Date: 20210401

Files: 566-02-11534 and 11701

Citation: 2021 FPSLREB 35

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

RENATA SLIVINSKI

Grievor

and

TREASURY BOARD
(Statistics Canada)

Employer

Indexed as
Slivinski v. Treasury Board (Statistics Canada)

In the matter of individual grievances referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Peter Engelmann and Erin Moores, counsel

For the Employer: Zorica Guzina, counsel

Heard at Ottawa, Ontario,
February 12 to 14, May 9 and 10, and October 29 to 31, 2018, and May 6 to 9, 2019.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] At the time of the grievances, Renata Slivinski ("the grievor") was employed by the Treasury Board (TB or "the employer") at Statistics Canada ("StatsCan") as the data manager for its geography division, classified at the EC-06 group and level. By the time the hearing was held, she had moved to Health Canada (HC) to a position classified at the EC-07 group and level.

[2] At the relevant time, her terms and conditions of employment were partially governed by a collective agreement between the TB and the Canadian Association of Professional Employees ("the CAPE" or "the bargaining agent") for the Economics and Social Science Services Group that was signed on October 15, 2012, and that expired on June 21, 2014 ("the collective agreement").

[3] On November 7, 2014, the grievor grieved as follows her 2014-2015 mid-year performance appraisal ("the mid-year PER"):

> *Grievance details:*
>
> . . .
>
> *I hereby grieve my Performance Evaluation Report of 2014-2015 for which my supervisor has commented that my inability to stay on track to achieve my objectives was due to a certified medical leave. My employer's comments on my Performance Evaluation Report is based on my absence from work due to a disability related illness which I find to be discriminatory in nature and in violation of Article 16.01 of my collective agreement and the respective sections of the Canadian Human Rights Act .*
>
> *I also consider my Performance Evaluation Report of 2014-2015 as disguised discipline, a camouflage, made in bad faith and in violation of the Employer's duty to fairly assess her performance.*
>
> *Corrective action requested:*
>
> *I request that my EPR report for 2014-2015 be rescinded and that, in future, my Employer cease from making any discriminatory comments against me. That all previous iterations of the document, regardless of the format, be removed from the Employer's record and that it is not used in any administrative or disciplinary process in the future.*
>
> *I am also requesting to be compensated a monetary amount of 20 000$ for pain and suffering under Section 53(2)(e) and to be compensated a monetary amount of 20 000$ as special damages under 53(4) of the Canadian Human Rights Act.*

[*Sic* throughout]

[4] On April 17, 2015, the grievor grieved as follows her 2014-2015 year-end performance appraisal ("the year-end PER"):

> *Grievance details:*
>
> . . .
>
> *I hereby grieve my final Performance Evaluation Report of 2014-2015 as I consider the performance evaluation process as disguised discipline, reprisal on the part of management, a sham, made in bad faith, arbitrary, discriminatory in nature, and in violation of the Employer's duty to fairly assess my performance.*
>
> *Corrective action requested:*
>
> *I request that my EPR final report for 2014-2015 be rescinded and that any administrative or disciplinary decision resulting from this EPR report, including, but not limited to the subsequent action plan, be considered null and void.*
>
> *I reserve my right of providing additional corrective actions throughout the grievance process.*
>
> . . .

[5] The grievance with respect to the mid-year PER would become Federal Public Sector Labour Relations and Employment Board ("Board") file no. 566-02-11534, and the one with respect to the year-end PER would become Board file no. 566-02-11701.

[6] The employer objected to the Board's jurisdiction to hear the grievance in file 566-02-11534 on the basis that it was out of time. It dismissed that grievance at the first, second, and third levels of the grievance procedure, stating that the grievance presentation at the first level was out of time. At the third level, in addition to taking the position that the grievance presentation had been untimely at the first level, it also took the position that the presentation at the third level was untimely. The employer also raised its objection on this basis when the grievance was referred to adjudication.

[7] The grievor did not seek an extension of time under s. 61 of the *Regulations* until the outset of the hearing.

[8] Both grievances alleged disguised discipline, and at the outset of the hearing and in his opening statement, counsel for the grievor maintained that the employer's action, with respect to both the mid-year and year-end PERs, was disguised discipline. At the end of the hearing, when he made his submissions, while maintaining that the

employer's action was disguised discipline, he conceded that it did not fall within the Board's jurisdiction.

[9] On February 23, 2015, the grievor began an assignment at Transport Canada (TC). It was to be for just under a year and was scheduled to end on February 19, 2016. However, after it ended, she did not return to StatsCan but remained at TC until July of 2016, when she moved to HC. She has since secured her indeterminate EC-07 position at HC.

II. Summary of the evidence

A. The collective agreement

[10] Article 16 of the collective agreement is entitled "No Discrimination", and clause 16.01 states as follows:

> ***16.01*** *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 Association, marital status or a conviction for which a pardon has been granted.*

[11] Article 40 of the collective agreement is entitled "Grievance Procedure", and the clauses of it relevant to this matter state as follows:

> . . .
>
> ***40.12*** *An employee may present a grievance to the first (1st) level of the procedure in the manner prescribed in clause 40.07, not later than the twenty-fifth (25th) day after the date on which the employee is notified orally or in writing or on which the employee first becomes aware of the action or circumstances giving rise to the grievance.*
>
> ***40.13*** *An employee may present a grievance at each succeeding level in the grievance procedure beyond the first (1st) level either:*
>
> *(a) where the decision or offer for settlement is not satisfactory to the employee, within ten (10) days after that decision or offer for settlement has been conveyed in writing to the employee by the Employer,*
>
> *or*
>
> *(b) where the Employer has not conveyed a decision to the employee within the time prescribed in clause 40.14, within twenty (20) days after presenting the grievance at the previous level and*

> *within twenty-five (25) days after the grievance was presented at the final level.*
>
> ***40.14*** *The Employer shall normally reply to an employee's grievance at any level of the grievance procedure, except the final level, within ten (10) days after the grievance is presented, and within twenty (20) days when the grievance is presented at the final level.*
>
> ***40.15*** *Where an employee has been represented by the Association in the presentation of his or her grievance, the Employer will provide the appropriate representative of the Association with a copy of the Employer's decision at each level of the grievance procedure at the same time that the Employer's decision is conveyed to the employee.*
>
> ***40.16*** *The decision given by the Employer at the final level in the grievance procedure shall be final and binding upon the employee unless the grievance is a class of grievance that may be referred to adjudication.*
>
> . . .
>
> ***40.20*** *Any employee who fails to present a grievance to the next higher level within the prescribed time limits shall be deemed to have abandoned the grievance, unless the employee was unable to comply with the prescribed time limits due to circumstances beyond his or her control.*
>
> . . .
>
> ***40.22 Reference to Adjudication***
>
> *(1) An employee may refer to adjudication, in accordance with the provisions of the Public Service Labour Relations Act and Regulations, an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to:*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> *(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty . . . .*
>
> . . .

B. The grievance procedure

[12] The grievance with respect to the mid-year PER (file 566-02-11534) was presented at the first level of the grievance procedure on November 7, 2014. The grievor signed it that same day. The grievance form contains a space for the bargaining agent representative to sign, signifying the bargaining agent's approval of presenting a

grievance with respect to an alleged breach of the collective agreement. The bargaining agent representative's signature appears there and is dated October 6, 2014.

[13] The first-level grievance hearing was held on December 9, 2014, and the employer's reply was provided on January 14, 2015. The grievance was referred to the second level of the grievance procedure, and a hearing there was held on April 24, 2015. The second-level reply was provided on May 8, 2015. The grievance was referred to the final level of the grievance procedure on July 10, 2015, and a hearing there was held on July 13, 2015. The final-level reply was provided on August 20, 2015, and on September 23, 2015, the grievor referred the grievance to the Public Service Labour Relations and Employment Board ("PSLREB"), as the Board was then called, for adjudication.

[14] On Thursday, October 2, 2015, at 09:47, the PSLERB's Registry wrote to the parties, acknowledging receipt of the grievance's referral to adjudication. On Thursday, October 30, 2015, the employer wrote to the PSLREB, objecting to its jurisdiction to hear the grievance on the basis that the grievance was not timely. The employer's objection set out that the grievance was neither initially filed nor moved forward from the second to the third level within the time limits set out in the collective agreement.

[15] No bargaining agent representative testified.

C. The grievor's work and work environment, and the PERs

1. Background

[16] The time frame for which the grievor was supervised and assessed for the mid-year and year-end PERs was from April 1, 2014, until February 22, 2015 ("the period in issue"), during which her immediate supervisor was Shelley Zimmerman.

[17] The grievor worked days, Mondays through Fridays, on a schedule of 37.5 hours per week 7.5 hours per day, which could be worked between the hours of 07:00 and 18:00. She said that she worked both a compressed and flexible schedule. Her compressed schedule was 8.5 hours per day, which permitted her to take a working day off roughly once every two weeks. In the public sector, this is known colloquially as a compressed workweek, and the day taken off is known as a compressed day. She stated that her flexible schedule allowed adjusting her hours for family issues and that

she often would work evenings or weekends to ensure that she made up any missed time.

[18] During the period in issue, the geography division was divided into sections, one of which was the Census Collecting Section (CCS), which was headed by a chief, Ms. Zimmerman, who was at the EC-07 level. Ms. Zimmerman testified that she started as the CCS chief in or about 2009 or 2010. Like the grievor, Ms. Zimmerman was in the bargaining unit. The work being done by the CCS was described as critical groundwork for the 2016 Census, which often had very strict deadlines.

[19] Ms. Zimmerman had three EC-06s reporting to her who headed up three different units. The grievor was the head of the data unit. The other two sections were paper-mapping and geo-coding. During this period, the grievor had, on and off, three employees reporting to her, Patrick Jordon, Anthony Bremner, and Dan Brown.

[20] Entered into evidence by the employer was a colour-coded summary of the grievor's leave taken in each month of fiscal year 2014-2015, including vacation, sick, family related, and other leave, as well as her compressed days. It disclosed the sick and vacation leave she took during the period in issue as follows:

Sick Leave

April:	none
May:	1 hour on May 27;
June:	5.5 hours on June 20; and, 2 full days on June 23 and 27
July:	3.5 hours on July 8; and, 3 full days July 28-30;
August:	none;
September:	11 full days on September 2-5, 8, 10, and 15-19;
October:	1 hour on October 21 and 5 full days on October 14, and 28-31;
November:	none;
December:	1 full day on December 11;
January:	none;
February:	none;

****

Vacation Leave

April:	April 3;
May:	none;
June:	none;

July:	none;
August:	9 days, August 5-8; and August 25-29;
September:	none;
October:	2 days, October 23-24;
November:	none;
December:	none;
January:	12 days, January 2, 8-9, and 19-29;
February:	none;

[21] Also entered into evidence was a copy of the grievor's electronic leave record for the period in issue. While that record and the colour-coded summary have some discrepancies, they are minor and do not impact the findings or the decision.

2. Before April 2014

[22] Between May of 2012 and May of 2013, the grievor was on her second maternity leave. She testified that before it, she worked with Ms. Zimmerman's group (which she described as her client) but did not report to Ms. Zimmerman; she reported to another supervisor, Glen Hohlmann. She described her working relationship with him as good. Mr. Hohlmann in turn reported to Joe Kresovic.

[23] When the grievor was asked about her working relationship with Ms. Zimmerman during this period, she described several different issues that revealed that from her perspective, it was strained and dysfunctional. She talked about an email that Ms. Zimmerman sent that she said was inappropriate. She stated that Mr. Kresovic was made aware of that situation and that he told her and Ms. Zimmerman to work on their communication issues.

[24] The grievor said that in 2011, she had requested to not work with Ms. Zimmerman. She said that she could not sleep and that their relationship was difficult. Entered into evidence was an email that she sent to Mr. Hohlmann on Saturday, January 8, 2011, at 04:01, about a meeting that had occurred on the previous day and about what she described as an unpleasant exchange she had with Ms. Zimmerman. The last two paragraphs of the email state as follows:

. . .

> *As well, I am at the end. I need to get off the project. Working in such a hostile environment has me up since 1 am this morning. This is affecting me.*
>
> *Sorry to insist. I have just never worked with someone like this, nor do I ever want to.*

. . .

[25] In cross-examination, Ms. Zimmerman was shown the email. She stated that she had not seen it.

[26] The grievor testified that during her maternity leave in the spring of 2013, she spoke with Mr. Hohlmann, who told her that she would report to Ms. Zimmerman upon her return to work. The grievor said that she was led to believe that Ms. Zimmerman wanted her on that team, while the grievor told Mr. Hohlmann that she wanted to work for him. Upon returning to work, she began reporting to Ms. Zimmerman, who in turn reported to Elaine Castonguay.

[27] Entered into evidence was a copy of an email exchange dated September 16 and 17, 2013, between the grievor and Ms. Zimmerman about excess vacation. The grievor had carried over 41 days at that point; her limit was 35. She stated that she wanted to keep the days because one of her children had an ongoing medical condition, and she wanted them in case the child became sick. She said that Ms. Zimmerman was fine with it. She did not elaborate on the medical condition. However, in a document entered as an exhibit, it was described sufficiently for me to understand that it could occur, every now and then, without warning.

[28] Entered into evidence was an email exchange between the grievor and some of her colleagues dated November 20 to 22, 2013, about a meeting that had taken place, in which the grievor described Ms. Zimmerman's actions at the meeting towards another individual as aggressive. It had made the grievor feel extremely uncomfortable.

[29] Entered into evidence was an email exchange dated January 27 and 28, 2014, between the grievor and Ms. Zimmerman, which appears to be the catalyst of the disintegration of what can be described only as the calm amidst the storm that was their relationship. After going through the email exchange in evidence, the grievor stated that at that time, she asked for an assignment somewhere out of the unit. Assignments at StatsCan were called "corporate assignments" or CADs, for short. The relevant portions of the email exchange are as follows:

> [Ms. Zimmerman to the grievor; January 27, at 15:20:]
>
> . . .

Can you please adjust your January holiday/leave schedule to account for the days you were absent. I think you may have missed an absent day. If possible, could you please put your leave in advance for holidays and the morning upon return for sick and family related days.

As well, I would like everybody's work day to become more consistent with timing and ensure the Time Management Schedule reflects this. As we move into the busy times, it is very important that we all try to become consistent so people can contact us when necessary. Your current schedule identifies your work hours from 7-3 or 7-4 depending upon your compressed schedule. There is one day reflecting 7-1:30. All days have 30 minutes for lunch, If you are not at work during these hours could you please let me know so we can plan accordingly. Could you please post a schedule outside your door to everybody is aware of the working hours.

Please come see me if you have any questions

. . .

[The grievor to Ms. Zimmerman; January 28, at 08:30:]

. . .

My leave is up to date. My vacation was put in prior to taking for January 8th to January 10th. My sick leave, I wrote in on January 24th, the day that I returned to work. You approved it yesterday January 27th. And this morning I submitted my vacation leave for yesterday. I will be taking Friday off.

I have mentioned to you verbally and in writing that any other time that I missed in January was worked on the weekend. I would be more than happy to add those hours to balance the time and put in the actual day off. If this was not OK with you at the time, it would have been preferable to know prior to the [sic] making up the hours.

I will post my schedule as requested. If I arrive late, I stay to ensure my minutes are accounted for. Today I was in at 7:15 and will leave at 4:15.

If I take lunch late, I come back within the allotted time. Most days I do not take lunch.

I have no questions.

. . .

[Ms. Zimmerman to the grievor; January 28, at 11:03:]

. . .

January 6th you stayed home with a sick family member. This needs to be accounted for in the system.

. . .

[The grievor to Ms. Zimmerman; January 28, at 11:09:]

. . .

> *The time that I did on the weekend to do the decision trees, the pseudocode, the process flow and the work description, you would like me to enter that as well I presume.*
>
> *That was to make up the time for that day because I know that we have deadlines that don't change.*
>
> *And just to clarify.*
>
> *Our lunch – we get 30 minutes for lunch and have the option of adding our two 15 minute breaks to that, right?*
>
> . . .
>
> [Ms. Zimmerman to the grievor; January 28, at 11:17:]
>
> . . .
>
> *We need to have accurate reporting of time. I do not believe that there was an arrangement for swapping this day for another. If there was, please send me the email.*
>
> *I do understand that in the Fall you were working at home on weekends and exchanged the time for days off when needed. As we move forward unless otherwise approved, work should be completed on site during regular work hours.*
>
> *As always, I am available to discuss.*
>
> . . .
>
> [The grievor to Ms. Zimmerman; January 28, at 12:06:]
>
> . . .
>
> *As your deadline was Monday Jan 20th to complete the work for the systems and the work description, I mentioned it to you in your office Friday January 17th. I also sent you all the work on Monday January 20th, indicating that the work had been done on the weekend.*
>
> *These are the e-mails to work after some of it was completed on the weekend.*
>
> . . .
>
> [Ms. Zimmerman to the grievor; January 28, at 12:09:]
>
> . . .
>
> *Renata, if you would like to discuss your time reporting with myself, Elaine or Joe I am more than willing to accommodate.*
>
> . . .

[30] The grievor testified that she found a CAD, was offered the position, and accepted it and that it was approved. This is reflected in an email exchange dated February 17, 2014, with Judy Lee, to whom the grievor would report during the CAD. The email referenced a start date of March 3, 2014; however, this date did not work out. When she was asked about it and was pointed to an email exchange dated

February 27, 2014, with Ms. Zimmerman, she said that the "chatter in the hallway" was not in the documentation. She stated that she needed Ms. Zimmerman and Mr. Kresovic to agree to the CAD. She then said that she was told that the new date was April 7, which she learned of on February 27 in a hallway, after which the email arrived. She said that the explanation she received was that a significant amount of work had to be done and that she could not leave until certain tasks were completed. However, the emails don't disclose exactly that. They state as follows:

> [The grievor to Ms. Zimmerman, at 10:24:]
>
> *I have decided to continue with the CAD to ESD. I had a good meeting with Judy and we have come to an understanding. I think that Judy will be in contact with you to establish a date.*
>
> *I am off to my French training test now.*
>
> [Ms. Zimmerman to the grievor, at 12:06:]
>
> *I am glad it worked out.*
>
> *I am going to suggest April 7th as a starting date, but first Joe has to approve this.*
>
> [The grievor to Ms. Zimmerman, at 12:11:]
>
> *Ok. Thanks for letting me know. I will let the higher powers figure out when. I am good either way.*
>
> . . .

[31] In cross-examination, Ms. Zimmerman stated that she had agreed to the March 3, 2014, date; however, Mr. Kresovic did not agree, and he did not testify.

[32] The CAD with Ms. Lee's unit never came to be. The evidence disclosed that at this juncture, the work being done by Ms. Zimmerman's unit, and by extension the grievor and her team, was critical. The grievor testified that both Ms. Zimmerman and Mr. Kresovic asked her to stay, and she did.

3. April 1 – September 30, 2014

[33] On April 2, 2014, the grievor received her PER for fiscal 2013-2014, which covered May 20, 2013, to March 31, 2014. It used a template form that had been filled in. The assessment of an employee's performance was set out in two places, the first on the first page of the template under the heading, "Accomplishments for 2013-2014 including learning activities", and the second on the third page, under the heading, "Narrative assessment of the employee's performance for fiscal year 2013-2014".

[34] For the 2014-2015 fiscal year, the PER template form changed. When employees and their managers met for their 2013-2014 PER meetings, in addition to reviewing each employee's performance for the previous fiscal year, the manager set the employee's work objectives for the 2014-2015 fiscal year. For the grievor, this was done on or about April 2, 2014. The objectives were set out in the new template form, which had five columns, titled as follows:

- "Departmental Priorities or Ongoing Program Delivery/Operational Activities";
- "Employee Work Objectives";
- "Performance Indicator or Standard";
- "Mid-Year Review"; and
- "Year-End Assessment Results Achieved".

[35] The first three columns would be filled out at the start of the fiscal year, while the fourth would be filled out at the mid-year point and the fifth at year end. According to Ms. Zimmerman, each employee would receive roughly four to six objectives. The form states that there should be a maximum of six, but three are recommended; the grievor's form contained four. Both she and Ms. Zimmerman filled in her objectives and signed them on April 2, 2014.

[36] The assessment portion of the new PER form to fill in at both mid-year and year end was also different. It included a number of boxes for the objectives that had been set at the beginning of the fiscal year. In addition to them was another box entitled, "Mid-Year Review", within which were the following four options for a manager to check off to indicate the progress towards an employee's performance objectives:

- "On track to meet expectations";
- "Performance results to date indicate a need for improvement";
- "Work objective no longer required"; and
- "N/A".

[37] In short, in a very limited manner, the PER form was to capture the objectives and to set out if the employee was on track or needed improvement or if the objective was no longer required. In addition, a limited narrative could be added in some provided boxes.

[38] I received a significant amount of evidence, both by way of oral testimony and through documents, of the specifics of what the grievor and those reporting to her were doing. For reasons set out later in this decision, I need not recite these specifics.

[39] Entered into evidence was an email and a meeting invitation dated July 10, 2014, for between 15:00 and 16:00, organized by Ms. Zimmerman. It invited the grievor, Christine Roy, and two others to the meeting. Ms. Castonguay was an optional attendee. It read as follows:

> *Two weeks ago, it was reported the CWM development plan was in yellow. I have been asked to identify a back to green plan for next week. This week, I would like to sit as a group and review the schedule for this epic. Please come to the meeting with all pertinent information and dates.*

[40] The grievor testified that "CWM" is the acronym for "case and workload management" and that it is a mapping application that Ms. Roy created. She reported to Jimmy Ruel, who in turn reported to Ms. Zimmerman. "Yellow" was a colour code against which an oversight committee tracked work progress; green was good, yellow indicated a slippage and a concern, and red meant a problem.

[41] The grievor testified that that part of the work had not been in a yellow state and just slipping but in fact had been in a red state and that Ms. Zimmerman called the meeting to get that part back on track. The grievor testified that as of then, in July, she and her team were helping with completing it as it needed to be out by the second week of August. She said that this work was not part of her usual work or her objectives; however, the delay in it would have had an impact on the work her team was carrying out and could have potentially pushed it back.

[42] The grievor stated that at about that time, she felt that she was becoming burnt out.

[43] As of the hearing, Stephen Budge was a physician who practised and specialized in family medicine in Ottawa, Ontario. At times material to the grievances, he was the grievor's treating physician.

[44] Dr. Budge testified that in general, the grievor had spoken to him at times about stress. However, he did not elaborate on any discussion about it for the time before the period in issue. He testified that she had chronic low-serum iron (an iron deficiency) and that she suffers from asthma, for which she has a puffer.

[45] Entered into evidence were Dr. Budge's clinical notes ("the clinical notes") for March 2, 2014, to February 5, 2015. There are entries for the following dates:

- March 2 and 4, 2014;
- April 5, 2014;
- May 8 and 15, 2014;
- July 24 and 29, 2014;
- August 27, 2014;
- September 16, 2014;
- October 2 and 10, 2014;
- December 2, 2014;
- January 27, 2015; and
- February 5, 2015.

[46] Also entered into evidence was a letter dated February 8, 2018, from Dr. Budge to the grievor's legal counsel ("the February 8 letter"), setting out in summary the grievor's medical issues from March of 2014 to February of 2015. It reflects what is set out in the clinical notes.

[47] Dr. Budge testified that he saw the grievor in March of 2014 for suspicious abdominal issues and for a persistent cough that he suspected could be pneumonia. Tests were ordered for the abdominal issues. He did not state that she had pneumonia then. He saw her again in April for the persistent cough, for which he prescribed antibiotics. When he was asked if he had recommended her to take time off, he said that he did not believe so. There was no note from him recommending that the grievor not go to work.

[48] In May of 2014, he stated that she visited his office to review the results of the tests that had been ordered in March. The results disclosed a lesion that caused a cancer suspicion. This discovery led to a call for either surgery or an immediate MRI scan. It was done on May 27, 2014, and showed that the lesion was benign in terms of cancer.

[49] Dr. Budge then saw the grievor twice in July 2014, first on July 24, when she reported to him a two-week history of fatigue. He said that lab tests disclosed a reactivation of mononucleosis and the iron deficiency. He did not provide any details with respect to when she had previously suffered from mononucleosis.

[50] He stated that mononucleosis causes fatigue and that it usually lasts two to three months but that it could cause a person to lose years of work. He said that iron deficiency also causes fatigue. It was also his assessment that at that time, the grievor was suffering from pneumonia. The effects of pneumonia, mononucleosis, and iron

deficiency are cumulative when it comes to fatigue. He said that the treatment for pneumonia was to take a break from work, so he wrote a note to this effect, stating that she should be off work for two weeks from July 28 through August 8, 2014.

[51] In cross-examination, Dr. Budge was shown two notes he had written so that the grievor could be off work. The first stated that she should be off from July 28 through August 1, 2014 ("the first July 28 note"), and the second stated that she should be off from July 28 through August 8, 2014 ("the second July 28 note"). When he was shown them, he stated that it could have been that the grievor had not been recovering well and that he extended the first note. He surmised that he gave her the first note and that later, he gave her the second one. He said that the time off was intended for her to recover. When he was asked if he expected patients to follow his advice, he replied that he hoped they would. When it was posed to him that if they did not, it could affect their recoveries, he said that it could, and when it was suggested that not following the advice could exacerbate a recovery, he also agreed.

[52] Dr. Budge stated that he also prescribed the grievor antibiotics for the pneumonia. When he was asked if it was the same, better, or worse, he said that it was different. He said that there are different strains of pneumonia and that because she was run down and her immune system was compromised, he thought the two weeks off work would get her back to form. When he was asked if she stayed off work, he said that he was not certain but that he believed so. He was also asked if she had mentioned her workplace as of that point, to which he replied: "Not as [he] had noted."

[53] On Sunday, July 27, 2014, at 21:35, the grievor emailed a number of people, including Ms. Zimmerman. She wrote: "I am really sick. I can't even lift my head off the pillow. I will not be in tomorrow or Tuesday for sure. Thanks". Ms. Zimmerman responded on Monday, July 28, 2014, at 08:20, stating, "I hope you feel better soon."

[54] When the grievor was shown the first July 28 note, she testified that she had been supposed to go on vacation starting the following weekend. She said that she was sick in bed the following week. She was asked if she had requested an exchange of her vacation leave credits for sick-leave credits. She stated that she went into work on July 31 (and August 1) and that she gave the note to Ms. Zimmerman. She said that Ms. Zimmerman threw it back at her and asked her what she wanted Ms. Zimmerman to do with it. The grievor said that when she returned to work on August 11, 2014,

after her intended vacation week, she told Ms. Zimmerman that she wanted to change the vacation leave to sick leave and that Ms. Zimmerman's response was, "You want more time off!"

[55] Ms. Zimmerman confirmed that she received the first July 28 note. When she was asked if the grievor asked to take sick leave instead of vacation leave for the week of August 5 to 8, 2014, she replied in the negative. She stated that there is an electronic process for doing it that was not followed. She said that had the grievor asked her and had she had the necessary sick-leave credits, she would have done so, as that is done at StatsCan. She would have changed it.

[56] There is no evidence that the grievor filed a grievance about not being permitted to change her vacation leave to sick leave for the week of August 5, 2014.

[57] Entered into evidence was the grievor's email dated Tuesday, August 5, 2014, to Ms. Zimmerman, the relevant portions of which state as follows:

> . . .
>
> *I spent most of the weekend in bed. Probably not a good idea to come in early last week (against doctor's instructions).*
>
> *I am feeling awful today.*
>
> *I am not coming in today and will have to see for the rest of the week. So, I may take my holiday as planned.*
>
> . . .

[58] The grievor was asked if she still had symptoms. She replied that she was visibly sick; she was dry-heaving and could barely get through a full day. She testified that throughout August of 2014, she remained sick; still, she took the time off during the week of August 25, 2014, as vacation.

[59] In cross-examination, it was put to Ms. Zimmerman that the grievor was off sick during her vacation the week of August 5 and was visibly ill the week of August 11. Ms. Zimmerman stated that she did not recall that the grievor was ill through her vacation the week of August 5. She stated that she recalled the grievor having a cough the week of August 11.

[60] Still in cross-examination, it was put to Ms. Zimmerman that the grievor told her about the thyroid issue (low iron), the biopsy, the mononucleosis, and the pneumonia. Ms. Zimmerman confirmed that she had been aware of a cough, a skin related problem,

and tests, although she had not been privy to what the tests were for. She categorically denied being told about the mononucleosis.

[61] Dr. Budge stated that he saw the grievor again on August 27, 2014, for a follow-up with respect to blood work, which he said showed a reactivation of the mononucleosis. He said that despite having recovered from the pneumonia, she was still fatigued, due to the mononucleosis and the iron deficiency. He said that he suggested that she take time off work because someone who works while suffering from mononucleosis will make more mistakes; he said that he could not do his job if he had it. When he was asked if she indicated that she was reluctant to take time off at that time, he said that he did not recall discussing that with her.

[62] In her examination-in-chief, the grievor identified a note dated August 27, 2014, and signed by Dr. Budge ("the August 27 note"), stating that she was unable to work from August 27 to September 20, 2014. When she identified the note, the grievor said that at that time, she told him that she had been sneaking into work. When she was asked if she gave the August 27 note to Ms. Zimmerman, she said that she did and added that Ms. Zimmerman told her to take all the time she needed. Entered into evidence was her email to Ms. Zimmerman dated September 23, 2014, in which she forwarded a scan of the August 27 note. At that time, due to the fatigue, Dr. Budge referred the grievor to Isabelle Desjardins, who practised internal medicine at the Ottawa Hospital.

[63] Also, at this time, a mole was discovered on the grievor's foot, and she was referred to a dermatologist for an assessment. Testing was done within a month, and the result in September disclosed that it was benign. When he was asked about the procedure with respect to the mole, Dr. Budge stated that the area is frozen, and the mole is cut out; the result is similar to having a bad blister on your foot, which takes about a week to heal.

[64] Dr. Budge was asked if he noticed stress in the grievor at that time (August of 2014), to which he said, "not really a mental health issue", but he stated that the fatigue was draining. He also testified that she was sent for an ultrasound with respect to a thyroid issue and later for a biopsy.

[65] Entered into evidence was an email exchange between the grievor and Ms. Zimmerman on Monday, September 8, 2014, the relevant portions of which were as follows:

> [The grievor to Ms. Zimmerman, at 09:16:]
>
> *I was not good yesterday. I am going to see if I can make it tomorrow.*
>
> *I will be off on Wednesday for sure. I have 3 sets of tests and Thursday morning – another test. My doctor has put me off until the 20th, but I am going to try and get back this week. I am a little bored. I might just be part time though.*
>
> *The week after I have my specialist appointments on the 16th and 17th. I have been waiting months for those.*
>
> *Sorry. I just have no energy. Can't stay up the whole day yet.*
>
> [Ms. Zimmerman to the grievor, at 13:33:]
>
> *Stay healthy and only come back when you think you are ready.*
>
> *Things are fine here*
>
> *Hope you are feeling better*
>
> [The grievor to Ms. Zimmerman, at 14:09:]
>
> *Thanks. I hate this.... I am a little bored at home, restless and some days just so tired I want to cry.*
>
> *I am stressed because I don't want things to get too far off track at work and come back to too much stress. I think it would be easier if at least I come some days this week.*
>
> *I am worried. The doctor has me going for lots of tests.*
>
> *See you tomorrow.*
>
> [Ms. Zimmerman to the grievor, at 14:29:]
>
> *We are fine here. Take the time to get better if you need it.*

[66] The grievor saw Dr. Desjardins on September 29, 2014. Dr. Desjardins did not testify. However, she did write a consultation note dated the same day, which was sent to Dr. Budge and was entered into evidence. The relevant notations made in that note are as follows:

> ***HISTORY OF PRESENT ILLNESS:***
>
> *Ms. Slivinski describes fatigue dating back to 2013. At the time, she had a newborn that was up all night and she felt her fatigue was due to lack of sleep at night. However, starting in January, the baby slept through the night. Despite this, she's had ongoing fatigue. By the summer, she could wake refreshed, without an alarm clock but her fatigue would recur a few hours after. Her*

> *symptoms worsened in July. At the time, she also had an episode of sore throat/cough/probably fever felt to be an URTI and there was some question as to a possible pneumonia. She had to take a leave of absence from work because she could not accomplish her daily tasks. Overtime, her symptoms have improved somewhat (compared to earlier this summer) but she is not back to her baseline level of function.*
>
> . . .
>
> ***IMPRESSION AND PLAN***
>
> *Mrs. Slivinski is a* [age omitted] *woman with a progressive history of fatigue over a few months. She has noted an improvement in her symptoms over the last few weeks but is not yet back to her baseline. I suspect this is could be multifactorial. Certainly she is quite iron deficient, likely secondary to her ongoing menorrhagia, and she is scheduled to see Dr. Tinmouth to see if she could benefit from restarting her IV iron . . . I will refer her for a sleep study to rule out underlying sleep apnea*
>
> . . .
>
> *She will follow up with her dermatologist with regards to her skin lesion biopsy results and with you with regards to her thyroid biopsy.*
>
> . . .
>
> *With regards to her positive EBV IgG serology, it's difficult to tell whether this reflects a recent infection or not. She recalls having mononucleosis twice in her life so this likely reflects her history.*
>
> . . .
>
> [Emphasis in the original]

[67] Dr. Budge testified that Dr. Desjardins found nothing other than the iron deficiency and the mononucleosis. When he was asked if he knew whether the grievor had taken time off from work this time, he stated that he believed that she did. When counsel for the grievor asked him if she had mentioned anything about work at that time, he stated not that he recalled and not as documented.

[68] The evidence disclosed that the grievor and Ms. Zimmerman met on September 30, 2014, to discuss her mid-year PER. Ms. Zimmerman said that the mid-year PER is done just to check employees' progress and to get them back on track if they need it. She stated that the grievor was not on track with respect to two of her objectives. At two locations, Ms. Zimmerman had checked off the box next to the comment, "Performance results to date indicate a need for improvement." In the box

on the last page of the mid-year PER in which the manager can comment, the following was written:

. . .

> *There were multiple reasons why Renata has been unable to stay on track to achieve her objectives. Due to certified medical leave, Renata was absent from the office for an extended amount this fiscal year. Due to this she was unable to fully achieve her objectives. Changing priorities in the project, specifically Case and Work Load development, pulled Renata away from her assigned tasks. This work took priority over Renata's assigned tasks. This contributed to Renata [sic] ability to accomplish her own objectives.*

. . .

[69] Ms. Zimmerman stated that as of the September 30 meeting, she asked the grievor if she wanted her objectives modified, which Ms. Zimmerman said the grievor declined. When she was asked if she mentioned the grievor's sick leave at the meeting, Ms. Zimmerman stated that she did not. She stated that she did not make any comment to the grievor about thyroid cancer; nor did they discuss it. The meeting was about the grievor's objectives, although Ms. Zimmerman admitted that they might have discussed the grievor's health.

[70] In cross-examination, Ms. Zimmerman said that as of the mid-year PER, the grievor was mildly off-track with respect to her objectives, and that there were no barriers to getting them back on track. Ms. Zimmerman stated that she was not made aware that the grievor required IVs from time to time. When it was put to her that she was aware that the grievor had been diagnosed with pneumonia, she did not deny it but stated that she was not sure if the grievor or someone else had been so diagnosed; nor could she speak to a timeline.

[71] In both her examination-in-chief and cross-examination, the grievor stated that at the September 30 meeting, Ms. Zimmerman spent between 8 and 10 minutes talking about the grievor's health.

[72] On September 30, 2014, at 13:26, the grievor emailed Ms. Zimmerman about her mid-year PER. Its relevant portions state as follows:

. . .

> *As discussed, I did not see that the Case and Workload Management, the revision of the epic, creation of the system*

> *specifications, test cases scenarios and testing is not included on my EPR. As well, the testing for the geocoding for CWM is not included on the EPR and should be. This was a significant task. This occupied me from May to mid August.*
>
> *Adhoc [sic] data request for testing, for creating test data and QCing of the testing data going for the MCS was another priority that was undertaken several times within the 6 month period.*
>
> *I was only gone for 17 days in total since March. I am not sure if that is significant, but that is all I took for sick leave.*
>
> *I am concerned that inability for systems to provide data output from the various systems for us to complete the analysis, the inability for other Census teams to integrate enhancements and the continued effort of the data team to do the testing of components of the non spatial services is not adequately itemized in the comments.*
>
> *I would agree that in the past 3 weeks, some of the work might have slipped, but the bulk of the work from May to August was on Case and Workload Management to get it out the door.*
>
> *We can discuss further if you would like.*
>
> . . .

[73] The evidence disclosed that up to the September 30 meeting, the grievor had used 17 sick-leave days and had been off sick despite using vacation leave on August 5 through 8 and 27 through 29.

[74] The evidence also disclosed that up to the September 30 meeting, the grievor would email Ms. Zimmerman regularly when she was ill and unable to attend work or was going for tests, which she set out in the emails. The emails would also often contain more information. Their tone, content, and context would suggest that prior discussions had taken place and that more specific information had previously been disclosed.

4. September 30, 2014 – February 19, 2015

[75] After the mid-year PER, a series of emails and meetings took place involving the grievor, Ms. Zimmerman, and Ms. Castonguay to discuss the mid-year PER and the grievor's objectives. In an email dated October 9, 2014, the grievor wrote to Ms. Zimmerman and copied Ms. Castonguay. The relevant portions of it stated as follows:

> *It has been just over a week since I received my performance evaluation. I believe we need to meet again on this issue. I do not*

> *think the 20 minutes that was allotted was adequate for me to understand how I did not meet my performance objectives. I must say that I am quite shocked at the evaluation and as I stated in e-mails following the performance review, I do not feel the objectives listed adequately detailed my list of responsibilities for that given period. Leading up to the evaluation, I had no indication that I was not meeting expectations.*
>
> *I am very concerned that this omitting of pertinent information will have a negative effect on my ability to CAD and to advance in the Public Service.*
>
> . . .
>
> *I am perplexed and devastated at* [sic] *perception of my work. I do not feel my contributions to the team, to the project and to the division are recognized or appreciated. This has caused considerable stress on me and it is for this reason that I am requesting that Geography Division revisit my request to CAD that was approved in March of this year.*
>
> . . .

[76] On November 3, 2014, at 15:11, Ms. Castonguay emailed the grievor and Ms. Zimmerman, stating as follows:

> . . .
>
> *After our discussion meeting that took place on October 27th, at 2:30pm, four (4) action items were identified:*
>
> 1. *Elaine and Shelly will support and guide Renata to ensure all of her objectives can be met by the end of the fiscal year.*
> 2. *Shelley will review one of Renata'* [sic]*objectives to make sure that the written of her performance indicators are exact.*
> 3. *Renata formally confirmed that she is looking for a CAD*
> 4. *Elaine will verify with Duncan Wright to check if the final version of Renata'* [sic] *Mid term review can be reopened to allow Renata to add her comments. (I will send an e-mail to the Performance e-mail to ask them to 'reopen' Renata' [sic] Mid term. I will cc. Renata and Shelley)*
>
> . . .

[77] One of the issues flagged in the mid-year PER was that people who dealt with the grievor had issues with her professionalism, communication, and integrity. One such person was identified as Christopher Cotton, whose work during the period in issue intersected regularly with the grievor.

[78] Mr. Cotton testified that he had worked with the grievor since 2013. He described their relationship and both good and professional. Entered into evidence was an email that he sent on October 17, 2014, to Mses. Zimmerman and Castonguay about the issue of the alleged work-relationship issues the grievor was having. He wrote as follows:

> *It has been informally mentioned to me that I have reported (or on behalf of my team members) has been having issues with professionalism, communication in regular, ongoing work interactions with Renata Slivinski.*
>
> *I would like to clarify any potential confusion.*
>
> *Such is not the situation. Indeed, neither I (nor any of my subordinate team members) have reported any such issue. Let me state that I have no issue with her professionalism, her communication style. I have regularly found Renata to engage with me and my team members in a respectful manner. Although her communication style is different than mine (in my opinion, far more direct), I (nor any of my team members) have found no issue in her comportment into resolving typical workplace issues, as needed per her assigned work/role as Business/ Data analyst for GEO Address Services project*
>
> *I would like to add that deliverables produced by Renata are of high quality and I personally find a have a good report with her and enjoy the process of mutually refining/verifying highly detailed business requirements into requisite IT specifications.*
>
> . . .
>
> [*Sic* throughout]

[79] On October 17, 2014, Ms. Castonguay replied to Mr. Cotton and copied Ms. Zimmerman, to which Mr. Cotton replied on October 20, 2014. The exchange is as follows:

> [Ms. Castonguay to Mr. Cotton:]
>
> *We will have to seriously talk about your e-mail. I remember some discussion what [sic] we had and do not corroborate this e-mail. So I am not sure what you are saying or what are your intent [sic].*
>
> . . .
>
> [Mr. Cotton to Ms. Castonguay:]
>
> *Yes, I would welcome the opportunity to discuss.*

[80] In his evidence before me, Mr. Cotton said that Ms. Castonguay never spoke to him about the email exchange and that he never had an earlier discussion with her

about the grievor. When she was shown her exchange with Mr. Cotton, Ms. Castonguay said that she did not speak to him about the grievor. However, she did say that she had spoken his superior, Patrice Lajoie, and that her recollection was that he had conveyed Mr. Cotton's views to her. She said that that was why she wrote, "it didn't corroborate".

[81] Mr. Lajoie was called in reply. He stated that his work cubicle was close to Mr. Cotton's and that he often saw Mr. Cotton and the grievor interacting there. He stated that he never saw the grievor exhibit any inappropriate behaviour toward Mr. Cotton and that neither Mr. Cotton nor any other employee complained to him about the grievor. When Mr. Lajoie was shown Mr. Cotton's and Ms. Castonguay's exchange, he said that he recalled it, although it was a bit fuzzy. He said that his team had had conflicts with Ms. Zimmerman.

[82] He further stated that there was tension between Ms. Zimmerman and his team as she was accountable to deliver certain projects with fixed dates. Sometimes, the requests came late, and sometimes, the timelines were shortened, both of which caused tension and stress. He stated that Ms. Zimmerman was aggressive at meetings and that she showed a lack of respect. He said that he had to act as a buffer between her and his team. Mr. Lajoie stated that several times and regularly, he brought his concerns about her behaviour to Ms. Castonguay. In cross-examination, he stated that he raised Ms. Zimmerman's behaviour with her directly. He stated that she was visibly stressed by the workload. He stated that the work she was responsible for delivering was high profile and that it involved tight deadlines.

[83] Dr. Budge testified that his first documentation with respect to stress or mental health was done on October 10, 2014. His notes state that the grievor told him that she felt unfairly questioned at work. He stated that at that time, there was no diagnosis of anxiety or depression for the grievor.

[84] Entered into evidence was a report identified as a "General Medicine Clinical Note" that was dated October 27, 2014, from the Ottawa Hospital and authored by Dr. Justine Siu-Bun Chan, who did not testify. However, her note was sent to both Drs. Budge and Desjardins. Dr. Chan's recorded impression of the grievor, at that time, was with respect to her chronic fatigue. She stated that she believed that the problem was related to the grievor's iron deficiency.

[85] The evidence disclosed that the biopsy with respect to the thyroid issue was to be done on October 28, 2014. As such, although Dr. Budge did not carry it out, he recommended that the grievor be off work for four days afterwards (October 28 through 31, 2014) as it would have been an appropriate time to recover from it. He stated that it is a stressful procedure that is done at a hospital and that it leaves the patient sore afterwards. The biopsy's result was negative.

[86] The evidence disclosed that after the mid-year PER, the fragile working relationship between the grievor and Ms. Zimmerman became worse. On December 5, 2014, the grievor emailed Ms. Castonguay. The relevant portions of it state as follows:

> *Over the past couple of weeks I have work and people that report to me, being redirected. I have commented about this in the past and I will bring it to management's attention again.*
>
> *Shelley is managing people for me, excluding me from meetings, and not communicating to me important details that I require to do my job. It is unclear at this point what my objectives are, as she has knowingly removed my tasks and assigned them to others. And in all but 1 instance, she has not advised me that she is removing the work from me. She also has not communicated with me what she would like me to do. Given that she is unable to work with me, and has a conflict of interest due to the formal grievance, I am requesting a re-assignment within GEO until I find a CAD. Below are the details of her actions that have taken place.*
>
> *Starting in November, I was responsible for the QC on the MCS. Shelley confirmed in an e-mail that I would be doing the QC and in Contact with the MCS if there were issues. Please see attached e-mail. This task was given to me later Friday afternoon and I started work on it on Monday.*
>
> *Due to a lack of access to the data, we had difficulty verifying the data. I wrote to Shelley on November 10th to inform her as to what we were going to do. On November 12th in the afternoon I outlined to Shelley that there might be issues delivering the QC due to several issues, including the move, and dependency on Jamie to deliver data. 10 minutes after I sent that e-mail, Shelley e-mailed Jimmy to inform him that he was to follow-up with Jamie and Diego. I was not informed by Shelley.*
>
> . . .
>
> *Shelly told me that I could come and see her. That was the follow-up. I indicated in the e-mail sent that I would not force the issue, but I wanted it noted that work had been taken and I had not even been advised. I then had to support Jimmy in completing the task (which I was more than happy to do).*

Then on November 27th, Shelley asked me to sign off on the two environments. Since this task had been given away and Jimmy clearly saw this as now his work, he responded and signed off on the work.

Work in the MXD is now being given directly to Diego by Christine and Kim. I was advised, but no explanation as to why the work was now going through them and there has been no explanation as to my role. If Christine and Kim are giving direction to Diego directly, I can only assume that they will be responsible for what is implemented.

. . .

The geocoding for mapping application is now under the responsibility of Tony Bremner. I was responsible for the CWM geocoding and was asked in November (November 7th, prior to the grievance) to continue working on completing the geocode mapping. And, as you can see, I am not included in any of the e-mails. I found out that Tony was going to be working on this at the CEAG meeting yesterday.

. . .

I was doing the analysis of the CEAG batch results. Shelley is well aware that I am investigating our ability to geocode in the rural areas. I have sent several analysis documents to her discussing why we don't match, and the options to increase match rates. Shelly had a meeting with CEAG to discuss the geocoding. An analysis paper was sent to her on November 27th by CEAG. When she forwarded the information to the team she didn't include me on the distribution list so that I could compare and address their concerns. I receive it December 2nd after our meeting with CEAG. In that meeting, CEAG has been asking about data that was sent to GEO, but never distributed to me until December 4th. Therefore, I couldn't answer their questions and a significant amount of time asking around to understand what file CEAG was referring to.

. . .

The other day, a meeting was scheduled for Room C. The location of the meeting changed. No e-mail, no note, no note in the conference room was given to indicate a change in venue. I sent an e-mail to ask that if the venue changed, to please send me a note. Due to the fact that we were coming back from the Christmas party, the exact start time was unclear. I had gone to the washroom, printed my information and sat in the room. I ended up writing the use case that was discussed at the meeting. I would have been beneficial for me to attend. I am not sure why we did not meet in the Room as it was indicated.

. . .

As well, there was a Business Requirements meeting set up by Shelley with CHL on December 2nd to outline the changes to the address searching services that I was not invited to. I was responsible initially for the use cases for that service.

> *Separately, you might be able to see these instances as an oversight, but collectively, there is obviously an issue that affects my ability to do my job. Obviously the stress of working together is too much, for both Shelley and I. This is now affecting my health because I am not sleeping. I have remained professional, but I am being excluded and I am exhausted.*
>
> *Please let me know if you would like to discuss any or all of the incidences above.*
>
> . . .
>
> [*Sic* throughout]

[87] The grievor embedded emails into her December 5, 2014, email, to illustrate her points.

[88] On Thursday December 11, 2014, the grievor emailed Ms. Castonguay and copied her bargaining agent representative. She stated as follows:

> . . .
>
> *I am not coming in today. I am no longer sleeping at night. The stress of this entire situation is causing me not to sleep.*
>
> *I am requesting again that alternatives be explored, even in the short term. It has been 2 and ½ months since this situation started and I asked back then to have a different reporting arrangement due to the conflict.*
>
> *This is affecting me at home, at work and my health.*
>
> . . .

[89] Ms. Castonguay responded to the grievor with two emails later that same day, stating as follows:

> [At 09:35:]
>
> *Thank you for your e-mail. I am sorry to read that you have [sic] hard time sleeping. Related to your request to be reassigned another [sic] activities or to a different reporting arrangement, I have to meet with Claude Graziadei and finalize the discussion with him.*
>
> [At 09:37:]
>
> *Sorry I did not finish my e-mail before sending it to you. So, as soon as I have an answer for you, I will get back to you as I mentioned earlier.*

[90] In the opening line of an email dated December 19, 2014, the grievor wrote to Ms. Castonguay as follows:

. . .

> *I know we discussed this Tuesday after the Task Managers Meeting that I had with Shelley. But I would like to reiterate that I feel that the current working arrangements are heavily affecting my work, my home and my health.*

. . .

[91] Despite the meetings and discussions, the grievor and Mses. Zimmerman and Castonguay could not agree on the wording for her mid-year PER or her objectives. The grievor emailed her related concerns to both Mses. Zimmerman and Castonguay on January 7, 2015, as follows:

. . .

> *I left yesterday's meeting with the realization that I am still unaware of what was expected of me for the first half of the year. Each subsequent meeting we have, I find out different and new responsibilities that were not discussed in prior meetings. To move forward, I would like a detailed list of deliverables from today (Jan 7th) to the end of the fiscal year (March 31st). I would like a list of tasks that I am to be responsible [sic]. I think this would be the only way there would be no confusion as to what I am responsible for. I look forward to see [sic] this detailed list prior to Tuesday so that at Tuesday's meeting, we can discuss how I am going to go about achieving those goals.*

. . .

[92] On January 14, 2015, Ms. Castonguay delivered the first-level grievance response to the grievance against her mid-year PER by leaving a copy on the grievor's chair. The response was dated that same day, and its relevant portions state as follows:

. . .

> *It is important to note that your grievance was presented outside the prescribed time limit and it is therefore untimely. . . Consequently, your grievance is deemed untimely and cannot be accepted. The corrective measures requested will therefore not be forthcoming. I have; however, accepted to review your concerns as a complaint.*
>
> *Before responding, I reviewed the facts of the case and the information you and your union representative supplied. After careful consideration, I have decided to have your mid-year review of your Public Service Performance Agreement (PSPA) amended to better reflect your performance on your objectives for the period and to clarify management's expectations with regards to your performance. Management met with you on January 6th to give you further details on your objectives and performance indicators.*

> *Another meeting is scheduled for January 16, 2015 to continue these discussions. Following these meetings, your supervisor will provide you with a revised PSPA.*
>
> . . .

[93] Dr. Budge stated that he saw the grievor next on January 27, 2015. He said that at that time, she complained of depression and many work stressors. She referenced being performance managed. He said that she did not complain much and that she downplayed her medical problems and symptoms. He stated that later, she confided in him with respect to certain things about what she was feeling, and he believed that she did not tell him those things earlier because she did not want to be put off work. He stated that at that time, he was concerned, and that he saw her two weeks later.

[94] The clinical notes reference the grievor's next visit as February 5, 2015, at which time Dr. Budge carried out a common diagnostic test for depression, which disclosed that the grievor scored in the moderate range. He said that she then broke down and cried a lot. He said that while it was the first time he had administered the test on her, she had likely been suffering from it before then. He said that those who score at her level on the test usually want time off work; she did not want time off, and she told him she wanted to stay at work. He said that she neither looked for time off work nor fought against a return to work.

[95] He said that she reported to him that she was having trouble sleeping and had been since October. He stated that at this time, he prescribed her a sleep aid. When he was asked if she had been on one before, he said not in 2014. He did not report whether she was on a sleep aid before or after this time, and if so, for what reason.

[96] On February 9, 2015, Ms. Zimmerman issued to the grievor a "Terms and Conditions" letter ("the February 9 letter"), which the grievor acknowledged receiving that day, the relevant portions of which state as follows:

> *In the past, I have spoken to you with regard to concern that I had with your attendance and behaviour in the workplace. As some of these issues are still ongoing, I feel the need to outline my expectations in writing in a Terms and Conditions letter. The purpose of this letter is to clarify my expectations in order to ensure we have the same understanding as to what is expected from you when you are at work or absent from the workplace. These guidelines are effective immediately. Failing to comply with any of these, may result in disciplinary action, such as, written*

reprimand, suspension, demotion, or termination. These guidelines are in effect until further notice and are the following:

1. *You are expected to remain professional and respectful with others at all times in the workplace. This includes your interactions and communications with clients, co-workers or management.*
2. *During work hours, you will remain focused on the tasks assigned. Any personal activities (such as making personal calls or socializing) should be conducted during your breaks and lunch period.*
3. *You will work in a co-operative and collegial manner with your colleagues, respect their input, and share your expertise and provide assistance in a timely manner.*
4. *You will attend all required meetings related to your work unless advised by your supervisor you are not required to attend.*
5. *Your work hours are from 7:00 AM – 3:00 PM (current schedule) Monday to Friday with thirty minutes for lunch and two fifteen minute breaks which are to be taken at a time agreed upon with your supervisor. You are expected to adhere to these work hours. Any modifications to these hours of work will need the approval of your supervisor in advance.*
6. *Upon arrival to the workplace and before leaving, you are required to email Elaine Castonguay and myself. This email will be used to determine your actual hours worked for the day.*
7. *If you need to be absent from your office during the workday for any period in excess of 15 minutes (excluding lunch), you are expected to inform your supervisor of the reason for your absence and request permission prior to leaving your office.*
8. *You are expected to report for work every working day unless you have an illness or injury that is severe enough to prevent you from working or you are on approved leave.*
9. *Should you be unable to report for work for any reason (lateness, illness, etc..) you must telephone and speak with Shelly Zimmerman* [phone number omitted] *on each day no later than 8:00 to explain your absence. If your supervisor is not available, you should call your Assistant Director (Elaine Castonguay at* [phone number omitted] *If both your supervisor and AD are not available, you should leave a message with Shelley Zimmerman and a phone number where we can reach you.*
10. *In lateness situations, if management considers the explanation to be reasonable (not extreme or excessive) the leave period may be submitted as code 980 – late leave without pay. In any other circumstances, the lateness will be*

> *considered as an unauthorized leave (leave without permission – code 985) and may result in disciplinary action.*
>
> 11. *Should you schedule a medical appointment, every reasonable effort will be made on your part to schedule this appointment after your hours of work. In the event that this is not possible, your medical appointment should be scheduled near the end of your work day.*
> 12. *For all other absences due to illness or injury, you must, on the day of your return to work, provide a medical certificate acceptable to management. An acceptable medical certificate will indicate:*
>
> · *That you were seen or treated by the medical practitioner during the period for which you are requesting leave, and;*
>
> · *That in the opinion of the medical practitioner, you could not report for duty on the specific date(s) for which you are requesting leave as a result of an illness or injury.*
>
> *I am confident that these guidelines will contribute to resolve the current situation and I wish to assure you that I remain available to discuss any concerns you may have.*
>
> . . .
>
> *These terms and conditions will remain in effect for 3 months. The situation will be closely monitored and we will meet again in May 04th 2015 to review the situation.*
>
> . . .
>
> [*Sic* throughout]

[97] The grievor acknowledged receiving the February 9 letter on that day.

[98] I have no evidence that she grieved the February 9 letter.

[99] Emails were entered into evidence that the grievor sent to Ms. Zimmerman at different points from before April of 2014 to the time she left StatsCan, advising Ms. Zimmerman of when and why she would be away from the workplace.

[100] As of the hearing, Dan Brown was employed by the TB with Indigenous Services Canada at the Indigenous Services First Nations and Inuit Health Branch at HC. Between July of 2014 and March of 2015, he was an EC-03 in the geography division at StatsCan on the data team and reported to the grievor. He said that before joining that team, he did not know either the grievor or Ms. Zimmerman. He described his working relationship with the grievor as good and stated that she was caring and helpful, that they communicated well, that she was always respectful and never unprofessional, and that she was always collegial and cooperative. He said that they had conversed socially

and that at times, they had gone for lunch together. He stated that he observed her interactions with the other team members and that they were the same as his.

[101] Mr. Brown stated that he did interact with Ms. Zimmerman; however, in the first three or four months that he was there, it would have been only about once a week. Entered into evidence was an email that he sent to the grievor on February 10, 2015. He said that the email was based on observations he made in December (and perhaps November) of 2014 and in January and February of 2015. Its relevant portions state as follows:

> *I have only been working at Statistics Canada just over seven months. In that time I've observed actions and behaviours by management in Geography (specifically Shelley Zimmerman) which lead me to believe it would be smart for me to seek work outside the Division. I wanted to put in writing my observations and concerns. While each of these actions and behaviours on their own may not be extremely serious, the continued repetition of these actions and the behaviours that accompany them are creating a highly stressful and highly negative work environment. I feel staying here may lead to serious mental or physical health issues for me if the work environment is not improved.*
>
> *Observations:*
>
> *1. Actions are continually taken to exclude Renata Slivinski from work/meetings/discussions.*
>
> *I am often the recipient of e-mails where other managers under Shelley are included by [sic] Renata has been excluded.*
>
> *Examples:*
>
> *- Shelley e-mailed to say she was sick. She included Kimberley Easter, Christine Roy and Jimmy Ruel but not Renata.*
>
> *- Renata often excluded from meetings with clients, yet I am included.*
>
> *- An additional resource was available (unpaid co-op student) but Renata was not sent the e-mail. (I was instead, along with other managers in CCPS).*
>
> *2. There is a lack of overall direction, planning and management for our section.*
>
> *I have noticed there is very little (if any at all) direction from management, specifically Shelley, regarding the work we are doing, the plan for the future and how we are to implement this plan.*
>
> *Examples:*
>
> *- When I asked Shelley about the role of Release Manager, she was unable to provide any concrete specifics. The concerns I*

raised were quickly dismissed by Shelley and never properly addressed.

- Conflicts between employees are not dealt with appropriately.

- Priorities are constantly changing, making it difficult to complete tasks.

3. Lack of professionalism from our chief

It is unprofessional to exclude individuals from e-mails/meetings that are directly related to their work. This occurs regularly to Renata and to me it is a lack of respect and professionalism on the part of Shelley. When Renata is included in meetings, she is often ignored, passed over and disrespected in front of others by Shelley. On multiple occasions, I have witnessed Shelley stop addressing Renata by name and refer to her as "the Data Team". I find this behaviour disturbing and am not comfortable working in an environment like this.

4. Shelley has been removing work resources from Renata, while also increasing the requirements from Renata

When I started here, it was my impression Tony, Diego and I, plus Pat all worked on data with Renata. Over the past seven months, it has been reduced to only Diego and I. Shelley has asked me to take on a new role that will effectively remove me from Renata's team. It is unreasonable to expect Renata to accomplish more with less than half the staff. Yet that is what is happening.

5. Insufficient response to legitimate questions/concerns

When Shelley asked me to take on the role of Release Manager, I had some legitimate concerns. I raised these concerns with her and she addressed them by basically dismissing them. I have yet to receive any electronic correspondence regarding this role.

I know this is a lot of information and not all of it can be solved overnight but I wanted to make known my concerns. I want to be very clear: I enjoy working with Renata very much. She is a great manager and a very hard worker. I am concerned that the longer I stay here, the more I will accept this negative unhealthy work environment created by Shelley as normal. It is not normal and should be dealt with accordingly. Shelley's actions are having a negative impact on my view of management in the Geography Division and to some degree management at Statistics Canada.

I would be happy to discuss these issues further.

. . .

[Emphasis in the original]

[102] Mr. Brown said that he sent that email because the grievor had told him about the February 9 letter, and he wanted to put in writing what he had observed, in case something happened. In particular, he described two incidents, the first being a large section meeting in which Ms. Zimmerman addressing everyone by name except the grievor, whom she referred to as the data team, and the second being an encounter in the grievor's office with Ms. Zimmerman, whose body language and tone had been mean and aggressive.

[103] With respect to the reference that the grievor was excluded from meetings, Mr. Brown said that it happened more than once from November through February. He was shown a meeting invitation dated January 22, 2015, which Ms. Zimmerman sent, inviting the grievor's team to a meeting that day, but it excluded her. In cross-examination, it was put to Mr. Brown that the grievor was on vacation that day, and he was asked if he had any reason to doubt it; he answered that he did not.

[104] Ms. Zimmerman stated that the grievor's name was not included on the January 22, 2015, meeting invitation as she was away on vacation that day. She further testified that when the meeting was called again, the grievor's name was left off due to inadvertence as her assistant merely used the names on the earlier meeting request.

[105] Mr. Brown also testified that priorities changed for the unit over the course of his tenure, although he could not provide specifics.

[106] When he was asked if he shared his February 10 email with anyone in management, Mr. Brown said that he did not, because first, he did not think it would make a difference, and second, he was concerned that he would be lumped in with the grievor and that it could impact his career.

[107] The grievor sought and secured the CAD at TC. The details of when she negotiated it were not provided to me. However, the evidence disclosed that her last full day of work at StatsCan was Wednesday, February 18, 2015, that she worked two-and-a-half hours on Thursday, February 19, and that she took leave for family related matters on Friday, February 20. She started at TC on Monday, February 23.

[108] When he was asked if he was aware that a change was made to the grievor's work environment after February 15, 2015, Dr. Budge stated that he was aware, that to him, she appeared better, and that she reported to him that she was feeling better. He

stated that her mental health had improved. That said, the clinical notes ended before the grievor started her CAD. Also, the February 8 letter did not contain any reference to when Dr. Budge saw the grievor after February 5, 2015, and for what reason, and to what, if anything, she told him about her health and well-being after she left StatsCan.

[109] In cross-examination, in response to a question about whether he had assessed the grievor for a worker's compensation claim for a workplace injury, Dr. Budge stated that he had trouble with worker's compensation. He stated that if a doctor documents mental health as a workplace injury, the worker's compensation board cannot prove it, so both that board and the related insurance company will deny any related claim.

[110] In cross-examination, counsel asked Dr. Budge about the grievor's iron issues, particularly the hematology reports, and whether he suggested any work accommodation for her. He answered that he did not. When he was asked whether adjusting performance targets would have helped the grievor, he answered, "We didn't get into details", and stated: "I don't know if the employer's expectations were proper; I don't know that the employer knew her condition."

[111] When discussing the grievor's condition as it was in February of 2015 and her being off work, Dr. Budge said that she conveyed to him that she felt trapped at work and that she was making significant efforts at work. He said that this made it doubly hard for her to be off work. The idea was to go to work; she insisted on continuing to work.

[112] In cross-examination, Dr. Budge confirmed that the grievor did go to a sleep lab for suspected sleep apnea. Entered into evidence was a report dated February 16, 2015, from Dr. Douglas McKim at the Ottawa Hospital's sleep lab. It indicates that the grievor went there on December 13, 2014, and that her complaint was daytime sleepiness. It recorded that her Epworth Sleepiness Scale score was well within normal limits. It suggested that she had no significant tendency to doze during the daytime, that her sleep efficiency was perfectly normal, and that no significant sleep breathing disorder had been observed. The section marked "Interpretation and Recommendation" states as follows:

> *This polysomnogram is essentially normal and demonstrates no evidence of significant sleep disordered breathing or other abnormalities. The results are most consistent with primary snoring and the patient should be reassured in this regard. They*

> *may remain at some lifetime risk for obstructive sleep apnea and weight management is strongly recommended.*
>
> . . .

[113] The Epworth Sleepiness Scale score was not explained to me.

5. The year-end PER

[114] When the grievor started her CAD at TC, a little more than five weeks remained until the fiscal year end. As such, Ms. Zimmerman completed the grievor's year-end PER.

[115] Before the year-end PER process, the grievance against the mid-year PER had yet to be resolved to the grievor's satisfaction.

[116] Entered into evidence were several iterations of the grievor's year-end PER.

[117] The objectives set out in the year-end PER were different from those initially set out on April 2, 2014, for fiscal 2014-2015, due to the discussions between the grievor and Mses. Zimmerman and Castonguay after the grievance was filed against the mid-year PER. While it was not resolved, a significant portion of the wording of the grievor's objectives was changed, but not with her concurrence.

[118] Much of the evidence about the objectives was highly technical. Ms. Zimmerman maintained that the grievor's objectives never changed and that the ones set out at the start of fiscal 2014-2015 were the same ones written for the year-end PER, only set out differently and in more detail. Her evidence was that given the grievor's level (EC-06), she would have been well aware of the specifics of her objectives at the outset of the fiscal year, and they did not need to be written down in the way the grievor suggested they should have been.

[119] The grievor maintained that the objectives as originally written in early April of 2014 were general and were not specific enough to encompass what was set out in the later versions of the objectives used for the year-end PER. In addition, her evidence was that she was required to move away from tasks that would otherwise have fallen within her responsibility to help get another part of Ms. Zimmerman's area of responsibility (AOR) back on track. The grievor maintained that if she was off-track with respect to her responsibilities, which she did not admit to, it was not within her control as Ms. Zimmerman required her to address the problems in the other section in

Ms. Zimmerman's AOR. Entered into evidence were the following relevant portions of an email chain between the grievor and Ms. Zimmerman that occurred from January 16 to February 2, 2015, the subject of which was originally the grievor taking eight days of vacation leave before the end of the fiscal year:

> [The grievor to Ms. Zimmerman; January 16, at 10:23:]
>
> *There are 8 days I would like to take prior to the end of the fiscal year. I am flexible on when, but I would like to go visit my parent's and take them consecutively.*
>
> . . .
>
> [Ms. Zimmerman to the grievor; January 16, at 14:02:]
>
> *I do not see an issue with you taking your vacation as desired. What I would like to see is a plan of all your deliverable and a strategy of how and when they will be accomplished. With this information we will be able to determine the best time for the leave.*
>
> . . .
>
> [Ms. Zimmerman to the grievor; January 30, at 14:14:]
>
> *I received your request for leave for another 10 days from March 16-25. (March 26-27 have already been previously approved). As we discussed in the email below prior to your leave (January 19-29), I would like to see a plan of all your deliverables and a strategy of how and when they will be accomplished so I could best fit your leave request into the project plan and ensure all deliverables are met.*
>
> *Could you please send me this information and then I will look at the schedules and request for leave.*
>
> . . .
>
> [The grievor to Ms. Zimmerman; January 30, at 14:37:]
>
> *I have requested from the Project Managers all data deliverables that they wish to have accomplished prior to March 31st. I sent this e-mail to each of them prior to my vacation. I have not received anything.*
>
> . . .
>
> *I also requested a list of objectives from you to be accomplished prior to March 31st. I requested this at the beginning of January. I have not received anything.*
>
> *I am more than happy to create a schedule once I have the expected deliverables from the project and yourself.*
>
> *In the meantime, I would like to book a flight and I do not want to get paid out for the time. If there is a time that is more convenient, then I would be glad to take the time then.*
>
> . . .

[Ms. Zimmerman to the grievor; January 30, at 16:26:]

Your objectives that need to be accomplished before the end of the fiscal year can be found in your Public Service Performance Agreement. I have scheduled two meetings to go over these objectives with you (January 16th and February 3rd) both meetings you have declined. As well, you have declined many section and project meetings. These meetings are scheduled so the group can discuss upcoming work, deliverables, process and concerns. Attendance at these meetings would help you understand your work requirements.

Many of the project expected deliverables can also be identified in the Census Tier plans. All of CCPS has access to this information. As we move in to a very busy Census year, I would expect that we have very solid dates, processes and detailed descriptions of the data required to support the tasks.

It is also my understanding (though you should confirm) that you are not carrying enough vacation days to get paid out for the time. I believe you can carry 35 days. I did check with our financial advisor on this, but this information can also be found in the collective agreement so you may want to confirm this.

[The grievor to Ms. Zimmerman; February 2, at 08:31:]

. . .

I have mentioned several times that my objectives are not clear. There are many interpretations for the work and I have asked for very specific tasks and objectives to which I have had no response.

If you would like to walk me through all the Census Tier plans, I would be happy to sit with you or we can do so at my EPR follow-up meeting. As well, if I am not mistaken, those Tier deliverables are high level and not assigned directly to a task team. I would not want to assume responsibility for something or miss something. It is for this reason that I asked you and the Project Managers to outline exactly what they expect of me. I asked the Project Managers prior to me leaving and followed up with at least one of them upon my return on Friday. Christine is working on determining all the dates and deliverables. I need to touch base with Jimmy. But in the short conversation that we had prior to me leaving, he is looking forward to having a project schedule.

I did decline the January 16th meeting. Seeing as I was going away, I wanted to ensure that my team had adequate work and an understanding of what they were responsible for while I was gone.

If you are asking me to cancel my course (the first one I have taken in many years), I will do so. Please let me know. We can keep the time.

I am over on my vacation days by almost 2 days and I have compensatory days (6 days – for which I did overtime) to use prior to fiscal. I do not want to get paid out for these. I am flexible as to

> *when I take the time, but I would like to take the time. I will still be carrying over 5 compensatory days to the next fiscal.*
>
> *As for you concern about missed meeting. I have missed 1 meeting that I was scheduled to attend when I was here. I notified Elaine at the time. There has been numerous cancellations, for our section meeting, by yourself over the past few weeks. If I am away, I cannot attend the meeting. But other than my holiday, I am unaware of any meeting that I have missed, that I was invited to, when I have been at work.*
>
> . . .
>
> [*Sic* throughout]

[120] The grievor stated that she was never informed of her deliverables for January through March 31, 2015.

[121] On April 17, 2015, the grievor grieved the year-end PER.

[122] On May 8, 2015, Claude Graziadei, who was the director general of the Statistical Infrastructure Branch, which included the geography division, issued the second-level response to the grievance against the mid-year PER. Its relevant parts state as follows:

> *At the hearing, your representative argued that the grievance which was deemed untimely at the first level was in fact timely. He presented a letter from the Public Service Labour Relations Board (PSLRB) which outlined anticipated changes to the PSLRB Regulations. However, it is important to note that these amendments are forthcoming but are not effective as of yet. Therefore, the existing clause 40.12 in the collective agreement which indicates the time limit to file a grievance prevails.*
>
> *Consequently, your grievance is still deemed untimely and cannot be accepted. I have however, accepted to review your concerns as a complaint.*
>
> . . .
>
> *Finally, I reviewed your original mid-year review and I agree the statement regarding your absences was inappropriate. However, following your first level hearing, amendments were made. Therefore, the original version is no longer valid and I have focussed may attention on the revised version that you received. That being said, I have noted that the original comments can still be found in the employee portion of the PSPA. To ensure these comments are fully removed, you are required to remove them from the employee comment box. I will make arrangements to have your mid-year review reopened so you are able to do so.*
>
> . . .

III. Summary of the arguments

A. For the grievor

1. Request for an extension of time for the grievance in file 566-02-11534

[123] The grievor requested an extension of time in the grievance procedure with respect to these two missed deadlines:

1) the time within which to present a grievance at the first level of the grievance procedure; and
2) the time within which to present a grievance at the third level of the grievance procedure.

[124] The grievor and the CAPE acknowledged the delay with respect to presenting the grievance at both levels of the grievance procedure. At the first level, the delay was two days, while at the third level, it was approximately five to six weeks.

[125] The grievor referred me to s. 61(b) of the *Regulations*.

[126] The grievor referred me to *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, which sets out the following five criteria for determining whether the Board should exercise its discretion to extend time under the *Regulations*:

> . . .
>
> · *clear, cogent and compelling reasons for the delay;*
>
> · *the length of the delay;*
>
> · *the due diligence of the grievor;*
>
> · *balancing the injustice to the employee against the prejudice to the employer in granting an extension; and*
>
> · *the chance of success of the grievance.*
>
> . . .

[127] The grievor also referred me to *Apenteng v. Treasury Board (Canada Border Services Agency)*, 2014 PSLRB 19, for the proposition that not all the *Schenkman* criteria are always afforded equal importance and that the circumstances of each case determine how they are weighted relative to each other. No presumptive calculations

or thresholds in the *Schenkman* criteria pre-empt a decision maker from considering whether, in the interests of fairness, an extension of time out to be granted.

[128] The grievor submitted that the two-day delay presenting the grievance at the first level was miniscule and that there is no prejudice to the employer; as such, the extension should be granted. She submitted further that the five-to-six-week delay transmitting the grievance to the third level also meets the test set out in the jurisprudence as it was not excessive, and there is no prejudice to the employer.

[129] Both grievances deal with serious issues, and determining their chances of success without hearing the evidence would be difficult.

[130] The grievor also referred me to *Duncan v. National Research Council of Canada*, 2016 PSLREB 75, and *Chow v. Treasury Board (Public Health Agency of Canada)*, 2015 PSLREB 81.

2. The merits of the grievances

[131] The grievor reviewed the evidence in detail.

[132] The grievor referred me to *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, *Nadeau v. Deputy Minister of Employment and Social Development*, 2019 FPSLREB 9, *Renfrew Victoria Hospital v. Ontario Nurses' Association*, [2016] O.L.A.A. No. 412 (QL), *Ko-Csonka v. TDL Group Corporation*, 2014 HRTO 1247, *Mou v. MHPM Project Leaders*, [2016] O.H.R.T.D. No. 320 (QL), *Mississauga (City) v. Amalgamated Transit Union, Local 1572*, [2005] O.L.A.A. No 328 (QL), *Belleville General Hospital v. S.E.I.U., Local 183*, 1993 CarswellOnt 1289, *Canadian Waste Services Inc. v. C.L.A.C.*, 2000 CarswellOnt 5852, *Mains Ouvertes-Open Hands Inc. v. O.P.S.E.U., Local 458*, 2000 CarswellOnt 6143, *Lethbridge Industries Ltd. v. Alberta (Human Rights Commission)*, 2014 ABQB 496, *Cominco Ltd. v. United Steelworkers of America, Local 9705*, [2000] B.C.C.A.A.A. No. 62 (QL), *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15, *Cyr. v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, *Stringer v. Treasury Board (Department of National Defence)*, 2011 PSLRB 110, *Hotte v. Treasury Board (Royal Canadian Mounted Police)*, 2016 PSLREB 122, and *Santawirya v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 58.

[133] It should be noted that the Federal Court of Appeal set aside the decision in *Santawirya* after this hearing was completed.

[134] The grievor submitted that as of the mid-year PER, she was meeting her performance objectives; albeit, nothing in them set out the deadlines.

[135] She submitted that the objectives originally set out in April of 2014 were not those that she was assessed against; as such, she could not have met them if she did not know what they were.

[136] If the grievor did not meet her objectives, it was because she had ongoing health issues. She shared her medical information with Ms. Zimmerman; therefore, her employer was aware of her medical issues.

[137] The grievor was provided no feedback during the first half of the fiscal year at issue. In addition to her medical issues, she was also required to change her work priorities and to help a team that had fallen behind.

[138] While the employer removed the offending language from the mid-year PER, the effect of the discriminatory language was not removed, and it worsened.

[139] The grievor submitted that the definition of "disability" has changed and that for the purposes of human rights law, it is nuanced. Many types of conditions meet the definition; there is a spectrum, which at one end covers things such as the common cold and the flu. At the other end are things like visual impairments and chronic impairments, like muscular dystrophy. Between the two ends are many states of health, and many things can be a disability. The struggle is to determine what is and what is not a disability.

[140] Medical conditions can be complex, and conditions can differ. Each case is different. At one point, the question was what is transitory versus chronic or common versus uncommon, but now it is whether a condition impacts a person's ability. Does a person have a condition, and does that condition impact his or her ability to work? That is the analysis done today. An ailment such as bronchitis can be a disability, depending on the circumstances (see *Renfrew Victoria Hospital*).

[141] For the grievor, the nexus between the disability and the workplace has been established. Her absences were medically necessary. The employer was well aware of

the medical issues, at the very least as of the September 30 meeting, when the mid-year PER was conducted, because Ms. Zimmerman suggested that the time away from work due to her medical issues caused the grievor to be behind in her work; in that lies the adverse treatment. The employer was aware of the disability and yet maintained its expectations of her as if she were able-bodied. She should have been accommodated by having her objectives amended; she was not.

[142] Once the employer acknowledges the disability's effect on the employee in the workplace, it cannot apply the same standards as it would to an able-bodied employee. This holds true for both the mid-year and year-end PERs in this case.

[143] As a nexus has been established between the disability and the adverse treatment, discrimination has been established, and the burden shifts to the employer.

[144] The employer's actions were wilful and reckless. It is not required to show that the employer intended to discriminate. "Reckless" means careless and thoughtless. The employer knew that the grievor was away from work due to her illness, and the employer held it against her. It knew that she could not improve in the future.

[145] With respect to the year-end PER, the grievor asked questions as to how she could improve her performance. There were ongoing discussions with respect to the expectations of her, but they went nowhere.

[146] There is no evidence that the discussions with respect to her performance expectations dealt with the grievor's health and welfare. The employer never provided the required assistance. Evaluating a person on objectives on which he or she cannot improve in terms of performance does not help that person.

[147] The year-end PER was a continuation of the employer's reprisal. If the grievor did not know what was expected of her for the second half of the year, then it was difficult for her to do her job. She received her new objectives on February 5, 2015. She started her new job on February 23, 2015.

[148] The employer completed the year-end PER with knowledge of the grievor's health issues in the summer of 2014. It did so in a wilful and reckless manner while knowing that she had been ill and while doing nothing to alleviate the concerns she raised. It was a continuation of the discriminatory action.

[149] As a remedy, the grievor requested the following:

- that the Board declare that the employer breached the collective agreement and discriminated against her in a wilful and reckless manner;
- that the Board remove the mid-year and year-end PERs from her record;
- damages in the sum of $15 000 under s. 52(2)(e) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*); and
- damages in the sum of $10 000 under s. 53(3) of the *CHRA*.

B. For the employer

1. Request for an extension of time for the grievance in file 566-02-11534

[150] The employer also referred me to *Schenkman* and agreed that the criteria do not necessarily have to be given the same weight. It referred me to *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92, which stands for the proposition that granting extensions of time should be the exception and not the rule. The time limits are mandatory, and all parties should respect them. Employees are responsible for knowing the deadlines.

[151] *Popov v. Canadian Space Agency*, 2018 FPSLREB 49, addressed situations in which a grievor engaged in an informal dispute resolution process. It held that while a grievor should not be criticized for taking this approach, it does not relieve the grievor of his or her obligations to proceed with the grievance procedure.

[152] The employer submitted that there is no evidence to explain why the grievor's grievance was untimely other than that she took informal steps. She was represented through the procedure. Equally, there is no evidence as to why the grievance was not presented at the third level on time and why presenting it there took five to six weeks.

[153] In argument, the grievor referred to her health and her new job, which she implied impacted the processing of the grievance. However, the employer submitted that she was doing well, was working at a new job, and was pursuing the grievance she had filed for her year-end PER when she missed the deadline to refer the mid-year PER grievance to the third level. No evidence explains why she missed it or that there was a medical reason behind it.

[154] *Schenkman* speaks of due diligence. The grievor bore the responsibility to act. Neither she nor the CAPE exercised due diligence. She should have explained why she

missed the deadlines; she did not. A respondent is entitled to expect a matter to end. There are no clear, cogent, and compelling reasons to extend the time.

[155] While the first delay was not significant, the second delay of close to two months was significant. Even if the delay was not significant, the grievor did not provide clear, compelling, and cogent reasons for it; nor did she act with due diligence.

[156] With respect to balancing justice and injustice, the employer submitted that there is prejudice to it; it is entitled to turn the page on this matter.

[157] The chances for success are difficult to evaluate.

[158] Clause 40.04 provides that the timelines set out in the collective agreement can be mutually extended, but it was not done.

2. The merits of the grievances

[159] In cases alleging discrimination, it is stated that to demonstrate that an employer engaged in a discriminatory practice, a grievor must establish a *prima facie* case of it. The test has three parts and is set out in *Dorais v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 39, *Diks v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 3, *Moore v. British Columbia*, [2012] 2 SCR 360, and *Stewart v. Elk Valley Coal Corporation*, 2017 SCC 30. The grievor had to establish that:

1) she benefits from a protected characteristic (in this case, a disability);
2) she suffered an adverse impact; and
3) there is a nexus between the protected characteristic and the adverse impact.

[160] *Cann v. Rona Incorporated*, 2012 HRTO 754, provides that the grievor has the onus of proving that on a balance of probabilities, the *prima facie* case has been proved. Convincing and cogent evidence is required to satisfy the balance-of-probabilities test. The employer's position was that the grievor did not establish a *prima facie* case.

[161] With respect to the protected characteristic, the disability, the evidence produced consisted of these three medical certificates:

- one for July 28 – August 1, 2014;
- one for August 27 – September 20, 2014; and

- one for October 28 to 31, 2014.

[162] Those were the only medical notes that the grievor provided to the employer, and they lack detail. The first two notes simply indicated that she was unable to work due to illness, while the third stated that she was unable to work due to a medical procedure. At no time did she request any form of accommodation due to a disability or illness. Before the mid-year PER, she was away from work for 17 days. After the mid-year PER and before her departure, she was away from work due to illness or medical reasons for 4 days in October and 1 day in December of 2014. The grievor missed no work for illness in January and February of 2015.

[163] With respect to the health issues identified by the grievor, Ms. Zimmerman acknowledged that the grievor had a bad cough and believed that she had an issue with a wart or warts, had pneumonia, and was undergoing some tests. Ms. Castonguay acknowledged knowing about the mononucleosis. The employer admitted that it was aware that the grievor was ill at times. When she asked for sick leave, it was granted and not challenged. The evidence also disclosed that despite medical advice to the contrary, the grievor attended work.

[164] The grievor was granted time off work for medical appointments and testing. The testing was for not one but several medical issues over the course of the year. Testing, while it can be stressful, is not a disability or an illness.

[165] While the grievor did have pneumonia and mononucleosis, she was given sick leave when she requested it. There was no evidence as to how the illnesses affected her performance. The employer acknowledged that she might have suffered from stress but that she did not disclose that she was unable to perform her duties. No medical evidence was advanced stating that stress affected her ability to carry out her duties or to meet her objectives and that it was a disability.

[166] Being affected by different illnesses and using short-term sick leave to cover time lost to them does not necessarily constitute a disability. In this respect, the employer referred me to *Attorney General of Canada v. Gatien*, 2016 FCA 3, *Riche v. Treasury Board (Department of National Defence)*, 2013 PSLRB 35, and *Halfacree v. Deputy Head (Department of Agriculture and Agri-Food)*, 2012 PSLRB 130 (upheld in 2014 FC 360 and in 2015 FCA 98).

[167] The medical evidence at the hearing and the grievor's family physician did not disclose that she suffered from a disability or an illness that affected her ability to carry out her work. Her anemia did not require her to take time off work; nor did her family physician suggest that it affected her work. There was no indication to the employer that her ailments affected her ability to work or to meet her objectives. There was no indication to the employer and no evidence that her ailments hindered her ability to participate at work. There is no evidence that her ailments affected her ability to function normally; therefore, they could not have reached the degree of a disability.

[168] The jurisprudence provided by the grievor can be distinguished on its facts.

[169] With respect to the criterion of an adverse impact, the employer referred me to *Dorais* and *Chênevert v. Treasury Board (Department of Agriculture and Agri-Food)*, 2015 PSLREB 52. There was no negative impact on the grievor's finances or on her deployment. She was deployed and eventually promoted. There is no evidence that her health issues had any impact on her performance. Being unhappy with her PERs does not satisfy the test.

[170] The third criterion, establishing *prima facie* discrimination, is a nexus between the protected characteristic (in this case, the disability) and the adverse impact. In this respect, the employer referred me to *Bassett v. Treasury Board (Correctional Service of Canada)*, 2017 PSLREB 60, and *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68.

[171] Ms. Zimmerman testified that the assessment of the grievor for the mid-year PER was based on her work performed while she was at work. Ms. Zimmerman explained the rationale for the comment in the mid-year PER about the certified medical leave; it was put there to soften the blow of a poor PER. It might have been inappropriate and an exercise of poor judgement, but it was not discriminatory. She evaluated the grievor on the work she performed while at work. There was no evidence of any functional limitation.

[172] If a *prima facie* case of discrimination is established, the employer can refute it by establishing that:

- the grievor failed to provide the appropriate medical information to the employer so that it could accommodate her; or
- disability was not a factor in the PERs.

[173] The principles of the duty to accommodate are set out in *Attorney General of Canada v. Cruden*, 2013 FC 520, which reiterates the principles set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3. They are also set out in *Cann*. An employee is required to bring forward enough information to determine whether an accommodation is required and must cooperate in the accommodation process. In this respect, the employer referred me to *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970, and *Hydro Québec v. Syndicat des employé-e-s de technicques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43.

[174] The employer referred me to *Boivin v. President of the Canada Border Services Agency)*, 2017 PSLREB 8, for the proposition that the grievor must provide enough information to the employer. The grievor in this case did not. *Ahmad v. Canada Revenue Agency*, 2013 PSLRB 60, *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97, *Yellowhead Road and Bridge (Fort George) Ltd. v. British Columbia Government and Service Employees' Union*, [2015] B.C.C.A.A.A. No. 158 (QL), and *Gatien* all stand for the proposition that the employer is not responsible for anything it is not aware of, and the grievor is responsible for providing information and for cooperating in an accommodation process. In her evidence, the grievor admitted that she did not want or need an accommodation.

[175] Disability was not a factor in the employer's decision. Ms. Zimmerman assessed the grievor on the work she carried out. There was no suggestion of a disability; nor was an accommodation request made. While Ms. Zimmerman made an unfortunate comment, it did not equate to discrimination, and Ms. Zimmerman's explanation was reasonable.

[176] At issue was the PERs. The assessment was that the grievor had difficulties with core competencies and that she worked in a silo. The difficulties with the core competencies included speaking about her grievances out of turn and her divisive behaviour. That said, there is no link between the core competencies and her behaviour and disability.

[177] While Ms. Zimmerman's management style might have been direct and perhaps rude, it does not make her style discriminatory. It could have been that way because

she was under pressure to deliver results. This situation was not created because of Ms. Zimmerman's management style.

[178] With respect to a reprisal, the grievor submitted that she was excluded from meetings. She was invited to and did attend some meetings. It is true that once, she was left off an email invitation to a meeting. However, the meeting she was not invited to had originally been scheduled to take place while she had been away, and the rescheduled meeting inadvertently did not include her. There is no clear evidence that she was not invited to meetings.

[179] With respect to the allegation that Ms. Zimmerman usurped the grievor by assigning work to the grievor's direct reports, Ms. Zimmerman testified that it was done because when the grievor was away, work still had to be assigned and carried out. This is a reasonable explanation for why things might have happened as they did.

[180] With respect to the revised objectives provided to the grievor in February of 2015, the fact is that she was an experienced EC-06 who had worked in the field for some time. While the employer had instituted a new PER appraisal process and form, and hiccups might have occurred during their implementation, it did not equate to the grievor not knowing her objectives. Even if they had not been clearly elaborated, including setting dates, it did not equate to discrimination. That stated, it is highly unlikely that she did not know the timelines she had to meet, as she attended meetings at which timelines and deliverables were discussed, along with assigning work to subordinates with respect to timelines and deliverables and coordinating timelines and deliverables with other divisions and groups. In turn, she had to assign objectives and deliverables to her direct reports and assess them. No evidence suggested that that was not done or that they had been unable to understand their objectives, timelines, and deliverables.

[181] It was also suggested that an employee who was moved and who had previously reported to the grievor was a reprisal action against her. The employee had been involved in a staffing process and had been successful. He went to a different section, and his reporting status changed. There was no link to discrimination.

[182] The grievor also talked about Mr. Graziadei discussing her grievance at their November 17, 2014, meeting. Doing so was not inappropriate; nor was there anything discriminatory about it.

[183] The grievor stated that the February 9 letter was a reprisal. She could have grieved it but did not. While she might not have been able to refer such a grievance to the Board for adjudication, it does not mean that she could not have grieved it as being disciplinary and a reprisal. Even if it was disciplinary and could be considered a written reprimand, under s. 209 of the *Act*, the Board would be without jurisdiction over it. In addition, there is no evidence of any link to the grievor's health issues or to the discrimination allegation.

[184] The grievor also spoke about her request to report to someone other than Ms. Zimmerman. It was an interpersonal and not a medical or health issue, and there was no evidence that for health reasons, she was required to report to someone other than Ms. Zimmerman, or that such a change was required for accommodation purposes.

[185] The employer submitted that if a finding is made that discrimination occurred, then it should be noted that the jurisprudence submitted by the grievor is not similar to the facts of this case. Also, given the facts that she suffered no loss of or any damage to her employment and was promoted, then only minimal damages should be awarded.

[186] The employer submitted that based on the facts, there was no discrimination, and the grievances should be denied.

C. The grievor's reply

1. Request for an extension of time for the grievance in file 566-02-11534

[187] *Grouchy* does not apply. Section 61(b) of the *Regulations* should not be read too narrowly.

2. The merits of the grievance

[188] The first step is the crux of the test of determining if there was a *prima facie* case. Is there enough evidence to establish a disability or a perceived disability?

[189] The employer downplayed much of the evidence.

[190] There is significant evidence of the grievor working while ill, of her explaining her illness, and of her asking to change her vacation leave to sick leave. She was sick on her holiday.

[191] The grievor worked while suffering from pneumonia and mononucleosis. She was not performing at the top of her game. She had functional limitations.

[192] This is not an accommodation case. Clearly, the employer's actions adversely impacted her.

[193] The threshold test for a disability has changed. Several ailments may be considered. This case is the perfect storm of different ailments coinciding.

[194] The employer's after-the-fact rationalizations do not meet the secondary part of the test.

IV. Reasons

[195] For the reasons that will be set out in this section, the request to extend the time is denied, and the grievance in file 566-02-11534 is denied. The grievance in file 566-02-11701 is granted to the extent set out in this section.

A. File 566-02-11534

[196] As set out in *Pannu v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 4, the grievance procedure in the federal public service is governed by the *Act*, the *Regulations*, and any group-specific collective agreement that an authorized bargaining agent and the employer may enter into with respect to employees in a particular bargaining unit.

[197] At article 40 of the collective agreement, the parties agreed to certain terms and conditions governing the grievance procedure. As set out in that agreement, the procedure has three levels. If a grievor is unsatisfied with the employer's response at the final level, he or she may refer the grievance to adjudication (if the Board would have jurisdiction over it). Clauses 40.12 through 40.14 set out the timeline for presenting a grievance through that procedure.

[198] Clause 40.12 provides that a grievance may be presented at the first level no later than the 25th day after the date on which the employee is notified orally or in writing or on which the employee first becomes aware of the action or circumstances giving rise to the grievance. If the grievance is presented after the 25th day, it is not considered timely.

[199] Clauses 40.13 and 40.14 provide for how a grievance, once presented, is moved through the grievance procedure and set specific timelines for both the grievor and the employer to take the requisite steps. With respect to the timeline requiring the employer to respond to a grievance, at any given step in the procedure, if it does not reply, it is incumbent on the grievor, within another specific timeline, to move his or her grievance to the next step. Once all the levels have been moved through, if the grievor is unsatisfied with the final-level decision, the grievor may, if the grievance may be referred to the Board for adjudication, do so if he or she is still within the requisite time limit.

[200] Clause 40.20 provides that any employee who fails to present a grievance at the next higher level within the prescribed time limits shall be deemed to have abandoned the grievance, unless the employee was unable to comply with the prescribed time limits due to circumstances beyond his or her control.

[201] Section 63 of the *Regulations* is found under the heading "Grievances", the subheading "General Provisions", and the marginal note "Rejection for failure to meet a deadline" and states as follows:

> ***Grievances***
>
> ***General Provisions***
>
> . . .
>
> ***Rejection for failure to meet a deadline***
>
> ***63*** *A grievance may be rejected for the reason that the time limit prescribed in this Part for the presentation of the grievance at a lower level has not been met, only if the grievance was rejected at the lower level for that reason.*
>
> . . .
>
> [Emphasis in the original]

[202] Section 95 of the *Regulations* is found under the heading "Grievances", the subheading "Adjudication", and the marginal notes "Deadline for raising objections" and "Objection may not be raised". It states in part as follows:

> ***Grievances***
>
> ***Adjudication***
>
> . . .
>
> ***Deadline for raising objections***

> ***95 (1)*** *A party may, no later than 30 days after being provided with a copy of the notice of the reference to adjudication,*
>
> ***(a)*** *raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the presentation of a grievance at a level of the grievance process has not been met; or*
>
> ***(b)*** *raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the reference to adjudication has not been met.*
>
> ***Objection may not be raised***
>
> ***(2)*** *The objection referred to in paragraph (1)(a) may be raised only if the grievance was rejected at the level at which the time limit was not met and at all subsequent levels of the grievance process for that reason.*
>
> . . .

[203] Section 61 of the *Regulations* is found under the same heading and subheading as s. 63, except with the marginal note "Extension of time", and states as follows:

> ***Extension of time***
>
> ***61*** *Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the providing or filing of any notice, reply or document may be extended, either before or after the expiry of that time,*
>
> ***(a)*** *by agreement between the parties; or*
>
> ***(b)*** *in the interest of fairness, on the application of a party, by the Board or an adjudicator, as the case may be.*
>
> [Emphasis in the original]

[204] Section 90 of the *Regulations* sets out the procedure for referring a grievance to the Board for adjudication and states as follows:

> ***Deadline for reference to adjudication***
>
> ***90 (1)*** *Subject to subsection (2), a grievance may be referred to adjudication no later than 40 days after the day on which the person who presented the grievance received a decision at the final level of the applicable grievance process.*
>
> ***Exception***
>
> ***(2)*** *If no decision at the final level of the applicable grievance process was received, a grievance may be referred to adjudication*

> *no later than 40 days after the expiry of the period within which the decision was required under this Part or, if there is another period set out in a collective agreement, under the collective agreement.*
>
> [Emphasis in the original]

[205] The grievor presented her first grievance late at the first step of the grievance procedure. She was also late moving it forward at a later level. The first delay was a mere two days, while the second was close to two months. There is no dispute that the employer did not consent to extending the time for filing the grievance or for transmitting it to a higher level in the grievance procedure.

[206] The employer raised the untimeliness of the original presentation of the grievance at each level of the grievance procedure and after its referral to the PSLREB for adjudication. When the grievor failed to present it at the third level of the grievance procedure within the timelines set out in the collective agreement, the employer raised that untimeliness both at the third level and when it was referred to adjudication.

[207] While it is not common for grievances to be filed late or to be moved through the grievance procedure late, it does happen. A body of jurisprudence based on s. 61 of the *Regulations* has been established to address such situations, which allows a grievor who has missed a deadline to come to the Board by way of an application made under s. 61(b).

[208] The leading case in this area is *Schenkman*, which sets out these five criteria that have been referred to and used over the years to address applications to extend timelines:

> . . .
>
> - *clear, cogent and compelling reasons for the delay;*
> - *the length of the delay;*
> - *the due diligence of the grievor;*
> - *balancing the injustice to the employee against the prejudice to the employer in granting an extension; and*
> - *the chance of success of the grievance.*
>
> . . .

[209] When hearing an application to extend time, a Board member is required to assess the facts of each particular situation as he or she determines is appropriate,

while taking into account all the circumstances. No fixed process or rating system is applied when assessing the criteria.

[210] The first criterion speaks to explaining the delay by way of clear, cogent, and compelling reasons. In the grievor's case, no evidence was presented with respect to explaining either the first or second delay, let alone clear, cogent, and compelling reasons for them. While I did hear that the grievor met with Mses. Zimmerman and Castonguay, the jurisprudence is clear that informal discussions related to resolving grievances do not in any way either stay or extend timelines (see *Popov*).

[211] In addition, clause 40.20 provides that any employee who fails to present a grievance at the next-higher level within the prescribed time limits shall be deemed to have abandoned the grievance, unless the employee was unable to comply with the prescribed time limits due to circumstances beyond his or her control. There was no evidence that the grievor was unable to comply with the prescribed time limits due to circumstances beyond her control. The deadline to present her grievance at the first level expired on Wednesday, November 5, 2014. The grievance was presented on Friday, November 7, 2014. The evidence also disclosed that while she was on sick leave from October 28 through 31, she was not off work at all for the week of November 3, 2014, and in October, she was at work 14 days.

[212] In addition, with respect to the initial grievance, although the grievor signed it on November 7, 2014, the bargaining agent representative signed it on October 6, 2014. This anomaly was not explained. I heard no evidence as to why the bargaining agent representative signed the grievance on that date but the grievor waited a full month to sign it and present it to the employer.

[213] The jurisprudence is also clear that time limits are mandatory, that all parties should respect them, and that employees are responsible for knowing them. The grievor was represented throughout the procedure by her bargaining agent, and as such, even if she did not know about the timelines, the bargaining agent was well aware of them, as they are an important part of representing its members.

[214] The second criterion is the length of the delay. As submitted by the grievor, the initial delay was miniscule; however, the subsequent delay moving the grievance from the second to the third level was not minimal, is troubling, and leads directly to the third criterion, her due diligence.

[215] There is no evidence of due diligence by the grievor in taking any steps to address the delay, and in fact, the opposite took place.

[216] It is clear that the grievor and her bargaining agent representative or representatives knew that the employer did not either waive the timelines or consent to extending them as its replies at both the first and the second levels denied the grievance on the basis that it was out of time. This should have been a red flag to both the grievor and her bargaining agent that the employer was serious about the time limits. Yet, in the face of the employer's position that was clearly articulated not once but twice, for reasons not provided at the hearing, the grievance was not moved forward within the time limits that the bargaining agent had agreed to in the collective agreement.

[217] The employer's reply at the third level again set out that it took the position that the grievance was untimely not only in its initial presentation but also at the third level. The grievor referred the grievance to the PSLREB for adjudication, and within the time limits set out at s. 95 of the *Regulations*, the employer again raised its objections based on timeliness.

[218] Despite the employer making it crystal clear four times to the grievor and the bargaining agent that the grievance was not timely and stating twice that the reference to the third level was also untimely, the grievor did not avail herself of an application under s. 61 of the *Regulations* to extend the time until at the outset of the hearing, which was more than three years after the missed deadlines. That was not acting with due diligence.

[219] The fourth and fifth criteria are, respectively, balancing the injustice to the employee against the prejudice to the employer in granting an extension, and the chance of success of the grievance.

[220] It is difficult in today's public-sector labour relations context, to envisage when a potential injustice to an employee could be outweighed by prejudice to the employer.

[221] Next is the fifth criterion. It can be difficult to assess, largely because in some cases, like this one, unless much, if not all, of the evidence is heard and assessed, it is impossible to reach a conclusion. Therefore, the Board member is left hearing all the evidence and arguments on the merits.

[222] The grievance was advanced on two fronts. The grievor alleged the following about the mid-year PER:

- it breached the collective agreement, as the employer commented about her inability to stay on track to achieve her objectives, which was due to her absence from work because of a disability-related illness, and the comments were discriminatory and a breach of clause 16.01 of the collective agreement and the *CHRA*; and
- it was disguised discipline, a camouflage, done in bad faith, and a violation of the employer's duty to fairly assess her performance.

[223] Section 208 of the *Act* allows an employee to grieve almost any aspect of his or her work relationship. However, s. 209 circumscribes the Board's jurisdiction with respect to which grievances filed under s. 208 can come before it for adjudication. Section 209(1)(a) gives the Board jurisdiction over collective agreement breaches, while s. 209(1)(b) gives it jurisdiction over disciplinary matters, if they resulted in a termination, demotion, suspension, or financial penalty.

[224] The jurisprudence relating to s. 209(1)(b) has been consistent in holding that a disciplinary action that did not amount to a termination, suspension, demotion, or financial penalty is not within the Board's jurisdiction.

[225] At the outset of her submissions, the grievor stated that while she still believed that the employer's action amounted to disguised discipline, she conceded that it did not fall within the Board's jurisdiction. That being the case, the chance of success of the grievance being granted due to a finding of disguised discipline is zero, as that is not discipline that falls within s. 209(1)(b) of the *Act*.

[226] This leaves only the allegation that the mid-year PER was a breach of the collective agreement. As this allegation suggests a breach of a section of the collective agreement, the Board does have jurisdiction. However, jurisdiction is not any guarantee of or even a measure of success; it is merely an indication that the issue is within the Board's jurisdiction.

[227] However, based solely on the wording of the grievance and the grievor's admission, in the simplest of terms, the chance of success of this grievance was reduced by half as she conceded that the portion related to disguised discipline was not within the Board's jurisdiction.

[228] *Schenkman* was issued by the Board's predecessor, the Public Service Staff Relations Board, when the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35) was the governing legislation. It was repealed on March 31, 2005, and replaced by the *Public Service Labour Relations Act (S.C. 2003, c. 22, s. 2;* PSLRA).

[229] Before the *PSLRA* came into force, an employer could raise an objection to the timeliness of a grievance at any time in the grievance procedure up to and including at the outset of an adjudication hearing. The coming into force of the *PSLRA* brought changes that instituted rules that significantly limited the employer's ability of to challenge a missed deadline and required it to raise such objections at each level of the grievance procedure and upon the reference to adjudication, failing which, despite the untimeliness, no objection could be pursued. In short, grievors were given an extra layer of protection when it came to delays presenting grievances and processing them through the grievance procedure.

[230] The parties to collective agreements in the federal public sector are, on the employer's side, the federal government in the form of the TB or any number of separate agencies, and on the employees' side, any number of national professional bargaining agents. They are sophisticated organizations that employ both professional negotiators and lawyers who act for them in the labour relations regime. They negotiate the collective agreements that set out the terms and conditions of employment. In doing so, it cannot be said that they are not fully cognizant of not only the rules but also the risks inherent to presenting and processing grievances.

[231] As set out in *Grouchy*, granting extensions of time should be the exception and not the rule. At a bare minimum, when a grievance has not been presented within the time limits set in the collective agreement and agreed to by the parties, it is imperative that the grievor and bargaining agent act diligently and with due haste to seek an extension of time and in doing so provide an explanation for the delay.

[232] The fourth and fifth criteria of *Schenkman* should be taken into account only if the grievor acted diligently, applied to extend the time as soon as possible after becoming aware of the missed deadline, and provided a clear and cogent explanation for missing it. Doing otherwise would render meaningless the deadlines in the collective agreement that the parties freely negotiated and agreed to.

[233] Based on clause 40.20, by operation of the collective agreement, the grievance would have been deemed abandoned.

[234] In addition, as the grievor failed to act with due diligence, and as she did not provide clear, cogent, and compelling reasons for the delay moving her grievance forward, the request to extend the time is denied, and the grievance is denied.

B. File 566-02-11701

[235] The Board (and its predecessors) has long held that it does not have jurisdiction over grievances about employees' performance appraisals (see, for example, *Bratrud v. Canada (Office of the Superintendent of Financial Institutions)*, 2004 PSSRB 10 at paras 90-92). The only way the Board can have jurisdiction is if it can be established that the grievance would otherwise fall within its jurisdiction under s. 209 of the *Act*.

[236] As stated earlier in these reasons, the grievor maintained that the employer's actions with respect to her PERs were disguised discipline. However, during her submissions, she conceded that in the circumstances, this allegation was not within the Board's jurisdiction. This left her having to establish that somehow, on a balance of probabilities, in its assessment of her performance with respect to her year-end PER, the employer breached clause 16.01 of the collective agreement.

[237] In the grievance that formed the basis of file 566-02-11534, the grievor alleged the following: "[the employer's] comments on my Performance Evaluation Report is [*sic*] based on my absence from work due to a disability related illness which I find to be discriminatory in nature . . .". The grievance that formed the basis of file no. 566-02-11701, states as follows:

> *Grievance details:*
>
> *I hereby grieve my final performance Evaluation Report of 2014-2015 as I consider the performance evaluation process as disguised discipline, reprisal on the part of management, a sham, made in bad faith, arbitrary, discriminatory in nature, and in violation of the Employer's duty to fairly assess my performance.*

[238] Clause 16.01 of the collective agreement states as follows:

> ***16.01*** *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 Association, marital status or a conviction for which a pardon has been granted.*

[239] Remaining before me is the grievor's argument that cumulatively, the series of medical issues over the period in issue should be considered a disability, and that when it assessed her performance, the employer discriminated against her based on that disability.

[240] Her argument was that the test for disability in human rights law is nuanced; it is a spectrum, with at one end things like colds and flu and at the other end chronic impairments such as multiple sclerosis and diabetes. Between them are many different states of health, and many things may constitute a disability. The grievor submitted that the question is whether a condition or ailment impacts someone's ability, which in turn equates to ailments being a disability. If an ailment is a disability, then the question becomes one of adverse treatment.

[241] The grievor pointed out that the appropriate benchmark is determining what is transitory versus what is permanent. While this may be an appropriate starting point, it is not that simple. I am certain that every day, millions of Canadians go to work without being in absolute perfect health. It can be something permanent, such as less-than-perfect vision, or something as fleeting as the common cold.

[242] Work environments have become complex, and great strides have been made in understanding and addressing health issues, discrimination, and, in turn, accommodation. For example, being able to see clearly is an important requirement in many if not all jobs, and many people have less-than-perfect vision. This problem has historically been dealt with for the most part by eyeglasses, contact lenses, and, more recently, laser surgery. Health difficulties that might have been issues a few decades ago have all but disappeared in the workplace context, given advances in science, technology, and the law. At one point, persons with mobility issues could not access buildings due to steps and stairs; these issues were resolved by ramps and doors that open with the push of a button.

[243] I accept and agree that what constitutes a disability has progressed and is nuanced. As a simple example, take someone perfectly healthy and mobile who then suffers an injury that renders a limb very limited in use. Depending on the duties and

tasks of that person's job, it could severely affect how he or she does that job or even stop the person from doing that job. Even if the injured employee eventually makes a full recovery after a few months, the injury, depending on the job, could certainly render that person disabled, as understood in both a labour and human-rights-law context, for a time that may require an accommodation. And depending on the circumstances of both the position and the work location, the injured person could be discriminated against, in the face of what is truly a transitory and impermanent health issue.

[244] At the start of the fiscal year, the employer and grievor appeared to agree to her objectives for the coming fiscal year. Although I heard no evidence as to the specific criteria taken into account in setting expectations, it appeared that both understood that whatever they were, they were achievable during the course of the fiscal year. It would make no sense that an employer would require, and an employee would agree to, expectations that could not be achieved during the normal working hours allotted during the fiscal year. I did hear from Ms. Zimmerman that when it sets expectations and what is achievable, the employer does account for the understanding that generally, employees will not be at work each and every potential workday, as most, if not all, will choose to take some time off. They may also have to be off work due to an illness on their part or on the part of a dependent relative, such as a child. How that is done was not disclosed to me; nor was whether the amount of time off per employee is taken into account in the equation.

[245] Based on the evidence before me, between April 1 and July 31, 2014, which was 4 full months of or 2/3 of the way into the first half of the 2014-2015 fiscal year, the grievor had taken roughly 6 days of sick leave with pay, 1 day of vacation (April 3, 2014), 1 volunteer (or personal) day, and the equivalent of 1 family related leave day. Nothing in that seems out of the ordinary.

[246] During those first four months and before July 28, 2014, the evidence disclosed that Dr. Budge saw the grievor three times, on April 5, May 8, and May 15. According to him, the April visit dealt with the grievor's persistent cough, and he prescribed her antibiotics. He had seen her earlier in the year, in March, for a persistent cough and suspected pneumonia. The evidence disclosed that in April, the grievor did not miss any days due to illness.

[247] In May, Dr. Budge saw the grievor twice, which disclosed a lesion that raised a cancer suspicion and led to an MRI scan. Late that month, the lesion was determined not cancerous. Her leave record discloses that on May 27, she took an hour of sick leave, which coincided with evidence that the MRI scan was done on that date.

[248] Having to undergo tests for suspected ailments is not in and of itself a disability; nor is it an illness.

[249] As set out earlier, the grievor worked a compressed schedule. Otherwise, her normal hours of work would have been 7.5 hours per day, Monday to Friday. Taking a compressed day off required her to work additional hours every day such that she could achieve the required 37.5-hour workweek. In both April and May, she took a total of 4 compressed days. This discloses to me that she worked the appropriate amount of time to earn the compressed days.

[250] The evidence disclosed no medical appointments for the grievor in June of 2014. It also disclosed that the first sick leave she took that month was on Friday, June 20, when she took 5.5 hours of it. The evidence further disclosed that she was on sick leave on the following Monday, June 23, and again on Friday, June 27. She was at work the first 4 weeks of July, except on July 8, when she took 3.5 hours of sick leave, and on July 17 and 22, which were her compressed days. Again, since she took her compressed days, the assumption is that she worked the requisite hours to fulfil her normal 37.5-hour workweek.

[251] On July 24, the grievor saw Dr. Budge, whose records indicate that she complained of a two-week history of fatigue. Although the evidence is not exact as to precisely when she was diagnosed with the specific ailments, it is clear that at some point between July 24 and 29, Dr. Budge determined that she was suffering from mononucleosis, an iron deficiency, and pneumonia.

[252] From the evidence, it appears that the iron deficiency was a chronic issue that the grievor had been dealing with for some time. Dr. Budge indicated that it could have caused her fatigue; however, the evidence also disclosed that it was being treated.

[253] The grievor's iron deficiency, in and of itself as a chronic ailment that causes fatigue, could have had an adverse effect on her work, and can certainly be considered a disability, as that term is understood in a labour relations and human rights context.

I was not provided with any evidence about the iron deficiency either before or after the period in issue and whether it impacted her work.

[254] However, at the same time, Dr. Budge indicated that he believed that the grievor had caught mononucleosis and that she had pneumonia. Of course, those ailments are transitory, and like a cold or flu, they can be recovered from; albeit, recovery times vary and involve a number of factors. It does not surprise me that given the intersection of the iron deficiency, mononucleosis, and pneumonia, the grievor was fatigued.

[255] At that point, Dr. Budge instructed the grievor that she should take time away from work. He signed two notes, both of which were entered into evidence. Both appeared to be signed the same day. The difference is that one was for July 28 to August 1 and that the other was for July 28 to August 8. While it is unclear exactly why two notes were issued, or when, there is no dispute that Dr. Budge provided them to the grievor and that it was up to her to provide them to her employer. It is not clear what exactly she provided to the employer, and when.

[256] Ms. Zimmerman confirmed that she received the first July 28 note. The grievor said that she gave Ms. Zimmerman the second July 28 note on either July 31 or August 1, when she went to work. This is quite a divergence in the evidence. The grievor stated that upon giving Ms. Zimmerman the first July 28 note, Ms. Zimmerman threw it back at her and asked her what she wanted Ms. Zimmerman to do with it. The grievor stated that she had already booked off the week of August 5 to 8 as vacation. When she returned to work on August 11, she said that she told Ms. Zimmerman that she wanted to change it from vacation leave to sick leave with pay. She said that Ms. Zimmerman exclaimed to her, “You want more time off!”

[257] Ms. Zimmerman stated that in fact she did not receive the second July 28 note and that had the grievor wanted to convert her vacation leave to sick leave, she could have done it through the electronic leave system, which she did not do. I am prepared to accept Ms. Zimmerman’s account with respect to this, as quite frankly, the change is meaningless to the employer. Whether the grievor took the week of August 5 to 8, 2014, as certified sick leave with pay or vacation leave, the employer still paid her the same salary for those days, and she was still away for them. The only difference would be that her sick-leave bank would be lowered by four days, and her vacation

leave bank would be credited the four days. The comment that the grievor attributed to Ms. Zimmerman makes no sense; there was no "more time off". The grievor was off work and was paid; she did not take any more time off work. It would merely have been a change to the type of leave taken. Arguably this could have been an issue, however, there was no suggestion that the grievor was not ill and Ms. Zimmerman did not question the legitimacy of the sick-leave notes.

[258] The evidence disclosed that the grievor took a second full week of vacation in August, from the 25th through the 29th. There is no evidence that she saw Dr. Budge until August 27, at which point he provided her with the August 27 note. It stated that she should be off work from August 27 to September 20, 2014. It is problematic that despite her physician directing her to stay off work, and given the August 27 note, she went into work when she was not supposed to. The evidence disclosed that while she provided the August 27 note to Ms. Zimmerman, it appears that it was provided on September 23, 2014, after she had returned to work. Despite being told to be off work during this period, the grievor did go in, on September 9, 11, and 12.

[259] Based on the evidence before me, I have no doubt that during the month of August, despite taking vacation time instead of sick leave, and despite going into work for 10 of those days, the grievor was ill and suffering from what appeared to be a multitude of ailments that contributed to her being fatigued. Dr. Budge's assessment of her indicated that she had serious medical issues in late July and that she should be off work. He gave her two medical notes covering the two-week period from July 28 through to August 11. While she did take some time off, she did not take the full amount off, which she should have done, and she went to work on a couple of days.

[260] The mid-year PER took place exactly half-way through the fiscal year (September 30, 2014). Between July 28 and September 30, 2014, there are 45 working days. According to the evidence, the grievor was at work for 20 or 44% of them. It is also clear that on at least 3 of those days, she should have been away on sick leave as advised by her doctor. In addition, while she was on vacation on August 25 and 26, and it was shown that vacation leave was used for the entirety of that week, it is evident from the August 27 note that she was suffering from the same ailments that Dr. Budge had diagnosed earlier that summer, for which he had put her off work for 2 weeks at the end of July and the beginning of August. The August 27 note put her off work again, and she was not to return until September 22. Again, despite being ill, she

ignored Dr. Budge's advice and returned to work on 3 days in September. She was off due to illness for a total of 23 days. A typical month has between 19 and 22 working days.

[261] Given the illnesses that the grievor was suffering from, I have no doubt that despite her attendance at work in August and likely September, her productivity was probably severely affected. However, despite clearly being ill and having been diagnosed with a number of medical issues that caused her difficulties, she ignored her doctor's advice and went to work when she should not have. This does not help her. While in her testimony, she suggested that Ms. Zimmerman was well aware of all the issues that befell the grievor during the period in issue, the full extent of what exactly Ms. Zimmerman knew and when is not crystal clear.

[262] The grievor was off work for 4 days due to the biopsy that took place in late October of 2014, and the evidence disclosed that she was on sick leave for about 1 more day plus a little more. Largely, throughout November and December of 2014, she was at work, but she was away for the majority of January 2015. The evidence disclosed that she was at work for only 8 of the 21 working days, the balance being recorded as vacation leave. The evidence disclosed that she was at work for only 10 days in February of 2015 before she started working at TC.

[263] Without specific evidence about exactly how the employer set the expectations of the grievor against the time frame available within the fiscal year, it is very difficult to assess what she should have accomplished, given that a significant block of working time was removed from the equation. While some of the time away from work would have been taken into account when first setting the expectations, given that no employee is expected to be at work every potential working day, in the end, the grievor's health issues appear to have removed another significant amount of time starting in late July and continuing into late September.

[264] Say that a hypothetical employee's productivity is assessed on completing a certain number of assigned tasks within a set time (hours, days, weeks, and months) and that that productivity takes into account that the employee would miss a certain amount of work during that set time due to vacation and sick leave. And say that the employee ends up not being able work the requisite number of hours, days, weeks, or months because of either an injury or illness that disables the employee and removes

his or her ability to work for a significant period that the productivity expectation is based upon. If so, should the expected productivity not be reduced to account for the lost time? Would that not be a form of accommodation? If not, and the disabled employee is required to maintain a level of productivity that was based on his or her health before being disabled, it would amount to discrimination based on the disability.

[265] I have no doubt that as of the start of fiscal 2014-2015, the working relationship between the grievor and Ms. Zimmerman was at best tenuous and fragile, and that over the period in issue, it rapidly disintegrated into something toxic, dysfunctional, and unworkable.

[266] Indeed, it appeared that their relationship was likely doomed from the start, as the evidence disclosed that before the grievor left on maternity leave, she wrote an email in which she described her relationship with Ms. Zimmerman as difficult, stated that it made for a hostile environment, and stated that it caused her to lose sleep. The last two paragraphs of the email state as follows:

> . . .
>
> *As well, I am at the end. I need to get off the project. Working in such a hostile environment has me up since 1 am this morning. This is affecting me.*
>
> *Sorry to insist. I have just never worked with someone like this, nor do I ever want to.*
>
> . . .

[267] That description hardly suggests that a sound foundation to a solid and good working relationship would be built, let alone one that was to operate under extreme pressure and hard deadlines. Simply put, it foreshadowed what was about to be nothing short of a disastrous working relationship, which led to this hearing.

[268] The majority of the evidence at the hearing before me came from the grievor and her supervisor, Ms. Zimmerman. While the contextual evidence from them was rarely in dispute, the evidence that the parties viewed as key was often contradictory. It makes it difficult to sort through the following:

- what Ms. Zimmerman knew and did not know about the grievor's health;
- the factors that went into determining the year-end PER; and

- the status of the work that was supposed to be carried out and against which the grievor was to be assessed.

[269] The test for credibility is set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, in which the British Columbia Court of Appeal stated as follows:

> . . .
>
> *If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility . . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*
>
> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. . . .*
>
> . . .

[270] While I do not have jurisdiction to determine the issue of the alleged disguised discipline, I did hear evidence with respect to actions that Ms. Zimmerman took relating to the February 9 letter, which goes directly to the credibility of the evidence. It was characterized as a letter of expectations with respect to the grievor's behaviour. While it set out 12 numbered guidelines, they can be broken down into these 2 issues:

1. the grievor's attendance and reporting with respect to her attendance; and
2. her treatment of her colleagues and subordinates.

[271] With respect to attendance and reporting, the allegations inferred by Ms. Zimmerman in the February 9 letter were that the grievor was not at work when she should have been, and when she was at work, she did not perform any work. There did not appear to be any evidence that would support any of this.

[272] With respect to how she treated her colleagues, what I heard from the employer's witnesses, specifically Ms. Zimmerman, was that the grievor treated some colleagues, namely, Messrs. Cotton and Brown, in both a non-collegial and an unprofessional manner. The grievor testified otherwise, stating that she had excellent relationships with both men and that she did not treat them or her other colleagues in the manner that Ms. Zimmerman insinuated.

[273] Both Messrs. Cotton and Brown testified. Their evidence appeared to strongly support the picture the grievor painted of each one's good collegial and professional working relationship with her. On October 17, 2014, Mr. Cotton emailed Mses. Zimmerman and Castonguay about the grievor's alleged work-relationship issues. He stated as follows:

> . . .
>
> *It has been informally mentioned to me that I have reported (or on behalf of my team members) has been having issues with professionalism, communication in regular, ongoing work interactions with Renata Slivinski.*
>
> *I would like to clarify any potential confusion.*
>
> *Such is not the situation. Indeed, neither I (nor any of my subordinate team members) have reported any such issue. Let me state that I have no issue with her professionalism, her communication style. I have regularly found Renata to engage with me and my team members in a respectful manner. Although her communication style is different than mine (in my opinion, far more direct), I (nor any of my team members) have found no issue in her comportment into resolving typical workplace issues, as needed per her assigned work/role as Business/ Data analyst for GEO Address Services project*
>
> *I would like to add that deliverables produced by Renata are of high quality and I personally find a have a good report with her and enjoy the process of mutually reining/verifying highly detailed business requirements into requisite IT specifications.*
>
> . . .
>
> [*Sic* throughout]

[274] Mr. Brown not only testified but also produced an email dated February 10, 2015, which he stated he wrote because he was aware of the February 9 letter, and he had seen things that had caused him concern not only for the grievor but also for his career. Mr. Brown testified that he and the grievor had an excellent working relationship and that they got along well. He had and made no complaints about her. In fact, his February 10, 2015, email suggests that the behaviour Ms. Zimmerman attributed to the grievor was the exact behaviour she exhibited toward the grievor.

[275] Ms. Castonguay, for her part, backed Ms. Zimmerman. She stated in her evidence that she responded to Mr. Cotton's email, which suggested that they should talk. Mr. Cotton replied to her, stating that he "would welcome the opportunity". In his evidence before me, Mr. Cotton said that Ms. Castonguay never spoke to him about the email exchange and that he never had an earlier discussion with her about the grievor.

[276] When she was shown her exchange with Mr. Cotton, Ms. Castonguay said that she did not speak to him about the grievor. However, she did say that she had spoken to his superior, Mr. Lajoie, and that her recollection was that he had conveyed Mr. Cotton's views to her. Mr. Lajoie was called in reply. He stated that his work cubicle was close to Mr. Cotton's and that he often saw Mr. Cotton and the grievor interacting there. He stated that he never saw the grievor exhibit any inappropriate behaviour toward Mr. Cotton and that neither Mr. Cotton nor any other employee complained to him about the grievor. When Mr. Lajoie was shown Mr. Cotton's and Ms. Castonguay's exchange, said that he recalled it, although it was a bit fuzzy. He said that his team had had conflicts with Ms. Zimmerman.

[277] He further stated that there was tension between Ms. Zimmerman and his team as she was accountable to deliver certain projects with fixed dates. Sometimes, the requests came late, and sometimes, the timelines were shortened, both of which caused tension and stress. He stated that Ms. Zimmerman was aggressive at meetings and that she showed a lack of respect. He said that he had to act as a buffer between her and his team. Mr. Lajoie stated that several times and regularly, he brought his concerns about her behaviour to Ms. Castonguay. In cross-examination, he stated that he raised Ms. Zimmerman's behaviour with her directly. He stated that she was visibly stressed by the workload. He stated that the work she was responsible for delivering was high profile and that it involved tight deadlines.

[278] The only conclusion that I can reach with respect to the evidence of Mses. Zimmerman and Castonguay about the issue of the grievor's alleged poor behaviour toward her colleagues and others was that it was a complete fabrication by Ms. Zimmerman that Ms. Castonguay accepted blindly, in the face of glaring evidence not only to the contrary but also that the real problem was perhaps Ms. Zimmerman.

[279] Given the overwhelming evidence put forward by not only the grievor but also by Messrs. Cotton, Brown, and Lajoie, I can only surmise that the February 9 letter was nothing more than a sham concocted by Ms. Zimmerman to undermine, discredit, punish, and get back at the grievor for reasons that confound me. This brings me back to my earlier comments, in which I referenced the grievor's comments in an email that predated her departure on her second maternity leave. For whatever reason, the relationship between the grievor and Ms. Zimmerman was toxic and was doomed to fail. The result was that the grievor received the two unsatisfactory PERs, which she contested.

[280] Based on my findings with respect to the evidence of Ms. Zimmerman's behaviour, and to a lesser extent that of Ms. Castonguay, I am left to consider their evidence with respect to the two PERs, the grievance procedure, and the discrimination issue. It leaves me wondering exactly whether what, if anything, they conveyed is accurate. As such, where their evidence is different from that of the grievor, I am prepared to accept that of the grievor.

[281] That said, given that I cannot rule on the disguised discipline, much of the contradictions are inconsequential, as the questions I have to answer rely on evidence that is largely not contradictory and that came mostly from either the grievor or her doctor. It comes into play, at least to a small extent, with exactly what Ms. Zimmerman knew about the grievor's health and inability to work. I am prepared to accept that the grievor, albeit at times in a less-than-always-direct fashion, kept Ms. Zimmerman apprised of her ongoing health problems. Ms. Zimmerman knew that these issues affected the grievor's ability to carry out the tasks required of her and that perhaps they affected the extent to which she would be able to meet or exceed the expectations of her set out in the 2014-2015 PER.

[282] As I have already stated, depending on the details, what may be a transitory health issue can be considered a disability if it renders a person disabled in the context

of carrying out the tasks related to the person's job. The grievor suffered from a chronic illness, her iron deficiency, and two more transitory illnesses, mononucleosis and pneumonia. I have no doubt that together, these three ailments rendered her disabled to the extent that she was unable to carry out the functions of her job. As such, an accommodation should have been made with respect to the expectations required of her that were originally set in April of 2014.

[283] What muddies the waters, to a certain extent, is that based on the evidence before me, as well as the lack of credibility I attribute to both Mses. Zimmerman and Castonguay, I am left to ponder the real state of affairs in relation to the expectations of the grievor and whether she met or exceeded them. She maintained that she met the expectations and that otherwise, it was because either they were not made clear to her or she was away for a number of reasons and was required to carry out other tasks, related to the CWM.

[284] While I am limited to addressing a specific breach of the collective agreement, it is not lost on me that in addition to the grievor's lost time during her illnesses, she never completed the fiscal year at StatsCan. She left with at least five-and-a-half weeks to go until the year ended. This lost time also would have contributed to whether she could have met the expectations of her.

[285] It is also not lost on me that the mid-year PER referred to the grievor's use of sick leave as likely contributing to her not being on target for the expectations. While I dismissed that grievance, her year-end PER covered a continuum that started on April 1, 2014, and ended on March 31, 2015. The mid-year PER was one point on that continuum. At year end, an employee's performance is measured for the entire year. It is trite to state that employees who fall behind in the first half of the year may have to do more in the second half, all things being equal. Certainly, the grievor was not present for the full extent of the latter part of the fiscal year, and she decided to take vacation leave. I am unable to find that the employer took any steps over the course of the fiscal year to adjust the expectations to take into account her disability and lost time from work.

[286] While Mses. Zimmerman and Castonguay provided some evidence about changing the expectations, and Ms. Zimmerman suggested that she offered to change the grievor's objectives, I am skeptical of the nature of the offer and its contents. Much

of the evidence brought forward about the expectations and objectives from the grievor and Mses. Zimmerman and Castonguay after the mid-year PER was contrasting. In addition, as the evidence was adduced, it became clear that Ms. Zimmerman and the grievor had a fundamental difference of opinion as to what the original expectations might have meant. Based on the incongruent evidence before me, it is impossible to untangle the truth of the status of what was expected in the face of the toxic work relationship and the credibility issues I have ascribed to both Mses. Zimmerman and Castonguay. The expectations were not resolved, and in the end, the year-end PER rated the grievor as underperforming, which I can only surmise at least in part was due to her illness and disability. As such, they were factors in the adverse treatment that she received and therefore discriminatory.

[287] The employer submitted that the grievor did not ask for an accommodation, while she submitted that this case is not about accommodation but discrimination. The case brought forward was that she was discriminated against because the employer did not take into account her disability when it assessed her performance. The act complained of was the assessment of her performance. The disability was the fatigue based on the iron deficiency, mononucleosis, and pneumonia.

[288] After September 30, 2014, while there is evidence that the grievor lost time from work, the longest set period was for four days in October, due to the biopsy. As set out earlier, it was a test; there was no illness or disability. She did miss other time from work, but the majority of it was in January of 2015 and was vacation.

[289] While Dr. Budge did diagnose that the grievor was suffering from depression, this was done in late January of 2015. In addition, he stated that she did not fully express her difficulties to him. There is no evidence that she expressed this information to Ms. Zimmerman, or that Ms. Zimmerman was aware of it. While the grievor had certainly expressed her difficulties to Ms. Castonguay and Mr. Graziadei, in general, the evidence with respect to depression, it's extent, and it's nexus with the performance of her work tasks, and discrimination, is insufficient for me to find that the year-end PER was completed in a discriminatory fashion with respect to this particular health issue. However, it is clear that the earlier discrimination and toxic work environment that existed contributed to the onset of this illness as diagnosed by Dr. Budge in January of 2015, and as such has a bearing on the quantum of the remedy.

V. Remedy

[290] As remedy, the grievor requested the following:

- An order declaring that the employer violated the collective agreement by discriminating against her in a wilful and reckless manner, thus violating clause 16.01 of the collective agreement and s. 7 of the *CHRA*.
- An order removing the year-end PER from her record.
- Compensation of $15 000 under s. 52(2)(e) of the *CHRA* and of $10 000 under s. 53(3).

[291] Given my findings, an order will be made that the employer breached clause 16.01 of the collective agreement.

[292] The evidence disclosed that the grievor, on one hand, and on the other hand, her supervisor, Ms. Zimmerman, and Ms. Zimmerman's supervisor, Ms. Castonguay, had significantly different views as to the expectations of the grievor or what they should have been, for the period in issue. It also disclosed the toxic relationship between the grievor and her supervisor that was beyond repair. Based on everything provided to me, it is clear that it would be impossible for anyone now to conduct a proper and fair assessment of the grievor's performance for the period in question.

[293] Given these circumstances, the only appropriate thing to do would be to order that the mid-year and year-end PERs be removed from the grievor's personnel record and that in their stead, a statement be placed in the record that they were ordered set aside and removed by an order of this Board.

[294] The grievor also asked for $15 000 in compensation for pain and suffering and $10 000 as special compensation. Section 226(1)(h) of the *Act,* as it read at the relevant time, provided adjudicators with the power to give relief in accordance with ss. 53(2)(e) and (3) of the *CHRA*, which read as follows:

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

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

[295] By the time she carried out the year-end PER, Ms. Zimmerman was well aware of the grievor's illnesses during the summer of 2014 and the extent of their effect on the grievor and her ability to meet expectations; at least in the employer's view, as Ms. Zimmerman had remarked in the mid-year PER that she believed that the time the grievor had taken off due to illness had affected her performance. Her behaviour in dealing with the grievor from this point forward clearly demonstrates both wilfulness and recklessness.

[296] Unfortunately, the broken relationship between the grievor and Ms. Zimmerman was likely the main contributing factor as to why no resolution could be reached on the performance expectations. Based on the evidence before me, their relationship was likely hanging by a thread when the mid-year PER was carried out, and the rating put forward by Ms. Zimmerman made things worse. While I have made a finding of discrimination, it is extremely difficult to separate the issues encountered in the work relationship that were directly related to the discrimination vis-à-vis the grievor's disability and those that were rooted in the broken and toxic relationship between the her and Ms. Zimmerman. As such, it is impossible to categorize what amount of pain and suffering was attributable to one as opposed to the other.

[297] In addition, Ms. Castonguay's behaviour, in her support of much of Ms. Zimmerman's actions, was also clearly willful and reckless. By the time she began having discussions with Mr. Cotton (October of 2014), she should have realized that something was seriously amiss. While she attempted to dismiss the interaction with him and said she spoke with his superior, Mr. Lajoie, Mr. Lajoie's evidence not only corroborated Mr. Cotton's concerns about Ms. Zimmerman, but his own, which he said he brought forward to Ms. Castonguay. Ms. Castonguay, as the responsible manager, was duty bound to act; she deliberately did not; and, in allowing the situation between the grievor and Ms. Zimmerman to continue and further deteriorate in the manner that it did, her actions were also nothing less than reckless.

[298] It is clear that the poor performance rating given, which I have found was directly related to the discrimination, had a profound effect on the grievor, so much so that by the time early February of 2015 rolled around, Dr. Budge had diagnosed that she was suffering from depression. The grievor's evidence and that of Dr. Budge clearly disclosed that the ongoing dispute over the performance rating was taking a toll on her health. In the end the grievor's only respite from the situation was by seeking out and finding an assignment in another department, which once done, Dr. Budge said marked an improvement in her health. Given all the facts and my findings, including the willful and reckless behaviour of not one but two supervisors, I award the grievor $15 000 for compensation under s. 53(2)(e) of the *CHRA* and $10 000 under s. 53(3).

A. Request to seal documents

[299] The grievor submitted copies of medical records and a report authored by her health care professionals with respect to her health issues during the period in issue. The parties agreed that these documents should be sealed.

[300] In *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 to 11, the PSLRB stated as follows:

> *[9] The sealing of documents and records filed in judicial and quasi-judicial hearings is inconsistent with the fundamental principle enshrined in our system of justice that hearings are public and accessible. The Supreme Court of Canada has ruled that public access to exhibits and other documents filed in legal proceedings is a constitutionally protected right under the "freedom of expression" provisions of the* Canadian Charter of Rights and Freedoms*; for example, see* Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480;* Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835;* R. v. Mentuck*, 2001 SCC 76*, Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII).*
>
> *[10] However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and administrative tribunals have the discretion to grant requests for confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering requests to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as*

> Dagenais *and* Mentuck. *These decisions gave rise to what is now known as the* Dagenais/Mentuck *test.*
>
> *[11] The* Dagenais/Mentuck *test was developed in the context of requests for publication bans in criminal proceedings. In* Sierra Club of Canada*, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:*
>
> . . .
>
> 1. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> 2. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> . . .

[301] While much of the medical issues were relevant to the hearing and to determining the grievances, the grievor's medical records should not be in the public domain. There is a serious risk to her privacy. Therefore, I order sealed the documents that were submitted and marked as Exhibits G-4, G-5, and G-7 through G-12.

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

(The Order appears on the next page)

VI. Order

[303] The request to extend the time to file the grievance in file 566-02-11534 is denied.

[304] The grievance in file 566-02-11534 is denied.

[305] The grievance in file 566-02-11701 is allowed.

[306] The employer breached s. 16 of the collective agreement.

[307] The grievor's mid-year and year-end PERs for fiscal year 2014-2015 and all iterations of them are to be removed from her personnel record.

[308] The employer shall pay the grievor $15 000 in compensation for pain and suffering under s. 53(2)(e) of the *CHRA*.

[309] The employer shall pay the grievor $10 000 in special compensation under s. 53(3) of the *CHRA*.

[310] Exhibits G-4, G-5, and G-7 through G-12 are ordered sealed.

April 1, 2021.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board