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

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

BETWEEN

TRACY DREW

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of individual grievances referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Corinne Blanchette, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

For the Employer: Alexandre Toso, counsel

Heard via videoconference at Abbotsford, British Columbia, and Ottawa, Ontario, October 12 and November 26, 2020.
(Written submissions filed October 23 and 30, November 2, and December 7, 15,and 21, 2020.)

REASONS FOR DECISION

I. Introduction

[1] Tracy Drew, the grievor, filed five grievances pertaining to her return to work after a long-term leave without pay for medical reasons. When these grievances were filed, she was a correctional officer, level 2, at the Pacific Institution ("the institution") of the Correctional Service of Canada in Abbotsford, British Columbia. This interim decision deals with the request by the Treasury Board of Canada ("the employer") for a production order for the grievor's entire medical file, along with her medical records, test results, and clinical notes in the possession of her treating physician.

[2] On June 3, 2015, the grievor filed three grievances. The first grievance alleges as follows:

> *Management has failed to uphold the agreement reached on February 2, 2015 regarding my return to work accommodation. On May 11, 2015, I was given information from management that made clear the fact that I was able to return to work full-time as of March 30, 2015. As of May 28, 2015, management continues to fail acting in good faith regarding the duty to accommodate and I still have not been given a start date or schedule for my accommodated return to work.*

[3] As corrective action, she requests the following:

> *… A) an immediate return to work, full-time, and in accordance with the accommodation as agreed upon in the meeting of February 2, 2015. I also require reimbursement for the hours I could have worked since March 30, 2015. I was to work full time [sic] on a 12-hour roster, evenings and nights only. And B) I require the shift differential associated with those hours as well as the sick leave hours and vacation hours that I would have earned. And C) I require the wages in accordance with minimum hours paid for attending the RTW meetings I have attended.*

[4] The second grievance pertains to allegations of psychological harassment resulting from the employer's alleged failure to accommodate her return to work. In it, she states this:

> *Management has provided conflicting information regarding requirements for my return to work. Further, management has failed to participate in good faith at Return to Work (RTW) meetings for myself. Management has displayed a restrictive interpretation of my accommodation requirements. This has resulted in creating adversarial nature to the RTW meetings.*

> *Management has displayed more focus on stopping my return to work rather than facilitating my return. The accumulative effect on [sic] meets the definition of psychological harassment as per the Treasury Board of Canada Secretariat.*
>
> *…*
>
> *The correction action I require is a financial settlement. A significant amount of distress can be attributed to the power differential and financial pressure I have experienced. The amount is to be determined by a representative for myself (to be named later) in negotiation with management of PI/RTC. I further require assurances in writing that declare that management will no longer treat me with inequity.*

[5] The third grievance pertains to retaliation allegations for the grievor having made a complaint with the Canadian Human Rights Commission. In it, she claims the following:

> *Management has adopted a demeanor of retaliation, for a complaint submitted to the Human Rights Commission, as evidenced in their efforts displayed at stopping my return to work. Management is aware of the power differential between itself and me and is also aware of the financial distress I am in which is further exacerbated by their delaying my return to work.*
>
> *…*
>
> *The corrective action I require is the immediate cessation of such practices that have resulted in an unjustified delay at allowing me to return to work.*

[6] The fourth grievance relates to her allegations that the employer relied on her failed handgun certification for not facilitating her return to work, as follows:

> *Management has claimed that my failure of the handgun (even though the 'failure' is being grieved) has caused delay in my returning to work. In the meantime, while the grievance for the 'failure' is being pursued, on May 5, 2015 I requested another date at [sic] for handgun training. There have been training dates available since then, but I have not been given another opportunity.*
>
> *…*
>
> *The corrective action I seek is immediate referral of my grievance to the adjudication process so it is heard outside of management from this institution <u>and</u> an immediate opportunity to re-train and re-shoot the handgun.*
>
> [Emphasis in the original]

[7] The fifth grievance relates as follows to the employer's alleged failure to facilitate her return to work while her coworkers were being offered alternate work opportunities:

> *I have been made aware of (on June 11, 2015) that management has provided other Officers returning to work with opportunities to work in other areas of the institution. This provides those Officers with an income while they wait to return to the line. I have made clear my financial distress and I have not been offered any such opportunity.*
>
> …
>
> *The corrective action I seek is an immediate opportunity for me to return to work and earn an income.*

[8] Essentially, the grievances relate to employer's alleged failure to accommodate the grievor with respect to facilitating her return to work from February 2 to August 6, 2015. She returned to work full-time as of August 7, 2015.

[9] Therefore, the issue before the Federal Public Sector Labour Relations and Employment Board ("the Board") is whether the employer failed its duty to accommodate the grievor as of February 2, 2015, until she returned to work full-time in August 2015. The only arguably relevant medical documentation to this issue is the information that the parties exchanged during that time.

[10] Note that in this decision, "the Board" refers to the current Board and any of its predecessors.

[11] For the reasons that follow, I am not satisfied that the requested documents and the main issues in dispute before the Board are rationally linked. The employer did not establish how the documents may be relevant to those main issues.

II. Background

[12] The grievances were scheduled for a hearing from April 28 to May 1, 2020, in Abbotsford, British Columbia. The hearing was postponed due to the COVID-19 pandemic. When the Board resumed its operations via videoconferencing in the summer of 2020, I contacted the parties to determine their intention to proceed with the matter. They confirmed their intention to proceed and were contacted to canvass their earliest availability for a case-management conference.

[13] On October 12, 2020, I held a case-management conference to schedule these matters for a hearing and to discuss the procedure at the hearing. During the conference, the employer mentioned that it would make a disclosure request for all the grievor's medical files, Sun Life files, and Canada Pension Plan (CPP) files. The grievor objected on the grounds that it is confidential information that is not in her possession and that it is not relevant to the matters before the Board. I invited the employer to make its request in writing, with written submissions in support, for a disclosure order from the Board. The grievor was provided with an opportunity to respond. The employer was given an opportunity to reply.

[14] On November 26, 2020, I held another case-management conference, at which I provided the parties with an opportunity to provide additional oral submissions and to clarify my understanding of the issues before the Board. On this basis, I invited the employer to resubmit its disclosure request and to explain how the requested documentation is arguably linked to the grievances before the Board. On December 7, 2020, it provided an amended request, along with written submissions. On December 15, 2020, the grievor responded to the second disclosure request. The employer provided a brief response on December 21, 2020.

III. Facts on the record, as alleged by the parties in their submissions

[15] The grievor went on long-term leave without pay for medical reasons in the middle of 2012. During that time, she applied for and received disability benefits. In June 2014, the employer sent her a letter detailing her options with respect to her position. She contacted the employer late in 2014 to commence a return-to-work process. In February 2015, she signed a return-to-work agreement, with accommodations, and agreed to complete all training and firearms requalification, as well as personal safety refresher training, before returning to work full-time.

[16] The grievor alleged that on February 3, 2015, a meeting took place to discuss her return to work, at which the employer confirmed that it needed no additional medical information. She claims that the employer agreed to assign her to the Main Communications and Control Post. An agreement was reached that she would complete the correctional officer training and the Main Communications and Control Post training. On February 5, 2015, she failed the pistol requalification.

[17] On March 4, 2015, the grievor went on sick leave for two weeks, without pay. On April 23, 2015, the employer followed up with her and sought information about her medical situation. On May 11, 2015, the employer confirmed her fitness to work full-time, with accommodation, as of March 30, 2015. On May 20, 2015, it followed up with her with respect to her need to work in a temperature-controlled environment. On May 28, 2015, the grievor alleged that she did not receive the accommodation and that no date was scheduled for her return to work.

[18] On June 3, 2015, she filed the first three grievances, against the employer's alleged failure to follow the February 2015 return-to-work agreement, psychological harassment resulting from the employer's alleged failure to accommodate her return to work, and the employer's alleged retaliation for her making a complaint with the Canadian Human Rights Commission. On June 22, 2015, the employer and the grievor met about her return to work. The employer requested a detailed account of the employee's physical and cognitive medical restrictions and limitations as they relate to any form of work.

[19] On July 13, 2015, the grievor filed a grievance against the employer for allegedly relying on the fact that she had failed the firearms certification for not facilitating her return to work. She also filed a grievance against the employer's alleged failure to return her to work, even though her co-workers were being offered alternate work opportunities.

[20] On July 21, 2015, the grievor's physician confirmed that she required a temperature-controlled environment, to avoid overheating. The treating physician stated, "… Tracy can successfully fulfill her duties and responsibilities provided that she starts her shifts after 2 pm. This is due to the medical condition which affects her sleep-wake cycle."

[21] On August 6, 2015, the grievor passed the firearms requalification process and was placed on the work schedule effective August 7, 2015. She returned to work full-time.

[22] On September 23, 2015, the grievor consented to being assessed by Health Canada and to the employer having direct discussions with her treating physician. But on October 13, 2015, she revoked her consent to be assessed by Health Canada.

IV. Summary of the arguments

A. The employer's original production request

[23] Further to the case-management conference of October 12, 2020, on October 23, 2020, the employer requested the disclosure of "… all arguably relevant medical information with respect to the accommodation/return to work issue, including, but not limited to" the following:

> …
>
> · *the medical file concerning the grievor in possession of Dr. Fadyeyeva, including all documents she may have relied upon in preparing medical notes or letters relating to the grievor;*
>
> · *the medical file concerning the grievor in possession of Dr. Hyams, including all documents he may have relied upon in preparing medical notes or letters relating to the grievor;*
>
> · *the medical file concerning the grievor in possession of her treating psychologist and psychiatrist including all documents they may have relied upon in preparing medical notes or letters relating to the grievor;*
>
> · *the SunLife file(s) concerning the grievor, including any application(s)/decision(s)/appeal(s) concerning the payment of disability benefits to the grievor;*
>
> · *the Canada Pension Plan file(s) concerning the grievor, including any application(s)/decision(s)/appeal(s) concerning the payment of disability benefits to the grievor;*
>
> *From the time the grievor went on long-term leave in mid-2012 up until 2016.*
>
> …

[24] The employer claims that it is entitled to test whether and to what extent the grievor's medical condition or conditions prevented her from returning to work or accepting the accommodations it offered and to examine the information that the medical practitioner relied upon to issue the medical notes to the employer. Moreover, the employer argues that Sun Life's and the CPP's determinations that the grievor should or should not receive disability benefits is relevant to the type of accommodation that the employer could offer. It would also allow verifying whether the medical information submitted in support of the disability benefits is consistent with the medical information submitted in support of the return-to-work process. The grievor would certainly have obtained medical information during that process that could have been shared with the employer to facilitate her return to work.

[25] The case law is clear that at this stage of the pre-hearing procedures, the employer must demonstrate only that there is a realistic possibility that the documents may be relevant to an issue in dispute in proceedings before the Board. The employer relies on the reasoning in *Canada (Attorney General) v. Quadrini*, 2011 FCA 115 at para. 37; *Gallinger v. Deputy Heard (Canada Border Services Agency)*, 2020 FPSLREB 54 at paras. 16 and 17; and *Lapointe v. Canada Revenue Agency*, 2020 FPSLREB 19 at paras. 56 to 97. The grievor has put her health at issue in these *de novo* proceedings. For that reason, the employer is entitled to the disclosure of any arguably relevant medical information. The employer cites *Schwartzenberger v. Deputy Head (Department of National Defence)*, 2011 PSLRB 4 at paras. 34 to 36.

[26] The employer submits that the grievor is attempting to have it bear the burden of the delay to her return to work. She alleges that delays were caused because the employer failed to accommodate her medical condition. All five grievances were filed under the "No discrimination" article of the relevant collective agreement. Therefore, it is difficult to see how the grievor could take the position that the medical information on which she relied to make her claims is not at least arguably relevant to the present matter. The employer argues that the disclosure will cause no prejudice. Moreover, it states that it would undertake confidentiality measures to ensure the privacy of the information.

B. The grievor's response to the employer's original production request

[27] On October 30, 2020, the grievor responded to the employer's original production request. She states that during the February 3, 2015, return-to-work meeting, she asked the employer if it needed any further documentation in addition to the medical notes she had submitted. It informed her that it did not need any. They agreed that she would be assigned to the Main Communications and Control Post but that she would have to complete her correctional officer training and the specific training for that position.

[28] Furthermore, she states that she provided the employer with all the notes and clarifications it requested at the relevant time. She provided six medical notes. She has already consented to the employer having direct discussions with her physician, and she consented to being assessed by Health Canada. The employer did not make any arrangements to have her assessed and never questioned that she had a disability before the referral to adjudication. It never requested access to her medical files before

the hearing. At no point since late 2014 to early 2015 did it dispute that she suffered from a disability.

[29] She argues that she was desperate to get back to work and that every time the employer requested a note or clarification, she complied. By its policy, the employer is not entitled to inquire about an employee's diagnosis and is even less entitled to request its employees' medical files.

[30] She submits that the employer was speculating about the information's relevancy. The cases it relied on are not relevant to the circumstances of this case. Requests for production orders are decided on the merits of the circumstances of each case. There is no realistic possibility that the documents may be relevant.

[31] By their nature, medical records are highly sensitive and private, and their confidentiality ought to be protected. The broadness of and the complete absence of itemization in the employer's request makes it easy to qualify it as a fishing expedition. It would force the disclosure of all the grievor's medical files, including prescriptions, referrals, etc. It is also unreasonable because of the excessive time that the production order wishes to cover. The employer is requesting information that predates the grievor's first return-to-work discussions. Furthermore, the lack of potential relevancy is illustrated by the employer's request for the grievor's Sun Life and CPP files. Those two organization's determinations with respect to the grievor's entitlement to benefits are not binding. Furthermore, the entitlement to benefits depends on eligibility criteria that go beyond having a disability. For example, for someone diagnosed with sleep apnea, which has been accepted as a disability under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), its existence alone would not automatically lead to an entitlement to Sun Life or CPP benefits.

[32] The grievor relies on the principle in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.). The employer is not allowed to change its position at this stage of the process. The Board and its predecessors agreed with the principles in *Burchill*, which determined that a party is not entitled to change the nature of a grievance. This reasoning has been applied to the employer as well. The grievor relies on the following cases in support of her position: *Gill v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 55, and *Jassar v. Canada Revenue Agency*, 2019 FPSLREB 54.

[33] Moreover, she states that she does not possess the requested documents; her medical practitioners, Sun Life, and the CPP possess them. It would be an enormous burden on her to force the disclosure of the documents. For relevancy, any documents sought must be linked to the subject matter of the dispute and the requirement to balance interests. Therefore, the grievor respectfully advances that the request should be denied. The employer had significant opportunity to test and challenge her medical condition during the return-to-work process but chose not to.

C. The employer's second production request

[34] On December 7, 2020, the employer submitted an amended request for the production of the grievor's entire medical file and her medical records, test results, and clinical notes in possession of Dr. Inna Fadyeyeva, including this:

> …
>
> - *Any information provided to the grievor or received from the grievor regarding the alleged disability for which the grievor required accommodation;*
> - *Any information received from the grievor regarding her job;*
> - *Any information that Dr. Fadyeyeva may have relied upon in preparing medical notes or letters relating to the grievor; and*
> - *Any information relating to the grievor's readiness to return to work in any position from February 2015 to August 2015*
>
> …

[35] For clarity, the employer states that it is not seeking the production of bloodwork results or dental or other such information that does not relate to the grievor's alleged disability to the extent that this information is not arguably relevant to the return to work and accommodation issue.

[36] The employer relies on the facts alleged in the submissions dated October 23 and November 2, 2020. It states that it understands that the issue before the Board relates to the grievor's return to work between February 2015 and the time she returned to a full-time schedule in August 2015. The employer understands that the alleged failure of its duty to accommodate primarily relates to the period between April 2015 and mid-June 2015. During other periods, the grievor either received a salary or was on leave for reasons unrelated to the ground of discrimination alleged in the grievances.

[37] The employer argues that the test to order the production of arguably relevant materials is broader than the test for admitting evidence at a hearing. Full disclosure allows a party to understand and prepare for the case it must meet. The documents requested are the bare minimum that would allow the employer to meaningfully participate in the matter.

[38] The requested documents are arguably relevant as they are directly linked to the grievor's contention that she had a medical condition that triggered a duty to accommodate. The nature and extent of that condition cannot be presumed at adjudication, since it was a hearing *de novo*.

[39] The grievor has the onus of proving that she had a disability, that she suffered an adverse effect, and that the disability was a factor in the adverse effect. This must be done before the employer has to prove any defence.

[40] Second, the accommodation process is a multi-party inquiry in which the grievor has an obligation to cooperate. The requested documents are relevant with respect to the grievor's cooperation in the accommodation process and to seeking requested medical information.

[41] Third, the requested documents are relevant to the grievor's credibility with respect to the testimony she is expected to give, be it about the alleged ground of discrimination or about her efforts to cooperate in the search for a reasonable accommodation.

[42] Fourth, the requested information is also directly related to the doctor's notes received by the employer. The requested documents are relevant considering the employer's position that the doctor's notes did not provide sufficient clarity with respect to the grievor's medical restrictions. In addition, the employer notes that the contents of the doctor's notes are hearsay without the doctor being called as a witness.

[43] The issues during the internal grievance procedure involved accommodation and return to work. To fairly adjudicate these grievances, the employer is entitled to know to what extent the medical condition prevented the grievor from accepting the proposed accommodations or from returning to work.

[44] To prepare its case, including with respect to questions of credibility, the employer is entitled to know to what extent the grievor was fully forthright in

providing the information either to her doctor or to the employer. Therefore, the contents of her medical file are directly related to the issues raised in the grievances.

[45] For these reasons, the employer's amended production order request should be granted.

D. The grievor's response to the employer's amended production request

[46] The grievor responded to the employer's amended request on December 15, 2020. She maintained her position and relied on the submissions she made on October 30, 2020.

[47] She argues that again, the employer failed to establish the nexus between the requested documents and the dispute. The four reasons it advanced to support its request were that the nature or extent of the grievor's medical condition cannot be presumed at adjudication, that she was obligated to cooperate in the accommodation process, that her credibility has to be tested, and that the medical notes lack clarity and do not meet the requirement to qualify as arguably relevant.

[48] Good faith must be presumed from everyone, including the grievor. The employer cannot simply request the disclosure of confidential medical information on the basis of credibility without advancing any factual basis to the contrary. With respect to the grievor's obligation to cooperate, it does not equate to providing blank and free access to her medical records. The employer is free to argue at adjudication that she did not provide the medical notes as requested during the return-to-work process, but that does not entitle the employer to have access to her medical records five years later.

[49] The amended request makes it clear that the employer seeks to dispute the grievor's disability. This was not done during the accommodation process or the internal grievance procedure. It never disputed that she suffered from a disability in the last five years. It appears now that it has instructed its counsel to make this argument.

[50] The employer has knowingly decided not to provide a response at the final level of the grievance procedure. It had ample opportunity to issue one, in which it could have raised this issue, but it elected not to until the hearing. Since this issue was not

raised during the accommodation process or the internal grievance procedure, the employer should not be allowed to advance such an argument now.

[51] With respect to the lack of clarity of the medical notes provided during the return-to-work process, accessing the medical records will not affect the substance of the notes. The suggestion that the notes submitted at the adjudication hearing would be considered hearsay is of great concern to the grievor.

[52] If that is the basis of the disclosure request, it can only be deemed as not arguably relevant. It is based in large part on mere speculation. In addition, the *Burchill* principle applies against the employer. The grievor never had to defend herself against the new allegation that she did not suffer from a disability. It is highly unfair to her to force her to more than five years later.

[53] Should the Board be inclined to order the production of the requested medical documents, the grievor and her representative should not have to bear the burden of disclosing the information. She and her representative do not possess the documentation. The order should be directed to the doctor's office directly. If there are costs, the employer should incur them. Should the disclosure be ordered, strict confidentiality measures should be imposed.

E. The employer's reply to the grievor's response to its amended request

[54] The grievor has the burden of establishing a *prima facie* case for accommodation. It is not sufficient to claim that a medical condition exists. The grievor must establish the nature and extent of that condition to trigger any duty to accommodate. She has the burden of demonstrating that she was medically prevented from performing the essential duties of her position. Obviously, the requested medical records are relevant to that issue.

[55] The grievor suggests that the employer should concede that all work conditions identified by her doctor as being advisable were medical restrictions, without having seen any of the arguably relevant documents that would support or contradict this point.

[56] The grievor suggests that the employer should concede that she provided all available information relevant to her return to work, again without having seen any of the arguably relevant documents that would support or contradict this point. The

medical records may have more information that would allow determining whether she met her duty to cooperate in the accommodation process. At the hearing, the employer could ask questions of her or her doctor, depending on what is or is not in those medical records.

[57] While the employer intends to argue that the medical notes provided by the grievor were insufficient, it is entitled to fully prepare its case in anticipation of her expected claim that her medical records contain information that supports the medical notes. As part of this, the employer is also entitled to explore whether any additional information existed that could and should have been provided at the relevant time.

[58] The employer's position at adjudication is consistent with its position before and during the grievance procedure. It does not question whether there is an underlying medical condition. It simply wishes to understand to what extent there are medical limitations and restrictions flowing from it. Its grievance replies refer to that. Therefore, the grievor's contention that it is raising new issues is without merit.

[59] Should the Board order the requested information disclosed, the order should be directed at the grievor and her representative. A third-party disclosure order is not warranted. The grievor's representative is attempting to evade its disclosure obligations. If it wishes to support the referral of these grievances to adjudication, it must comply with all pre-hearing disclosure obligations.

[60] With respect to confidentiality measures, the grievor did not advance any allegation of prejudice if the medical information is disclosed to the employer and its representatives. The content of her medical files is directly related to the accommodation issues raised in the grievances. For all these reasons, the employer's amended request should be granted.

V. Analysis

A. Is the grievor's medical information, as detailed in the employer's production request, arguably relevant to the issues raised in the grievances?

[61] The Board's authority to order documents produced before a hearing is based on its enabling legislation. A panel of the Board has the power to exercise any of the Board's powers, which are set out in ss. 20 to 23 and 39 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "the *Act*"),

including the power to compel, at any stage of a proceeding, any person to produce documents and things that may be relevant. Section 20 states in part as follows:

> ***20*** *The Board has, in relation to any matter before it, the power to*
>
> …
>
> ***(e)*** *accept any evidence, whether admissible in a court of law or not; and*
>
> ***(f)*** *compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant.*

[62] The initial step when determining whether documents should be produced is to determine whether they may be relevant to the grievances before the Board. When making that determination, the issues in dispute and the documents sought must be rationally linked.

[63] In *Quadrini*, at para. 37, the Federal Court of Appeal stated that the legal test to apply when making a disclosure request is to establish a realistic possibility that the documents may be relevant to an issue in dispute in proceedings before the Board. Mere speculation as to their possible relevance is not sufficient.

[64] In *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46, the Board quoted Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 3.1400, which details as follows the parameters to apply to determine whether a production order should be issued:

> …
>
> *3:1400 Pre-hearing Disclosure*
>
> …
>
> *… the requirements of natural justice require that one party not unfairly surprise the other, and accordingly, some arbitrators have required pre-hearing disclosure of information and documents that are necessary to enable a party to participate properly in the adjudicative process.*
>
> …
>
> *3:1420 Production of documents*
>
> *The purpose of production of documents is somewhat different from the requirement that particulars be provided, in that production of documents assists a party in actually preparing its case, whereas particulars simply inform the other side of the case it will be required to meet….*
>
> …

> *3:1422 Ordering production*
>
> *The basic criterion for ordering production of documents is a determination of whether they may be relevant to the issues in dispute. And in that regard, the test at the pre-hearing stage would appear to be either "arguably relevant" or "potentially relevant".*
>
> …

[65] That extract is consistent with the Board's jurisprudence. As the Board stated in *Sather v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 45, at the pre-hearing stage, there is no need to go beyond a finding that the requested documents have arguable relevancy. The Board has broad power to compel document production, which is rooted in the requirements for natural justice.

[66] The grievances relate to the employer's alleged failure to accommodate the grievor with respect to facilitating her return to work from February 2 to August 6, 2015. She returned to work full-time as of August 7, 2015. As discussed with the parties during both case-management conferences, the Board is tasked with reviewing the accommodation process undertaken by the employer during the period in question.

[67] The grievor bears the initial onus of establishing that due to her disability within the meaning of the *Canadian Human Rights Act*, she was prevented from returning to work without accommodation. If the grievor discharges her onus, the employer will have the burden of establishing either that it did in fact reasonably accommodate her, that she did not provide sufficient information at the relevant time to assess how to accommodate her medical restrictions, or that accommodating her would impose undue hardship on it.During an accommodation process, employees must disclose the medical restrictions that constitute a disability preventing them from fully performing the duties of their positions. They must provide the employer with sufficient information so that it may provide them with reasonable accommodations. If the information is unclear or insufficient, or if the employer has questions about it, the employer can request additional information from employees and their treating physicians. The employer is entitled not to a diagnosis but only a prognosis, which does not ordinarily include an employee's medical records. Accordingly, only the documents that were at issue during this accommodation period are arguably relevant.

[68] The employer's amended production request is detailed as follows:

> ***The grievor's entire medical file, medical records, test results and clinical notes in possession of Dr. Inna Fadyeyeva including:***
>
> - *Any information provided to the grievor or received from the grievor regarding the alleged disability for which the grievor required accommodation;*
> - *Any information received from the grievor regarding her job;*
> - *Any information that Dr. Fadyeyeva may have relied upon in preparing medical notes or letters relating to the grievor; and*
> - *Any information relating to the grievor's readiness to return to work in any position from February 2015 to August 2015*
>
> *For clarity, the employer stated that it was not seeking the production of bloodwork results, dental or other such information that do not relate to the grievor's alleged disability to the extent that this information is not arguably relevant to the return to work/accommodation issue.*

[69] By their very nature, an individual's medical records are confidential. I disagree with the employer's position that the grievor did not demonstrate any prejudice from having her medical information disclosed. She did not have to present any evidence of prejudice to assert that her medical information is confidential. The employer's own guidelines for its return to work program, in the document entitled "Guidelines 254-2", at paragraph 29, on accommodation, limit the scope of what can be requested by providing that the employer can request medical information such as:

> …
>
> *a. prognosis (not diagnosis)*
>
> *b. expected return to work date*
>
> *c. details of any limitations or need for accommodation for staying at work or returning to work*
>
> *d. duration of the required medical limitations and/or restrictions and whether they are temporary or permanent.*

[70] During the accommodation process, an employer is not ordinarily entitled to the grievor's full medical records or her diagnosis. The employer recognizes this in its own Guidelines on accommodation. However, it needed her medical information that pertained to her functional limitations. This information had to be sufficiently precise to allow the employer to assess how to accommodate her functional limitations or to determine if it could not accommodate her condition without causing it undue

hardship, which would constitute a bona fide operational requirement (s.15 of the *Canadian Human Rights Act*).

[71] The main issue before the Board is whether the grievor was accommodated in accordance with the collective agreement and the *Canadian Human Rights Act* and whether the information that the grievor provided to the employer from February 2015 to August 2015 was sufficiently precise to allow it to assess how to accommodate her functional limitations. The grievor is challenging the sufficiency of the employer's accommodation process. At all levels of the grievance process, the employer did not challenge the grievor on the existence of her disability or her functional limitations. It simply claimed that it accommodated the grievor. The accommodation process is a multi-party inquiry in which the grievor, the bargaining agent, and the employer have an obligation to cooperate. That is the issue before the Board.

[72] Applying the principles in *Quadrini*, I am not persuaded that the information that the employer seeks by way of its amended disclosure request meets the "… realistic possibility that the documents may be relevant to an issue in dispute in the proceedings before the Board." In particular, the information that the grievor may have provided to the physician about her condition or job, which the physician may have relied upon, is not relevant to the issue of what her functional limitations were, their duration, and her general prognosis, which as the employer's accommodation policy highlights, is the information that is relevant to an accommodation analysis. If the employer questions the grievor's credibility with respect to her functional limitations, it will have the full opportunity to cross-examine her on that evidence.

[73] In its amended request, the employer is requesting the disclosure of the grievor's entire medical file, medical records, test results and clinical notes in possession of Dr. Inna Fadyeyeva. The employer is also requesting information exchanged between the grievor and her treating physician about her job. It requests the disclosure of all the information the treating physician relied upon in preparing the medical notes and any information relating to the grievor's readiness to return to work in any position from February 2015 to August 2015. The employer is requesting the entire medical file including the itemized bullets which means that the employer is requesting everything including those things. I agree with the grievor, this amounts to a fishing expedition.

[74] Therefore, I find that the employer's request for the disclosure of the grievor's medical information, as detailed in its amended production request, is not arguably relevant to the accommodation process that took place between February and August 2015.

VI. Conclusion

[75] The employer's amended production request is denied.

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

(The Order appears on the next page)

VII. Order

[77] The employer's amended production request is denied.

[78] The hearing will proceed as scheduled on March 30 and 31 and April 1, 2021.

March 12, 2021.

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board