevant medical certification, resignation, or medical retirement… Following this letter Management provided three (3) consecutive extensions to give you the opportunity to confirm your decision.*
>
> …

[207] This statement in the termination letter clearly mispresents what took place. The facts show that *Options Letters #2*, *#3*, and *#4* clearly outline just two options. I am satisfied that the grievance about the termination letter challenges the options letters process that led to the termination.

[208] Furthermore, the content of the union's grievance presentation to management in November 2017 made clear reference to the options letters and to the fact that the first one provided three options and the subsequent ones, only two.

[209] From those points alone, I conclude that I have jurisdiction to find that the contents of the options letters are at issue in this case.

[210] However, I will take the analysis one step further. The employer's argument was in effect a suggestion that to even question the content of each options letter, Ms. Gallinger would have had to file a grievance after each and every letter. I do not find this suggestion at all helpful to fostering effective labour-management relations. I take note of Arbitrator Knopf's analysis in *York Region*, in which she allowed allegations of racism to be considered at arbitration, writing as follows (at paragraph 23):

> ***23*** *The seminal case of Blouin Drywall, supra, determined that "the board [of arbitration] is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the collective agreement provisions". That case, and its subsequent applications, have established that the grievance must identify the issue between the parties, and that issue then forms the basis of the arbitrator's jurisdiction. However, the parties to the collective agreement are not expected to be precise in their legal articulation of the grievance. Grievances will not be defeated simply because of defects in form. It is to everyone's advantage that the true nature of the dispute will be litigated. On the other hand, the "true nature of the dispute" cannot later be fundamentally modified or enlarged to take on a completely different case, resulting in a different grievance proceeding to arbitration than the one that was initially filed.*

[211] The true nature of the dispute in this case is clear. Ms. Gallinger wanted to keep alive the option of returning to work. She and her union advocated for that when they asked for extensions to the employer's deadlines. An informal meeting was held in August 2017 to try to keep that option alive. The employer's decision to terminate her employment in September 2017 finally closed that option, and Ms. Gallinger filed a grievance to challenge her termination so that she could attempt to return to work. The employer's decision to remove that option from the second and subsequent letters is a central issue to be adjudicated. Therefore, I reject the employer's second *Burchill* objection.

[212] The employer's third *Burchill* objection was in relation to the grievor's testimony about events that took place from 2009 to 2015, before she started her sick LWOP. As I have not included those events in my summary of the evidence or my analysis of the termination, this objection is moot.

F. The medical evidence

[213] The employer made two objections with respect to the medical evidence tendered, or not tendered, at the hearing.

[214] With respect to the family physician's medical notes (of September 13, 2017, October 11, 2017, and January 20, 2020), the employer argued that I should consider them hearsay evidence as the doctor was not called to testify and therefore could not be subjected to cross-examination, even on the question of whether she wrote them, let alone on the process she used to reach her conclusions. This objection was linked to its argument that the September 13, 2017, note was vague and conditional about a return in early 2018 and that the October 11, 2017, note was limited by the statement that the grievor "… feels she will be able to return to work …".

[215] More generally, the employer argued that for a case involving disability and the grievor's argument that she was able to return to work, the lack of medical evidence is problematic. I should draw a negative inference from the fact she did not call her family doctor, the specialist upon whose report the October 11 note was allegedly based, the cognitive behavioural therapist, or the concussion specialist that she saw at different stages. It cited *Schwartzenberger v. Deputy Head (Department of National Defence)*, 2011 PSLRB 4 at para. 51, and *Topping v. Deputy Head (Department of Public Works and Government Services)*, 2014 PSLRB 74 at para. 130, for this principle.

[216] The grievor's response to these arguments was that the two medical notes provided to the employer in 2017 should have triggered a decision to reconsider its termination decision and to follow the duty-to-accommodate process it said it would follow, namely, to ask the family physician additional questions or to request an FTWE via Health Canada.

[217] I agree with the employer that the lack of detailed medical evidence and testimony in a case such as this significantly limits my ability to reach conclusions about if and when the grievor was able to return to work. She had the opportunity to

tender that evidence during the hearing, but did not. The grievor has therefore not presented the medical evidence required to establish that she was able to work as of October 30, 2017 and should be reinstated retroactively to that date, which is the remedy she was seeking when her grievance was presented.

[218] That said, I also agree with the grievor that the contents of the medical notes were sufficient to cause the employer to continue the accommodation process and move it to the next stage. I accept them as evidence that the grievor received from her physician clearance to attempt a return to work, and I accept the evidence that shows she presented that medical information to her employer. The medical notes were clearly relevant to her search for accommodation, and the employer refused to consider them. As such, they are not hearsay, as the employer argued. I have accepted them as evidence of what information was made available to the employer, which should have initiated a reaction from it.

[219] I cannot know what information might have come out of the continuation of the accommodation process, had the employer agreed to that. The evidence to me was somewhat contradictory.

[220] On one hand, the employer led evidence suggesting that Ms. Gallinger remained unable to return to work after October 2017. This includes the Sun Life "Attending Physician Statement of Continuing Disability" form signed by a specialist physician on February 28, 2018, stating that the grievor was "… not able to return to work in the short term." Also, in the Plan Member's Update she signed on August 25, 2019, where it asked, "Has your current medical condition improved?", she checked the "no" box.

[221] On the other hand, the grievor led evidence that indicated that she is able to return to work. On October 5, 2018, she was turned down for medical retirement following a review of medical documents submitted by her physicians on the following basis: "… we cannot establish that you are permanently disabled." So, she was not totally disabled.

[222] Similarly, On June 12, 2019, Service Canada wrote to her and informed her that it had turned down her application for CPP disability benefits on the basis that her medical reports did not establish that her disability was "severe and prolonged." It reported a neurologist's conclusion that her symptoms "… would not limit [her] capacity to pursue all types of suitable work on a regular basis."

[223] Finally, as noted earlier, the grievor introduced the January 20, 2020, medical note from the family physician supporting a gradual return to work that was underway as of the hearing with a different employer.

[224] I find that on the basis of this evidence, I cannot reliably conclude at what point Ms. Gallinger might have been able to resume full-time work. All I can conclude is that she has presented enough information to justify a continuation of the accommodation process, and initiation of a return-to-work process.

G. The grievor's lack of credibility, and her compliance with the production order

[225] The employer made two other arguments that I will address before summarizing my conclusions and detailing the remedy.

[226] First, it argued that Ms. Gallinger was evasive in her cross-examination, and that she had to be asked questions several times. Her memory in direct examination was excellent, and she spoke of events that took place in 2007 and 2010, but in cross-examination, it was foggy, and she had trouble recalling facts until materials were put in front of her. She could not give a clear and consistent narrative of how the specialist's report came to be delivered to her family doctor. In contrast, the employer's witnesses were credible, had good powers of observation, and did not contradict themselves in testimony.

[227] The grievor's representatives argued that she made her best efforts in testifying. It is natural that her examination-in-chief went more smoothly because it was related directly to evidence in the book of documents. Her responses were clear once the questions were made clear to her.

[228] Second, the employer argued that the grievor did not fully comply with the Board's production order. She was ordered to provide the medical records from all her physicians, but several doctors were mentioned whose records were not disclosed. She was ordered to produce evidence of her job searches since the termination but provided only a list. She was ordered to provide tax returns but provided only T4 slips and copies of assessment notices, with some non-income information redacted. It argued that she tampered with evidence.

[229] The grievor's representatives argued that she did her best to comply with the production order. The Board's order was issued only on January 15, 2020, and she had

a week to try to fulfil it. She encountered resistance from some doctors due to the short timelines involved and resistance from others who questioned the authority of an adjudicator to order the release of such sensitive personal information. Under those circumstances, she did her best. With respect to her mitigation efforts, she disclosed a full list of the jobs she applied for and disclosed all the income reported on her tax return, which is the information required to establish the extent of the mitigation she was able to make.

[230] The credibility test that both parties relied on is set out in *Faryna v. Chorny* [1951] B.C.J. No. 152 (QL). Among other things, the Court stated (at paragraph 11), "In 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."

[231] I find problematic some of the grievor's actions in her response to the Board's production order, in particular the redaction of some of her tax information. Her reluctance to produce some medical information was also a problem, but one for which she is paying the price, given that it has a bearing on my decision not to order her retroactive reinstatement as requested.

[232] However, there are no issues of credibility with respect to the analysis of whether the employer acted incorrectly in terminating Ms. Gallinger's employment. The evidence that has led me to the conclusion that the employer discriminated against her is founded on its own documents and the testimony of its witnesses.

[233] While finding both Ms. Lacroix and Mr. Tremblay credible witnesses, I do have trouble reconciling their testimonies that they would have considered returning Ms. Gallinger to work had they received the proper medical note with the extensive written documentation indicating that only the two options of separating from the public service were being offered to her.

H. Conclusion

[234] In September of 2017, the CBSA decided to terminate the grievor's employment because she had been on sick LWOP for more than two years and because, before the deadline it had established, she did not provide a note confirming that she was capable of returning to work in the foreseeable future.

[235] I have concluded that the CBSA acted incorrectly when it removed the return-to-work option from *Options Letters #2*, *#3*, and *#4*. I have concluded that when the September 15, 2017, deadline came and went without a note from Ms. Gallinger, the CBSA acted incorrectly by simply proceeding to issue a termination letter without so much as a phone call or email to Ms. Gallinger or her union representative.

[236] I have concluded that the grievor's disability was a factor in the employer's decision to terminate her employment, which is a discriminatory practice, and that the employer failed to establish, as a defence, that it had accommodated her to the point of undue hardship.

[237] This should **not** be interpreted as a conclusion that an employer is obligated to keep extending sick LWOP indefinitely into the future even when an employee fails to file a note stating that he or she can return to work. But in this case, based on what the CBSA knew at the time, I do not believe that it demonstrated that circumstances had reached the point that it could no longer accommodate the employee without incurring undue hardship, and thereby establish a defence to the *prima facie* case of discrimination.

[238] I have also concluded that in any event, within a few short weeks of the September 15, 2017, deadline, the employer was presented with two medical notes indicating that Ms. Gallinger could return to work within the foreseeable future. The second note, dated October 11, proposed a graduated return to work commencing at the end of that month. This is precisely the kind of note that Ms. Lacroix and Mr. Tremblay said they were looking for before the deadlines and the kind of note that they said would further the accommodation process.

[239] I have considered that they were provided to the employer both before a grievance was filed and after one was filed and that the purpose of the grievance process is to give the employer a chance to reconsider its decision in the light of the information that the grievor and her union provided to it when the grievance was filed.

[240] Having said all that, I have also concluded that Ms. Gallinger's failure to call medical evidence significantly undermined her argument that she was ready and able to return to work in the fall of 2017, which in turn prevents me from ordering that she be reinstated retroactively to that date.

VI. Remedy

[241] Following all these reasons, my order rescinds the termination of Ms. Gallinger's employment.

[242] However, as I have determined that Ms. Gallinger has not provided me with the evidence that would be required to demonstrate that she should have been returned to full-time status as of the date of termination, my order does not provide for that result. The medical information that was tendered provided contradictory information as to whether she was able to work full-time for the more than 2.5 years since she left the CBSA.

[243] Therefore, in addition to restoring Ms. Gallinger's employment status, I wish to construct an order that restarts the accommodation process, with the purpose of starting her return to work as soon as medically possible.

[244] In doing so, I must acknowledge that the current COVID-19 pandemic may place constraints on both the parties' ability to implement this direction, particularly as they may face difficulties in accessing medical providers.

[245] To accomplish this, I will order that the employer extend Ms. Gallinger's sick LWOP up to the date of this decision and that it further extend the leave as required to complete the accommodation process.

[246] Within 30 days of this decision, the employer, the grievor, and her union are directed to **start** the return-to-work process that should have proceeded on the basis of the October 11, 2017, medical note. This should include any requests the employer might make to Ms. Gallinger's physicians for clarification of her functional limitations and accommodations. It may include a requirement to participate in an FTWE.

[247] Ms. Gallinger is to be returned to paid work status or paid leave status effective the date of this decision to the extent supported by the medical information that arises from the accommodation process. In other words, should the medical information indicate that she is capable of working full time as of the date of this decision, she should be paid full-time from that date forward. If it shows that she is capable of being returned on a gradual basis, she should be paid on that basis.

[248] I recognize that an actual return to work may be delayed by the COVID-19 situation. In that event, Ms. Gallinger should be provided with the same leave arrangements extended to other employees, until such time that she is able to return to work.

[249] Of course, the parties are also free to reach an agreement on any issues arising in the implementation of this award. In the event that the parties are not able to reach an agreement on a return to work or on paid leave status, I will remain seized of the matter and resolve any dispute on these issues provided that one or both parties notify me within 120 days of this award.

[250] The grievor also argued that she should receive remedies under the provisions of the *CHRA*. Specifically, she argued for an award of $15 000 for pain and suffering under s. 53(2)(a) and $10 000 in special compensation for wilful and reckless conduct under s. 53(3).

[251] The Board is granted the power to make awards under s. 53(2)(e) as follows:

> ***53 (2)*** *If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*
>
> *…*
>
> ***(e)*** *that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*

[252] The Board is granted the power to make awards under s. 53(3) as follows:

> ***53 (3)*** *In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.*

[253] In support of her arguments, the grievor cited *Rogers*, in which the Board awarded $15 000 for pain and suffering and $10 000 for wilful or reckless conduct. The grievor in *Rogers* was also terminated for medical incapacity. In that case, the Board found that the employer should have returned the grievor to work after his

physician completed an occupational assessment form that stated that he was able to return.

[254] The grievor also cited *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3, in which the adjudicator awarded $20 000 for pain and suffering and $18 000 for reckless or wilful misconduct, based on the Board's conclusion that the employer had "… engaged in discriminatory practices … conduct [that] was repeated, sustained and calculated to ensure the grievor would not return to work" over a period of almost four years (at paragraph 157).

[255] As the employer argued that the grievance should be dismissed, it argued that the Board should make no awards with respect to the *CHRA*. It provided no alternative arguments other than suggesting that the grievor's union was at fault.

[256] In *Rogers*, the Board reviewed a number of awards under the *CHRA* and made its award in that case in light of that jurisprudence. I found that review useful and will not repeat it here.

[257] I find Ms. Gallinger's case more analogous to *Rogers* than *Nicol*. I have considered her testimony on the impact of the termination on her family, her personal mental health, and her self-esteem. I have considered the fact that this decision does not involve a retroactive reinstatement with pay, even though she might well have returned to work at an earlier stage had the employer responded differently to the grievance in the fall of 2017. I award $15 000 for pain and suffering under s. 53(2)(e) of the *CHRA*.

[258] With respect to special compensation, I consider that the employer acted recklessly by removing the option to return to work from *Options Letters #2* to *4*, by failing to reach out to the grievor or her union when the September 15, 2017, deadline was not met, and by not properly reconsidering its decision during the grievance process. In my view, the recklessness is less overt or deliberate than what appears to be the case in *Rogers* or *Nicol*. I award $7 500 in damages under s. 53(3) of the *CHRA*.

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

(The Order appears on the next page)

VII. Order

[260] I order that Ms. Gallinger's termination be rescinded and that she be reinstated to a position classified at the CS-02 level in the National Capital Region.

[261] I order that the employer extend Ms. Gallinger's sick LWOP until the date of this decision and that it further extend the leave as required to complete the accommodation process ordered in the next paragraph.

[262] Within 30 days of this decision, the employer, the grievor, and her union are directed to commence the return-to-work process that should have proceeded on the basis of the October 11, 2017, medical note.

[263] Ms. Gallinger is to be returned to paid work status or paid leave status effective the date of this decision to the extent supported by the medical information that arises from the accommodation process.

[264] I will remain seized for a period of 120 days in the event that the parties are not able to reach an agreement on a return to work or on paid leave status.

[265] Within 90 days of this award, the employer shall pay Ms. Gallinger $15 000 in damages under s. 53(2)(e) of the *CHRA* and $7 500 in special compensation under s. 53(3).

May 20, 2020.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board