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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

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BETWEEN

**LOUISE DIONNE**

Grievor

and

**CANADA REVENUE AGENCY**

Employer

Indexed as

*Dionne v. Canada Revenue Agency*

In the matters of an individual grievance referred to adjudication and an application for an extension of time referred to in paragraph 61(b) of the *Federal Public Sector Labour Relations Regulations*

**Before:** Linda Gobeil, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Grievor:** James Cameron, counsel

**For the Employer:** Pierre-Marc Champagne, counsel

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Heard at Saguenay, Quebec,  
November 13 to 15, 2019.  
(FPSLREB Translation)

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**REASONS FOR DECISION****FPSLREB TRANSLATION**

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**I. Individual grievance referred to adjudication and application for an extension of time**

[1] On July 3, 2013, Louise Dionne (“the grievor”), represented by her union, the Public Service Alliance of Canada (“the union”), filed a grievance against the Canada Revenue Agency (“the employer”) under clause 19.01 of her collective agreement. Clause 19.01 reads as follows:

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

[2] The grievance reads as follows:

[Translation]

*I file this grievance against the employer's decision to not renew my term position due to my disability. The decision is discriminatory and breaches the collective agreement, CRA policies and guidelines, and the Canadian Human Rights Act. The employer acted unreasonably by terminating my employment when it had agreed that I would stop working due to illness without requesting a return date. Moreover, it did not make every effort to keep me in the SP-05 position, despite my many years of experience and good performance. It did not act reasonably when it failed to consider my personal situation.*

[3] As corrective measures, the grievor sought the following:

[Translation]

*That the employer reverse its decision and keep me employed*

*That I be reinstated to the SP-05 position when I return from sick leave and, alternatively, to another CRA position*

*That the employer make an accommodation for my return to work, if my medical condition so requires. That the employer take other reasonable measures under the circumstances. That I suffer no further prejudice. That I be compensated in full.*

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the *Federal Public Sector Labour Relations and Employment Board Act* and *Federal Public Sector Labour Relations Act*

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Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continued under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[5] The grievor's grievance was dismissed at the final level of the grievance process on January 20, 2015. On March 10, 2015, she referred it to adjudication and gave notice to the Canadian Human Rights Commission, alleging discrimination by the employer.

[6] On March 20, 2015, the Canadian Human Rights Commission informed the Public Service Labour Relations and Employment Board of its intent to make submissions on the grievor's discrimination allegation. However, on April 4, 2017, the Canadian Human Rights Commission informed the Public Service Labour Relations and Employment Board that it no longer intended to make such submissions.

[7] On March 26, 2015, the employer alleged that the grievor's grievance had to be dismissed as it had been filed beyond the prescribed 25-day time limit. In response, on April 14, 2015, she maintained that it was not out of time. Were I to find that it was late, she asked that I grant an extension of time in light of the circumstances of this case.

[8] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the

*Federal Public Sector Labour Relations Act* (“the Act”), and the *Federal Public Sector Labour Relations Regulations* (“the Regulations”).

## **II. Summary of the evidence**

### **A. The employer’s objection**

[9] At the start of the hearing, I informed the parties that I would take the employer’s objection under reserve, and I heard the evidence.

### **B. The grievor’s evidence**

[10] The grievor testified that she had worked for the employer starting in 1984 or for approximately 30 years. She always held term positions, until June 2013. After that, the employer stopped offering her positions (Exhibit B-A, Tabs 2 to 4).

[11] For the period in question, I will note the times and durations of the term positions the employer offered the grievor beginning in August 2011, as indicated in Exhibits B-A, Tab 7, and E-1, Tab 2. I must make it clear that no arguments were made about the grievor’s status after her many term positions of more than three months.

[12] These are the grievor’s employment periods as a CPP-A2 rulings officer (at the SP-05 group and level) in the Insurability group:

- Term appointment from 2011-08-29 to 2012-03-30.
- Term appointment from 2012-03-30 to 2012-11-02.
- Term appointment from 2012-11-02 to 2012-12-28.
- Term appointment from 2012-12-28 to 2013-03-08.
- Term appointment from 2013-03-08 to 2013-03-29.

[13] Here are the grievor’s employment periods as an administrative support clerk (at the SP-02 group and level) in the Insurability group:

- Term appointment from 2013-03-30 to 2013-05-10.
- Term appointment from 2013-05-10 to 2013-06-07.

[14] Note that the grievor took sick and other leave during these periods, including sick leave for six months from May 25 to November 29, 2012.

[15] In August 2011, the grievor accepted a term position as a rulings officer (at the SP-05 group and level) in the Insurability group. The initial period was from August 29, 2011, to March 30, 2012 (Exhibit E-1, Tab 3). She testified that she lacked training at the time and that the files she had to handle were more complex than she

had initially been told. According to her, she was supposed to deal with files without an “[translation] arm’s-length relationship”, which were more routine and easier to manage. However, she explained that she had to deal with “[translation] inter-corporate” files, which were too difficult for someone like her, who did not have much experience at the SP-05 group and level. It all made her work stressful. She indicated that she then raised this problem with her complex-case and technical revisor at the time, Luc Coudé. He also felt that “inter-corporate” files were too complex for someone less experienced, as she was. According to her, her team leader, Jocelyne Simard, instead thought that the grievor would need to handle that type of file sooner or later, so she continued assigning more complex files to the grievor.

[16] The grievor testified that given her lack of experience, she had to spend more time reading the procedures, meaning that she required twice the time her colleagues did to process the files. Her colleagues also advised her to not process certain files. She indicated that she did not raise the problem with her superiors, as she felt vulnerable due to her term-employee status. She was also embarrassed by her personal situation (Exhibit B-A, Tab 10).

[17] Indeed, the grievor testified that in October 2011, a few months after starting her term employment (SP-05), problems arose with her spouse, which impacted her workplace. She, her spouse, another person involved all worked for the same employer in the same workplace. The grievor had to change workplaces, as it was hard for her to work and focus. According to her, everyone at work talked about her personal situation. She said that she cried many times at work.

[18] The grievor testified that fall 2011 and winter 2012 were very difficult. She and her spouse separated, which affected her children. At the same time, she had to meet with a lawyer and resolve the separation details. Emotionally, it was difficult.

[19] The grievor also testified that she had health problems at the time. On May 25, 2012, she underwent major surgery that kept her immobilized for six months. Thus, she was on sick leave from late May to November 29, 2012. She explained that after her sick leave, the employer made no accommodations, even though she was in pain and had difficulty walking. She maintained that after that, she was in a state of psychological distress, and that the employer should have helped her more. According

to her, the action plan it proposed to help her improve her performance was not enough. She should have been assigned a mentor (coach).

[20] The grievor explained that when she returned to work in November 2012, she needed help, but that the employer continued to assign her complex SP-05 files. According to her, the other employees did not have such complex files. However, she agreed that in May 2012, the employer told her that when she returned from sick leave, she would continue to follow the improvement plan that had been put in place to help her. But according to her, the plan was not enough. She needed more help when she returned from sick leave, which ended on November 29, 2012, due to her physical and mental state (Exhibit E-1, Tab 10). She indicated that from January 2013 to June 2013, she “[translation] was not there”. She was inconsolable and had health problems. She indicated that she did not know if her supervisor, Ms. Simard, was aware that her mental health was affected by everything happening to her. According to her, she did not have to explain her private life.

[21] The grievor agreed that she did not provide her employer with a medical certificate requesting special accommodations or a gradual return to work when she returned from sick leave in late November 2012. She maintained that she told her supervisor, Ms. Simard, to consider her six-month sick-leave absence when assigning work and when completing her appraisal.

[22] On March 12, 2013, the employer offered the grievor another term position, this time as an administrative support clerk (at the SP-02 group and level) from March 30, 2013, to May 10, 2013 (Exhibit E-4).

[23] The grievor testified that she had to go back on sick leave almost immediately after starting her SP-02 assignment. She had more symptoms and could not focus. Moreover, the employer had to send her home in a taxi on April 30, 2013, because she did not feel well and was unable to drive.

[24] After June 7, 2013, the grievor had no more positions with the employer, even though she had worked for it continuously since 1984 and had always been a model employee. According to her, around June 12, 2013, while on sick leave, Ms. Simard informed her that her last term position, at SP-02, would not be extended (Exhibit B-A, Tab 3, page 6). She testified that she was unemployed for six months, after which she

worked at a hospital in Chicoutimi. She worked there on-call for two-and-a-half years. After that, she worked full-time at a hospital in Joliette, but temporarily.

[25] According to the grievor, the performance problems that the employer blamed her for were caused by her personal and medical problems, which made her unable to work as she had done for 30 years (Exhibit E-1, Tabs 7 to 9). Unfortunately, the employer did not consider that reality. She indicated that she believed that it was aware of her personal and medical situations but that it did not take them into account (Exhibit B-A, Tab 10). She indicated that she would probably have met her objectives had she continued working with the file revisor Fabienne Gagné.

[26] The grievor indicated that she met with her doctor in June 2013. However, she emphasized that the doctor had been familiar with her health since October 2012 (Exhibit B-A, Tab 9). In her medical certificate dated June 10, 2013, the doctor stated that she suffered from major depression and adjustment problems that dated to February 2013 (Exhibit B-A, Tab 9). The grievor also noted that after her separation, the doctor prescribed medication to help her sleep.

[27] Steve Boivin testified for the grievor. He is her former spouse. He has worked for the employer for over 27 years. He testified that the grievor's mental health deteriorated in fall 2011. According to him, she cried often and had difficulty managing her stress and focusing. In cross-examination, he admitted that he was not a doctor and that he had no medical or psychological training.

[28] Ms. Gagné also testified for the grievor. She is now retired after 36 years of service with the employer. She was a rulings officer (at the SP-05 group and level), as was the grievor, before becoming a file revisor (at the SP-06 group and level) until she retired.

[29] Ms. Gagné explained that her file-revisor work included reviewing files from SP-05 officers to ensure that they were compliant and complete. The employer had implemented a revisor-rotation system, meaning that revisors were not always assigned to the same officers. Ms. Gagné indicated that she worked as a revisor from December 4, 2012, to March 9, 2013, with approximately 10 officers, including the grievor (Exhibit B-A, Tab 10).

[30] Ms. Gagné explained that she had to revise all the grievor's work, which she did not do with the other officers under her responsibility. However, Ms. Gagné pointed out that the grievor had "[translation] a great attitude" and that she was a hard worker. According to Ms. Gagné, the grievor had a good understanding of the files, but she sometimes forgot little things that had to be corrected. She stated that she had never had to overturn one of the grievor's rulings. Ms. Gagné testified that around late March 2013, encouraging signs showed that the grievor would meet the position's requirements. She added that the grievor told her that she was having problems with her husband, but she did not know if the team leaders, Ms. Simard and Andréa Laflamme, were aware of it. Ms. Gagné testified that in early 2013, she felt that the grievor was vulnerable and sensitive; she often saw the grievor crying.

[31] Jérôme Martel was the grievor's last witness. He joined the employer in 2010. In 2013, he was the president of the union local, and until 2015, he held a position at the SP-05 group and level in the Insurability group, a division that dealt with different types of clients. After 2015, Mr. Martel became the union's vice-president of its Quebec Region.

[32] Mr. Martel explained that once hired, a rulings officer (at the SP-05 group and level) takes two weeks of classroom training and then practical work. The officer then receives files and is assigned a revisor. During the first three months, all the work of an SP-05 rulings officer is revised. Those officers must also meet their deadlines. According to Mr. Martel, an SP-05 rulings officer needs about a year to learn everything. At the end of the year, normally, the officer should be able to process more-complex files.

[33] Mr. Martel explained that the performance system for SP-05 rulings officers is a source of much stress. According to him, an average of 8.5 hours is spent on each file, and 30% to 40% of rulings officers do not meet their objectives.

[34] According to Mr. Martel, if a gap arises between objectives and outcomes, the team leader will try to determine if medical or other reasons can explain the limitations, such as file complexity, which implies that the supervisor and the SP-05 rulings officer will have a discussion. According to Mr. Martel, absences due to illness may also explain why SP-05 rulings officers would have difficulty achieving their objectives (Exhibit B-A-1, Tab 6).



[35] Mr. Martel also indicated that SP-05 rulings officers do not normally deal with “inter-corporate” files when they start their assignments. And according to him, it is quite rare to implement an improvement plan less than 9 to 12 months after an SP-05 rulings officer begins an assignment.

### **C. The employer’s evidence**

[36] Ms. Simard testified for the employer. She retired in June 2015. Before then, she was a team leader at the MG-03 group and level. She has held positions such as that of administrative clerk (SP-02) and rulings officer (SP-05). She was also a file revisor (SP-06).

[37] Ms. Simard explained that she was the grievor’s team leader when the grievor arrived in 2011. A group of other new SP-05 rulings officers met the grievor. They were then introduced to the people who would be their revisors. Ms. Simard testified that new SP-05 rulings officers take two to four weeks of training. The files assigned to them in the first two weeks are revised in their entirety. During those first two weeks, the employer does not consider the time spent on each file. After four weeks, the revisors conduct fewer checks, and the employer expects an employee to spend about seven-and-a-half hours per file.

[38] According to Ms. Simard, files are assigned based on their facts. Thus, according to her, “inter-corporate” files may or may not be complex. It depends on the case.

[39] Ms. Simard stated that normally, a new employee needs about eight weeks to be able to process SP-05 rulings officer files. After a year, normally, they are independent.

[40] Ms. Simard testified that after the grievor finished her training, she was informed that she had difficulty gathering facts in a file and that she was wasting significant time asking different people instead of relying on her revisor for tips and advice.

[41] Since she wanted the grievor to achieve her goals, Ms. Simard met with her often and asked if she needed help.

[42] Ms. Simard testified that as a result of the meetings, she offered to have an employee help the grievor manage the stress caused by her fear that she would not meet her objectives (Exhibit E-1, Tab 10). At the grievor’s request, she was also

assigned a new revisor to help her. Ms. Simard also explained that after a discussion was held with the grievor, Ms. Simard implemented a first improvement plan in January 2012, a second in May 2012, and a third in January 2013 (Exhibit E-1, Tabs 10 to 12). She explained that she had many meetings with the grievor about the objectives to achieve and how to achieve them.

[43] Ms. Simard testified that apparently, in their meetings in early 2012, the grievor told her that she found that she lacked training and that she was in the process of separating.

[44] Ms. Simard also testified that throughout the grievor's time as an SP-05 rulings officer, her performance did not improve (Exhibit E-1, Tabs 8 to 11). Normally, according to Ms. Simard, the number of hours spent on each file should have decreased in 2012 and early 2013; however, it did not happen, despite the facts that the grievor received help managing her stress and changed revisors (at her request) and that two improvement plans were put in place, in January 2011 and May 2012 (Exhibit E-1, Tab 10).

[45] Ms. Simard stated that in 2012, she had regular discussions with the grievor, as noted in the two improvement plans (Exhibit E-1, Tab 10). According to Ms. Simard, the grievor's performance did not really improve during the two periods covered by the improvement plans. The quality of the work was still lacking, even though the grievor had direct access to a revisor. In fact, she had priority when she had a question and did not have to wait. According to Ms. Simard, the grievor continued to have problems interpreting directives and the law. She also continued to rely on other SP-05 rulings officers instead of consulting with the revisor available to her. Ms. Simard noted that she informed the grievor of the possible consequences if her performance did not improve (Exhibit E-1, Tab 10).

[46] Note that a third improvement plan was also put in place, from January 7, 2013, to March 8, 2013, which was intended to continue the last improvement plan, which had covered May 15 to 25, 2012 (Exhibit E-1, Tab 11). According to Ms. Simard, the third improvement plan simply had a different title and became an action plan (Exhibit E-1, Tabs 11 and 12).

[47] As for the grievor's physical and psychological health, according to Ms. Simard, the grievor did not seem to be in any emotional stress and did not say anything about

it in their regular meetings (Exhibit E-1, Tab 10). However, Ms. Simard acknowledged that in early January 2012, the grievor complained about physical pain and said that she was afraid it was cancer. The grievor consulted a doctor about it and later informed Ms. Simard that it was not cancer and that it “[translation] was not serious” (Exhibit BA-1, Tab 10). Ms. Simard acknowledged that she was aware of the grievor’s problems with her spouse but noted that other employees had gone through separations.

[48] Ms. Simard indicated that she had planned new training for the grievor when she returned from sick leave; the grievor had undergone surgery and was off work from May to November 2012. Ms. Simard felt that the grievor had to refresh her knowledge. So, the grievor received a new training plan with access to a revisor for two weeks when she returned. It was a tailored training plan for an employee returning from sick leave. The idea was to resume the earlier, scheduled improvement plan after the training.

[49] Ms. Simard indicated that in the time she supervised the grievor, the grievor took several sick leaves, including a six-month absence from May 2012 to the end of November 2012, but that her absences were always supported by medical certificates (Exhibit E-1, Tab 6). Ms. Simard indicated that she asked the grievor if she needed accommodation to help her; she replied that the doctor had not prescribed special accommodations as a result of her surgery in May 2012. Everything seemed to be going fine in that respect. When she was asked why she did not ask the grievor to undergo a more in-depth medical assessment, Ms. Simard stated that the grievor had just started in the position. The grievor said that she was being followed by a doctor and that no accommodation was needed.

[50] Ms. Simard testified that she did not recall the grievor crying in her office after she returned from sick leave in November 2012. Ms. Simard stated that had the grievor done so, she would have done something. She testified that an employee cannot be left in tears and distress. Ms. Simard stated that she did not see the grievor’s medical certificate dated June 10, 2013, as the grievor no longer reported to her in June 2013.

[51] Ms. Simard left in December 2012 and was replaced by Ms. Laflamme, the grievor’s team leader. However, Ms. Simard prepared the grievor’s performance appraisal for September 1, 2011, to October 22, 2012 (Exhibit E-1, Tab 7). Ms. Simard

explained that the appraisal identified several performance problems. She stated that essentially, the grievor had not met the objectives of the SP-05 position. She explained that she did not include this conclusion in the performance report, as it would have meant that the grievor's term employment would simply have not been extended.

Ms. Simard indicated that she also considered the grievor's medical condition.

According to Ms. Simard, the grievor did not have to process complex and difficult files. For example, Ms. Simard maintained that she would never have left the grievor with a complex "inter-corporate" file; had the grievor had one, her designated revisors, like Mr. Coudé, would never have allowed it and as team leaders, would have reported it.

[52] Ms. Simard also explained that she was involved in the grievor's performance appraisal for September 1, 2012, to August 31, 2013, even though Ms. Simard had left in December 2012. Ms. Simard explained that she had supervised the grievor when the grievor returned from sick leave in November 2012 and that Ms. Laflamme asked her to take part in the appraisal (Exhibit E-1, Tab 9).

[53] Ms. Simard indicated that that appraisal again identified problems with the grievor's performance; she had not met the quantitative and qualitative standards of her SP-05 position (Exhibit E-1, Tab 9).

[54] With respect to the decision in late March 2013 to not renew the grievor's SP-05 rulings officer term position, Ms. Simard indicated that she was no longer in the position and that Marie Christine Claveau, a manager in the Legislative Policy and Regulatory Affairs Branch, had contacted her for feedback. Ms. Simard said that she shared her observations with Ms. Claveau, along with what the revisors said about the grievor. However, it was Ms. Claveau's decision.

[55] When she was asked if she knew that the grievor had physical problems in 2012 and 2013, Ms. Simard recalled that after the grievor said that she thought that she had cancer, the grievor corrected herself. The grievor sometimes told her that she was in pain, but that was at other times. For example, the grievor had informed Ms. Simard that she had difficulty sitting. So, the employer requested an ergonomic assessment to help her. According to Ms. Simard, the employer did not know the nature of the grievor's illness, and the grievor made no other requests.

[56] According to Ms. Simard, despite her performance issues, the grievor wanted to remain in the SP-05 rulings officer position. Ms. Simard stated that she asked the grievor if she felt comfortable as an SP-05. Apparently, the grievor never told her that she was not. According to Ms. Simard, it was also all related to money. The grievor did not want to be in a position with a lower salary.

[57] Mr. Coudé testified. He is retired. He was an SP-05 rulings officer for 19 years. He became an SP-06 complex-case and technical revisor in 2010. As a revisor, he had the opportunity to revise the grievor's rulings.

[58] Mr. Coudé stated that normally, new rulings officers process files based on their employment status and level of independence. In his view, not all "inter-corporate" files are complicated; some are simple.

[59] According to Mr. Coudé, if a rulings officer like the grievor consulted him about a file and it seemed too complex to him, he notified the team leader, in this case Ms. Simard or Ms. Laflamme, who then decided whether the officer simply required "[translation] coaching" or to reassign the file to a more experienced officer.

[60] Mr. Coudé stated that he did not remember whether the grievor had seen him about files that were too complex for her. However, he said that he remembered a file from her that his revisor colleague, Ms. Gagné, had revised. He said that after Ms. Gagné's revision, he had to revise the file, at Ms. Laflamme's request. According to him, Ms. Gagné was less experienced as a technical revisor than he was. When he was asked if the grievor was required to follow Ms. Gagné's instructions on that file, Mr. Coudé indicated that he was not in a position to say. He was not involved in the 2013 decision to not renew the grievor's term employment.

[61] Ms. Laflamme also testified. She once held an SP-05 rulings officer position and was an SP-06 revisor. She replaced Ms. Simard as the team leader (MG-03) in the Insurability group on an acting basis and in 2016 became permanent in that position.

[62] Ms. Laflamme's testimony essentially corroborated that of Ms. Simard. Ms. Laflamme was first a colleague of the grievor's as a rulings officer. At the time, her workstation was very close to the grievor's. The grievor never told her of any personal problems. Ms. Laflamme then revised the grievor's decisions when she became an SP-06 revisor in January 2012. The grievor then had many performance issues. Indeed,

she had difficulty understanding the legislative framework and the procedures to follow when establishing a ruling. She also made careless mistakes.

[63] Ms. Laflamme indicated that she met with the grievor when she became the team leader on an acting basis, replacing Ms. Simard. Ms. Laflamme agreed with Ms. Simard before she left to give the grievor a “[translation] refresher,” as she was to return from her six-month sick leave in late November 2012. In addition, the employer wanted to reinstate an improvement plan for the grievor that was to run from January to March 2013. According to Ms. Laflamme, the grievor felt that the monitoring of her performance caused her stress.

[64] Ms. Laflamme testified that two or three times, the grievor cried in her office because results had not been reached, and she was emotional. Ms. Laflamme tried to comfort her. According to Ms. Laflamme, the grievor did not request any assistance. Assistance measures were put in place, such as the improvement plan for January 7, 2013, to March 8, 2013 (Exhibit E-1, Tabs 11 and 12).

[65] In her testimony, Ms. Laflamme reviewed the January 2013 improvement plan. She highlighted the employer’s efforts to help the grievor achieve her objectives, which included giving her more time to process files and assigning a full-time revisor in January 2013, Ms. Gagné, to accompany her (Exhibit E-1, Tab 11).

[66] According to Ms. Laflamme, the grievor tended to consult her colleagues at the same level rather than relying on the revisor’s expertise. A few times, she also included information in several reports that was from other files. Files were often also incomplete. As for Ms. Gagné’s positive and encouraging comments about the grievor’s performance, Ms. Laflamme explained that while she did not question Ms. Gagné’s qualifications, it was necessary to understand that Ms. Gagné was new to her SP-06 revisor position (Exhibit B-A, Tab 10).

[67] Ms. Laflamme indicated that she did not notice emotional or physical problems on the grievor’s part and that she was not informed of any by other employees, except the two or three times the grievor cried in her office because she was stressed from not achieving her goals.

[68] Ms. Laflamme testified that on March 6, 2013, she informed Ms. Claveau that the grievor’s performance had not improved (Exhibit E-1, Tab 14). The quality and quantity

still had not met the mark. Ms. Laflamme asked Mr. Coudé to revise the grievor's last three rulings files, one of which the revisor, Ms. Gagné, had revised. According to Ms. Laflamme, Mr. Coudé also raised questions about the grievor's performance (Exhibit E-1, Tab 14). Ms. Laflamme concluded that the grievor had not met expectations; the anticipated results simply had not been reached (Exhibit E-1, Tab 8).

[69] On March 11, 2013, in the presence of Ms. Laflamme, Ms. Claveau, and the grievor's union representative, Mr. Martel, the grievor was informed that her term employment as an SP-05 rulings officer would not be renewed. According to Ms. Laflamme, nevertheless, the meeting went well. No physical or psychological problems for the grievor were raised.

[70] On March 11, 2013, when she was informed that her rulings officer job would not be renewed, nevertheless, the grievor thanked Ms. Laflamme for giving her every opportunity to help her achieve the objectives she had been given (Exhibit E-1, Tab 15).

[71] Ms. Laflamme testified that since the grievor's term rulings-officer position would not be renewed after March 29, 2013, Ms. Claveau immediately took other steps to find the grievor another position. She was offered a term position as an administrative support clerk at the SP-02 group and level for March 30, 2013, to May 10, 2013. It was for a term until the incumbent returned.

[72] According to Ms. Laflamme, the grievor's final administrative support clerk assignment also did not go well. As an example, she noted that the grievor often made mistakes when opening files, files were not sent to the Appeals Branch in Ottawa within the required time, and the grievor did not follow up as required.

[73] On April 30, 2013, Ms. Laflamme, Ms. Claveau, Mr. Martel, and the grievor met to discuss her difficulties in her SP-02 administrative support clerk position. It did not go well. According to Ms. Laflamme, at the meeting, the employer learned that the grievor was not well, that she was taking medication, that she had separated, and that she was consulting a psychologist. Ms. Claveau wanted to ensure the grievor's safety and wanted to send her to a hospital; she refused. Reportedly, she said that she was not well and that her doctor had advised her three times to rest and to stop working. Ms. Claveau contacted the grievor's sister, but she refused to intervene. However, Ms. Claveau personally set up an emergency appointment with a doctor for the next day. Mr. Martel accompanied the grievor home in a taxi.

[74] According to Ms. Laflamme, the meeting was the first time she was told that the grievor had separated. In addition, the grievor had never mentioned concentration problems to her.

[75] Ms. Laflamme did not see the grievor again after that, but the grievor provided a medical certificate dated June 10, 2013 (Exhibit B-A, Tab 10).

[76] Ms. Claveau was the final witness. Before retiring in 2015, she was a manager in the Legislative Policy and Regulatory Affairs Branch. She was responsible for approximately 150 employees. From 2011 to 2013, Ms. Simard, and later Ms. Laflamme, reported to her as team leaders, and Ms. Claveau was kept informed of the grievor's performance as she said she was committed to her employees' development.

[77] Thus, in 2011, Ms. Claveau learned that the grievor was having performance problems. She was also made aware of the grievor's medical situation. The grievor thought she might have cancer, but it was not so. According to Ms. Claveau, in 2011 and 2012, no doctor requested or prescribed an accommodation.

[78] With respect to the grievor's performance issues when she was an SP-05 rulings officer, Ms. Claveau testified that Ms. Simard and Ms. Laflamme consulted her. At that time, Ms. Claveau asked that improvement plans be put in place to help the grievor (Exhibit E-1, Tabs 11 and 12).

[79] Unfortunately, the performance did not improve, neither qualitatively nor quantitatively. In March 2013, Ms. Claveau's only choice was to not renew the grievor's term employment as an SP-05 rulings officer (Exhibit E-1, Tab 14). On March 11, 2013, Ms. Claveau and Ms. Laflamme met with the grievor and Mr. Martel to inform her that her employment as an SP-05 rulings officer would not be renewed when it expired on March 29, 2013. The meeting was without incident.

[80] The term position's lack of renewal was not new to the grievor. Several times in her performance appraisals and improvement plans she was told that the objectives and results had not been achieved and that her term employment would not be extended (Exhibit E-1, Tabs 8 to 11). At that meeting, no mention was made of any psychological or physical problem that could have affected her performance. On



March 28, 2013, Ms. Claveau also informed her in writing that she was not meeting the SP-05 performance expectations (Exhibit E-1, Tab 16).

[81] Ms. Claveau testified that despite everything, she did not want the grievor to be left without anything; she said that “[translation] humanely speaking, something had to be done”. She wanted to find the grievor another position. So, she inquired with the person in charge of the Jonquière Tax Centre to see if the grievor could return there. It was not possible.

[82] Therefore, on March 12, 2013, Ms. Claveau decided to offer the grievor a term position as an SP-02 administrative support clerk (Exhibit E-1, Tab 4). Ms. Claveau explained that the grievor was to replace an employee only for the duration of that employee’s absence. The term SP-02 position was to be from March 30, 2013, to May 10, 2013. Note that it was extended to cover the grievor’s period of sick leave, to June 7, 2013 (Exhibit E-1, Tab 2). She accepted the new term position.

[83] According to Ms. Claveau, the situation did not improve in the new duties as an SP-02 administrative support clerk. Problems still arose with forwarding documents, along with misunderstandings with other employees.

[84] On April 30, 2013, Ms. Claveau, accompanied by Ms. Laflamme, met again with the grievor and Mr. Martel. The purpose was to see how things were going. The grievor was unnerved at that meeting. She cried and was emotional. She said that it was not going well, which concerned Ms. Claveau, who was worried for the grievor’s life at that moment. So, she immediately set up an appointment for the grievor with a doctor. She also called the grievor’s sister, who did not receive her well. It was decided that Mr. Martel would take the grievor home by taxi. Ms. Claveau testified that she gave the grievor her personal phone number so that the grievor could call her at any time, if necessary.

[85] Ms. Claveau testified that the grievor did not report to work after the April 30, 2013, meeting. She was on sick leave until June 7, 2013, the date on which the SP-02 term position expired. As well, the incumbent of the grievor’s position was to return to work on June 17, 2013 (Exhibit E-1, Tab 17). On June 5, 2013, Ms. Claveau emailed Mr. Martel and advised him that the grievor’s SP-02 term position would not be renewed beyond June 7, 2013 (Exhibit E-1, Tab 17).

[86] Ms. Claveau acknowledged that on June 11, 2013, she received the grievor's medical certificate dated June 10, 2013, which was retroactive to February 2013. However, she maintained that the grievor's performance problems began as soon as she was hired as an SP-05 rulings officer in 2011.

[87] According to Ms. Claveau, she and her colleagues had no information to detect that the grievor was suffering from major depression. Ms. Claveau stated that the grievor "[translation] never raised that; it did not come up". She also testified that she was unaware that the grievor had separated from her spouse in 2011. She was surprised to learn of it at the hearing.

### **III. Summary of the evidence**

#### **A. For the grievor**

##### **1. Was the grievance filed out of time?**

[88] In response to the employer's claim that her grievance is out of time because it was filed after the applicable 25-day period, the grievor maintained that the time began to run after she was informed on June 12, 2013, of the decision to not renew the SP-02 term position. Thus, the grievance is not out of time, as it was filed on July 3, 2013. She explained that it is a continuing grievance that began in 2011 and that ended not on March 29, 2013, at the end of the SP-05 term position, but rather on June 12, 2013, when she was informed that the SP-02 term position would not be renewed.

[89] Alternatively, if I decide that the grievance should have been filed 25 days after the announcement was made that the SP-05 term position was not renewed, verbally on March 11, 2013, and in writing on March 28, 2013 (Exhibit E-1, Tab 16), she asked that I exercise my discretion and extend the period under s. 61(b) of the *Regulations*. She referred me to *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1. She emphasized that the employer knew that she had serious mental-health issues, which affected filing her grievance. According to her, she would suffer serious prejudice were the grievance dismissed because it is out of time, but the employer would not were an extension of time granted.

**2. Was not renewing the SP-05 term position discriminatory?**

[90] The grievor maintained that the employer acted in bad faith by deciding to not renew her SP-05 term employment.

[91] The grievor argued that the employer's decision was based on discriminatory reasons. Therefore, its decision had legal consequences, even though the position not renewed was for a term. She referred me to the following decisions: *Teti v. Deputy Head (Department of Human Resources and Skills Development)*, 2013 PSLRB 112 at para. 129; and *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at paras. 2 and 3.

[92] The grievor argued that I had to consider whether in fact the employer discriminated against her and whether she lost her job as a result. She referred me to *Hughes v. Canada (Attorney General)*, 2019 FC 1026 at paras. 36 and 37, in support of her argument.

[93] The grievor also argued that not only could the employer not discriminate against someone on the basis of mental and physical health, but also, it had a duty to investigate whether her performance was affected by her mental and physical health. The employer should have known that her physical and mental condition affected her performance and that it could not simply say that it did not know her state of health. She referred me to the following decisions: *Mellon v. Human Resources Development Canada*, 2006 CHRT 3 at paras. 88 to 100; and *Dupuis v. Canada (Attorney General)*, 2010 FC 511 at paras. 25 to 27.

[94] According to the grievor, setting aside the periods during which she was absent due to illness leaves approximately 9 to 10 months when she was at work and when allegedly, performance issues arose. If the period in which her performance was reportedly poor is compared to her approximately 30 years of work without problems, it is very short. The employer should have considered it, as it should have also considered the fact that she was suffering from major depression (Exhibit B-A, Tab 9). Ms. Claveau should have asked questions; she received poor advice.

[95] The grievor maintained that the employer said that it had sufficient evidence to decide to not renew her SP-05 term position. It had to dig deeper to see if she had any physical or mental issues.

[96] The grievor noted that in 2011 to 2012, she worked while in physical pain and that she had trouble sitting. She even had to undergo major surgery, which prevented her from moving for six months. She also had to deal with her personal situation at work, which was not easy, as her former spouse and another person involved worked at her location, and everyone was aware of the situation. People talked. She found it hard to work in her situation and in her environment and to focus as she had for 30 years.

[97] The grievor experienced tremendous stress between September 2011 and May 2012. Ms. Gagné and Mr. Martel said that the grievor cried at work and that she was stressed.

[98] The grievor also maintained that before May 2011, Ms. Simard knew that she was suffering physically, that she was to have surgery, and that she was going through a separation. Unfortunately, like Ms. Laflamme, Ms. Simard was concerned only with performance. Ms. Simard never told Ms. Laflamme that the grievor was going through a separation, which proves that in her opinion, the situation was not a concern. Ms. Claveau was more direct; she stated that she feared for the grievor's life.

[99] Unfortunately, after some consultations, Ms. Claveau did not follow up on the medical certificate indicating that the grievor had been suffering from major depression since February 2013. Ms. Claveau did not see a need to request an independent medical examination. According to her, the performance issue existed in 2011. However, she did not know that the grievor was separated from her spouse at that time. Had she investigated, she would have seen that the grievor's physical and mental problems existed in 2011.

[100] According to the grievor, the employer knew her past since 1984 and should have looked deeper and realized that particular circumstances explained her performance issues. Unfortunately, it did not.

## **B. For the employer**

### **1. Was the grievance filed out of time?**

[101] As to whether the grievor's grievance is out of time, the employer stressed that SP-05 and SP-02 term positions are jobs in different positions.

[102] On March 11, 2013, the grievor was informed verbally that the SP-05 term position would not be renewed. It was confirmed on March 28, 2013 (Exhibit E-1, Tab 16). Therefore, clearly, her grievance, which was filed on July 3, 2013, was out of time and must be dismissed. According to the employer, the fact is irrelevant that it was filed within 25 days of the decision to not renew her SP-02 term position on June 5, 2013. According to it, clearly, the grievance filed on July 3, 2013, was about the decision to not renew the term employment as an SP-05 decision officer, not about the SP-02 administrative support clerk position. As a result, her grievance was filed late and must be dismissed.

[103] Alternatively, were I to find that the grievor's grievance was about the SP-02 term position not being renewed and was not late, the employer claimed that everyone acknowledged that the position was clearly for a specified period while the incumbent in the position was away, that it had been assigned to help the grievor, and that performance was not the issue.

## **2. Was not renewing the SP-05 term position discriminatory?**

[104] In the employer's view, the next question is, when did the grievor suffer from depression? According to it, no one can say when she began feeling depressed. It claimed that caution is required when considering the medical certificate she provided after the April 30, 2013, events, which indicated that she had had depression since February 2013. The certificate provides only a brief diagnosis. There are no details; the doctor did not testify. The employer referred me to *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68 at paras. 26 and 31.

[105] The employer also referred me to the grievor's earlier medical certificates and emphasized that none had mentioned depression (Exhibit E-1, Tab 6). Only on June 10, 2013, after being informed that her SP-02 term employment would not be renewed, and five days after Mr. Martel so was informed, did the employer receive the medical certificate indicating major depression that had allegedly been ongoing since February 2013. As for the grievor's responsibility, the employer referred me to *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33, and *Brassard v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 102.

[106] The employer maintained that it should be recalled that the only information Ms. Claveau had when she decided to not renew the grievor's SP-02 term position was the last meeting with the grievor on March 11, 2013, during which no indication arose that the grievor had a depressive disorder.

[107] The employer stressed that it could not guess the grievor's physical and mental condition and that had it insisted on a medical assessment at the time, it would have been accused of harassing her.

[108] The employer submitted that it was up to the grievor to provide *prima facie* evidence that it discriminated against her based on her physical and mental health, resulting in her SP-05 term position not being renewed.

[109] As such, the grievor had to provide *prima facie* evidence that she had a physical disability that led to differential treatment, namely, her term position not being renewed. There must be a nexus between those two things.

[110] The employer maintained that during the time before the grievor's surgery in May 2012, she complained about discomfort and pain, but none of that was communicated to the employer or documented in medical certificates. There is no evidence of a disability with limitations or a need for accommodation. None of that was requested. Although the grievor regularly provided medical certificates after her absences, nothing supported a disability or limitations. According to the employer, physical disability must be differentiated from being afflicted with pain. In this case, no evidence was presented of a physical disability.

[111] According to the employer, the evidence is clear that often, Ms. Simard asked the grievor if she needed anything. The grievor did not request or indicate that she needed anything. When she returned from surgery in November 2012, Ms. Simard again asked her if she needed accommodation. The answer was in the negative. According to the employer, it is important to understand the context of this case, in that it had no information from which to conclude that there was a physical disability. It referred me to the following decisions: *Medeiros v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2012 PSLRB 104; and *Belmar v. Treasury Board (Department of Human Resources and Skills Development)*, 2012 PSLRB 20.

[112] As to whether the employer discriminated against the grievor on the basis of her mental condition, again, the employer claimed that it was not informed of her mental state. It argued that although Ms. Simard and Ms. Laflamme had seen the grievor cry, it was all related to performance stress and the fact that she believed then that she had cancer, which was not so.

[113] In that respect, the employer specified that although the witnesses Mr. Boivin and Mr. Martel indicated that they had seen the grievor cry, they were her former spouse and union representative, not employer representatives. Therefore, there was no evidence that the grievor was distraught at work or in distress.

[114] The employer also argued that not everyone was aware of the grievor's separation; Ms. Laflamme and Ms. Claveau learned at the hearing that she was separated from her spouse and that another person at work had also been involved.

[115] The employer revisited Ms. Claveau's testimony that she made her decision based on the information available to her. She could not provide an accommodation when she did not know one was needed. Nevertheless, the employer made several efforts to help the grievor, for example by implementing improvement plans to help her achieve her objectives, when it had no information about her overall health. It referred me to *Togola v. Treasury Board (Department of Employment and Social Development)*, 2014 PSLRB 1. According to the employer, on March 11, 2013, the grievor could have taken the opportunity to inform it of her situation. She and her accompanying union representative said nothing. If indeed she was physically and mentally unwell, why was a grievance filed only after the decision was made to not renew her SP-05 term position? According to the employer, the union that represented her in this case had a responsibility.

[116] According to the employer, it is irrelevant that the grievor had worked almost 30 years without problems. It pointed out that on one hand, it was not 30 years of continuous work, and on the other hand, the duties she performed before joining the Insurability group as an SP-05 had been more suited to her.

[117] As for the SP-02 term position, the employer maintained that there was no discrimination issue, as everyone was aware that the term position was to end, including the grievor, when the incumbent returned to work on June 17, 2013.

### C. Rebuttal

[118] In rebuttal, the grievor submitted that the employer had enough evidence to see that she was not herself. According to her, it had enough information to inquire further with her and to try to understand what was wrong. Although it put things in place to help her, it had a duty to try harder to understand what was going on.

[119] According to the grievor, in this case, the employer did not take a reasonable approach. While several signs appeared of her physical and mental disabilities in 2013, the employer chose to ignore them. It should not have simply implemented improvement plans. Instead, it should have taken a reasonable approach of trying to understand what was behind her performance issues. Unfortunately, it did not.

### IV. Reasons

#### A. Is the grievance out of time, and if so, should the Board exercise its discretion and extend the time under s. 61(b) of the *Regulations*?

[120] In response to the employer's objection that the grievance should be dismissed because it was filed out of time, the grievor argued that it was not out of time as it is a continuing grievance of the employer's decision to not renew her SP-05 and SP-02 term positions.

[121] Alternatively, if I find that the grievance was filed beyond the 25-day time limit, the grievor asked that I exercise my discretion under s. 61(b) of the *Regulations* and extend the time for filing it.

[122] First, I must determine whether the grievance is related to the SP-05 term position, is against the SP-02 term position not being renewed, or is continuing.

[123] In my view, the wording of the grievance presented to the employer leaves little doubt about the grievor's intent to file a grievance against the employer's decision to not extend her SP-05 term position. There is no mention of the SP-02 term position.

[124] Although the grievor filed the grievance on July 3, 2013, after the employer decided to not renew her SP-02 term position, the fact remains that the decision being challenged in the grievance was to not renew the SP-05 term position. The employer informed her of that decision verbally on March 11, 2013, and in writing on March 28, 2013 (Exhibit E-1, Tab 16). Thus, her grievance is out of time, as it was filed more than 25 days after she was informed of the employer's decision.



[125] Section 61(b) of the *Regulations* provides that in the interest of fairness and on application by either party, the Board may extend the time to file a grievance.

[126] *Schenkman* listed these criteria to consider in an application for an extension of time:

- clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the grievor's due diligence;
- balancing the injustice to the grievor against the prejudice to the employer were the extension granted; and
- the grievance's chances of success.

[127] Considering the first criterion, which is that the delay be justified by clear, cogent, and compelling reasons, the evidence showed that at the meeting with Mr. Martel, Ms. Laflamme, and Ms. Claveau on March 11, 2013, Ms. Claveau informed the grievor that her SP-05 term position would not be extended beyond March 29, 2013. However, out of compassion, Ms. Claveau found another term position for her as an SP-02 while its permanent incumbent was away.

[128] The grievor did not file a grievance within 25 days against the SP-05 term position not being renewed. I understand from the evidence that once she knew that the SP-05 term position would not be extended, she chose to move forward and accept the SP-02 term position. Discussions on the SP-05 term position not being renewed and the SP-02 term position offer were very contemporaneous, as the SP-02 term position was officially offered the day after the meeting with the grievor, on March 12, 2013, as evidenced by the SP-02 letter of offer (Exhibit E-1, Tab 4). It seems that under the circumstances, she opted to accept the SP-02 term position (Exhibit E-1, Tab 4). I can understand that at that moment, she wanted to continue working, even though it was at a lower level, namely, SP-02.

[129] Under the circumstances, the grievor faced a difficult choice of filing a grievance or moving forward and accepting a term position at a lower level. She accepted the SP-02 term position. Given the context, the concurrent discussions about the SP-05 and SP-02 positions, the grievor's explanation of wanting to continue working appears to me to be a clear, cogent, and compelling reason given the factual and time context.

[130] Turning now to the test of balancing the injustice the delay caused to the grievor against the prejudice to the employer from granting an extension, I find that

the prejudice that the employer could suffer from an extension would be much less than the injustice that the grievor faces. In this respect, no indication of potential serious harm to the employer was presented.

[131] With respect to the length of time between the decision date and the grievance filing, from March 11, 2013, to July 3, 2013, I find that a delay of about three months is not excessive under the circumstances. Finally, considering the chances of success of the grievance, given the facts in this case and the many witnesses, it seems harder to assess and would require reviewing the evidence on the merits.

[132] Therefore, under the circumstances and in the interests of fairness, I allow the grievor's application for an extension of time with respect to her grievance having been filed on July 3, 2013, against the employer's decision to not renew the SP-05 term position.

**B. Was the employer's March 2013 decision discriminatory to not renew the SP-05 term position?**

[133] As I have already mentioned, in my view, the grievance is about the SP-05 term position not being renewed, not the SP-02 position. Therefore, the issue of the SP-02 term position not being renewed is not before me. However, I would add that clearly, the SP-02 term position seems to have been awarded, as Ms. Claveau said, in the interest of "[translation] humanity". She still tried to continue helping the grievor and did so in good faith. More importantly, in March 2013, the employer clearly informed the grievor that it was an SP-02 term position and that it had a clearly stated termination date that was subject to the incumbent's return.

[134] First, I would like to note that the grievor's SP-05 position was also for a term and that no employee is entitled to the automatic renewal of such a position. I would also like to note that despite her performance problems from the start of her SP-05 term position, nonetheless, the position was renewed several times between May 2011 and March 2013.

[135] Indeed, considering all the evidence about the grievor's performance, it seems clear to me that despite the three improvement plans, help with stress management, training, direct access to revisors, detailed performance appraisals, meetings, and regular follow-ups with her team leaders, she was unable to achieve her objectives.

Details were provided about the performance problems, attempts to resolve shortcomings, and comments (Exhibit E-1, Tabs 5 and 7 to 12).

[136] Also, remember that according to the evidence, it was the first time the grievor held a position in the Insurability group at the SP-05 group and level (Exhibits B-A, Tab 7, and E-1, Tab 2). Before that, she had held term positions in the Revenue Collections Directorate at the SP-03 and SP-04 group and levels (Exhibit B-A, Tabs 3 and 7).

[137] Despite the grievor's performance difficulties, the employer extended her SP-05 term position four times, from August 29, 2011, to March 30, 2013. For reasons referred to as "[translation] humanitarian", Ms. Claveau then offered another term position, at SP-02, from March 30, 2013, to May 10, 2013, which was extended to June 7, 2013, based on the incumbent's return (Exhibits B-A, Tab 7, and E-1, Tabs 2 and 17).

[138] The grievor claimed that in 2011, she experienced psychological distress after her separation that fall. Her spouse worked in the same building as she did. Reportedly, it all led to difficulty focusing, which apparently hindered her performance. She added that her performance problems were also due to her physical condition, which required surgery in May 2012 and convalescence until November 2012.

[139] According to the grievor, it was then clear that she had been suffering psychologically and physically since 2011. Reportedly, she had always performed well in the past. Therefore, the employer allegedly had a duty to try to understand the reason for her performance problems. Instead of simply imposing improvement plans that only increased her stress, it should have looked deeper. By deciding to not renew her SP-05 term position, it allegedly discriminated against her on the basis of her mental and physical health.

[140] The jurisprudence is consistent that the party alleging discrimination must first provide *prima facie* evidence of it. Thus, as the Supreme Court of Canada notably recognized as follows in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33:

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

[141] In this case, the characteristic that the grievor cited was allegedly protected under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), rather than the *British Columbia Human Rights Code* (R.S.B.C. 1996, c. 210)), and the adverse effect was allegedly related to the SP-05 term position not being renewed. Therefore, the issue is whether she presented *prima facie* evidence of the following:

- she had a characteristic protected by the *Canadian Human Rights Act*;
- she suffered an adverse impact with respect to her SP-05 term position; and
- the protected characteristic was a factor in the adverse impact.

[142] Sections 3(1) and 7(a) of the *Canadian Human Rights Act* read as follows:

**3(1)** *For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*

...

**7** *It is a discriminatory practice, directly or indirectly,*

**(a)** *to refuse to employ or continue to employ any individual ....*

[143] Therefore, I must determine whether the grievor demonstrated a psychological or physical disability and whether, as alleged, the disability was a factor in the decision to not renew her SP-05 term position. In that context, the question arises as to whether the employer should have known that she had such a disability.

[144] First is the psychological distress that the grievor said she suffered from in 2011 when she had difficulties with her spouse. She stated that those difficulties were exacerbated by the fact that she, her spouse, and another person involved worked in the same building. I note that no medical evidence was presented to establish that she was disabled at that time. However, the evidence shows that although she told

Ms. Simard that she was having difficulties with her spouse, she never elaborated on it with Ms. Simard or indicated that the situation was causing her stress, causing her focusing problems, and preventing her from meeting her objectives. In that respect, she testified that she did not know if “[translation] Ms. Simard was aware that [her] mental health was affected by what was happening to [her]” and “that [she] did not need to explain [her] private life”. Therefore, I find that the evidence did not establish that Ms. Simard had an objective reason to suspect that the grievor was in a state of psychological distress, particularly as the grievor chose not to inform her.

[145] Although I understand the grievor’s delicate situation and the fact that she did not want to provide details, I now find it hard to argue that Ms. Simard should have known what was going on. It is true that Ms. Simard indicated that she was aware that the grievor had separated from her spouse in fall 2011. However, according to Ms. Simard, it was nothing exceptional; other employees separated from their spouses. Moreover, the medical certificates at that time did not mention psychological distress. The grievor did not prove that she suffered from a disability at that time and that Ms. Simard should have known of it.

[146] It is true that in her testimony, the grievor maintained that her colleagues were aware of her personal situation and that “[translation] people were talking”, thus making the situation even more difficult for her. In that respect, I must point out that no independent evidence was submitted at the hearing to support that assertion. On the contrary, I note their sincerely surprised reactions when Ms. Laflamme and Ms. Claveau learned that the grievor was separated from her spouse and that another person had been involved in her personal difficulties.

[147] As mentioned, the grievor testified that she did not know if Ms. Simard was aware of her problems with her former spouse and that she did not need to explain her private life. In practice, this means that she did not want to talk about it. Although again, I understand that the grievor wanted to be discreet, I find it hard to conclude that the employer should have known what was going on. In her testimony, Ms. Simard referred to several meetings with the grievor to discuss performance. The uncontradicted evidence shows that nothing, apart from the stress of meeting objectives, showed the grievor’s psychological condition. Nothing in the minutes of those meetings as part of the improvement plans indicates that she raised any difficulty or that she made any comments (Exhibit E-1, Tabs 10 and 11).

[148] In her testimony, Ms. Simard candidly replied that had she seen the grievor crying and in a state of psychological distress, she would have intervened. According to her, she allegedly “[translation] did something; an employee cannot be left in tears and distress”. I would add that many medical certificates were submitted from 2011 to 2013 and that apart from the one of June 10, 2013, none referred to the grievor’s depression. And none indicated that she was taking medication.

[149] In that respect, Ms. Laflamme’s testimony is also consistent with that of Ms. Simard. At no time did Ms. Laflamme receive any information or was she in situations that should have led her to conclude that in addition to experiencing stress from meeting her performance objectives, the grievor was in psychological distress. As mentioned, Ms. Laflamme and Ms. Claveau learned to their surprise only at the hearing that the grievor separated from her spouse in fall 2011 and that another person at her workplace was also involved.

[150] Ms. Laflamme, as had Ms. Simard before her, held regular meetings with the grievor to help her and to follow up with her throughout Ms. Laflamme’s time as her team leader. However, it is unfortunate that during those meetings, the grievor did not share with her team leader the fact that her personal situation was significantly affecting her performance, particularly as the two seemed to have had a good working relationship, as evidenced by the grievor’s thank-you email when on March 11, 2013, she was informed that her SP-05 term position would not be renewed (Exhibit E-15).

[151] Although the medical certificate dated June 10, 2013, was provided to the employer on that date and after the grievor was informed that the SP-02 term position would not be renewed, it seems appropriate to address the weight to give the certificate, which indicates that she had been suffering from major depression since late February 2013 and therefore was unfit for work during that time.

[152] The medical certificate was provided to the employer when the decision to not renew the SP-02 term position was made and communicated to the grievor and her union representative in an email dated June 5, 2013 (Exhibit E-1, Tab 17). I have already found that the issue of the SP-02 term position not being renewed is not before me. However, clearly, the information in that certificate was not available to the employer’s representatives when the decision was made on March 11, 2013, to not renew the SP-05 term position. The evidence was clear that the grievor did not say

anything in that respect at the March 11, 2013, meeting. On the contrary, she acted as though everything was going well under the circumstances. She raised no concerns about her psychological and physical health. In my view, it cannot now be said in hindsight that based on that medical certificate given to the employer three months later, the evidence supports that it should have known what was going on. I would also add that the doctor did not testify, that he could not be cross-examined, and that the medical certificates submitted by the grievor between 2011 and 2013 do not reference that medical condition.

[153] With respect to the physical difficulties that the grievor experienced in May 2012 while she was in her SP-05 term position, again, the evidence showed that she informed her team leader at the time, Ms. Simard, of the pain she was experiencing and of the fear that it was cancer, which fortunately proved wrong. Ms. Simard's uncontradicted testimony was that she personally requested an ergonomic assessment to help the grievor and asked her for the accommodations, if any, which should be applied. The grievor did not follow up on Ms. Simard's accommodation proposal. Again, the many medical certificates submitted make no mention of any special measures to be put in place. In addition, it was not established that the grievor's physical problems at that time were related to her performance issues or that they were a factor in the decision to not renew her SP-05 term position.

[154] Only on April 30, 2013, at another meeting to discuss the grievor's performance issues, this time as part of her SP-02 term position, did she raise her personal issues in a very emotional way with Ms. Claveau and Ms. Laflamme. However, the decision to not renew the SP-05 term position had already been made and communicated to the grievor over a month earlier, on March 11, 2013.

[155] In the circumstances, was Ms. Claveau required to determine if the mental and physical condition was related to the grievor's performance issues when she was in the SP-05 term position? I do not believe so. While everyone agreed that the April 30, 2013, meeting was difficult and emotional, it must be remembered that the grievor's SP-05 position was for a term, that it had expired, that the decision had already been made and communicated to her a month-and-a-half earlier, and that no objection or concern was raised. As mentioned, no employee is entitled to the automatic renewal of such a position.

[156] When she made the decision to not renew the SP-05 term position, Ms. Claveau had no information to suggest that the grievor's physical and psychological health problems might have affected her performance. Only on June 10, 2013, did the grievor provide a medical certificate indicating she had been suffering from depression since February 2013. I would add simply that this information was not available when on March 11, 2013, in good faith, Ms. Claveau decided to not renew the grievor's SP-05 term position.

[157] Additionally, it hard to claim that the employer knew or that it should have known of the grievor's psychological or physical distress while she held the SP-05 term position. According to her, it should have investigated deeper.

[158] Given the facts of this case, I disagree with the grievor's claims. I believe that based on the information available, the employer made reasonable decisions, in light of the facts known in March 2013.

[159] Again, although the grievor had physical and psychological health problems, she never informed her employer that her problems went beyond physical pain requiring accommodation. Ms. Simard asked her if an accommodation was required; the grievor did not follow up on that proposal. At no time did she indicate that her physical pain was adversely affecting her concentration and that it was affecting her performance.

[160] As for her psychological distress, the grievor testified that she did not need to explain her private life. In practice, she did not want to talk about it. In that context, it becomes difficult to seriously claim that the employer should have known and that it should have investigated more.

[161] In this respect, I must say that I do not believe that the employer's duty to go further in its investigation was absolute. Also considered must be the context in which the facts took place, the information available to the employer at the time, and the disposition of the employee involved. In *Gibson*, the adjudicator concluded as follows at paragraphs 36 and 37:

*[36] It is my view that it would be an unreasonable responsibility to place the onus on the employer to unilaterally determine the nature of the disability of the employee and similarly unilaterally determine the nature of the accommodation without some input from the employee ....*



*[37] I do wish to suggest that under the circumstances of the case, Ms. Smith should have been more proactive. In that regard, I note that in her testimony she acknowledges that fact, but in the final analysis, the employer's failure to be more proactive did not amount to a failure to accommodate since the grievor's actions were lacking.*

[162] I agree with the reasoning in *Gibson*, except that in this case, the evidence showed that the employer inquired about the need for accommodation. I would add that unlike the facts in *Dupuis*, in fact, the employer tried to go further to help the grievor, despite the little information she provided. Indeed, it made efforts, such as checking with her to see if accommodation was required, which she did not follow up on, and recommending an ergonomic assessment. It also gave her priority access to a revisor to help her with her files, and sessions were organized on how to manage her stress, as evidenced by the 2012 and 2013 improvement plans (Exhibit E-1, Tabs 10 and 11).

[163] Contrary to what the grievor asserted, I find that the employer was truly proactive in its efforts to help. In addition to the steps it took and the questions it asked to help her, it even went so far as to extend her SP-05 term position four times after the initial appointment in 2011, even though clearly, she did not meet the objectives of the SP-05 position. In the interests of “[translation] humanity”, the employer also appointed her to another term position in March 2013, as an SP-02.

[164] As mentioned, remember that the grievor was in a new position at a higher level than she had previously occupied (Exhibits B-A, Tab 7, and E-1, Tab 2). The difficulty for any employee to adjust to a new position at a higher level certainly may not be related to physical or psychological disabilities. In my view, the employer acted reasonably based on the information available and the information that the grievor wanted to share. My view is also that contrary to what the grievor alleged, the employer truly sought to help her by proposing ways of managing her stress and of addressing her physical and performance problems.

[165] Therefore, I find that the grievor did not provide evidence showing on its face that her alleged physical and psychological disabilities were a factor in the employer's decision to not renew her SP-05 term position.

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

*(The Order appears on the next page)*

**V. Order**

[167] The application for an extension of time to file the grievance is allowed.

[168] The grievance is dismissed.

April 13, 2021.

FPSLREB Translation

**Linda Gobeil,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**