Date: 20210730

File: 560-02-41367

Citation: 2021 FPSLREB 87

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

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

BETWEEN

KRISTINE LUECK

Complainant

and

DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND DEVELOPMENT
Respondent

Indexed as
Lueck v. Department of Foreign Affairs, Trade and Development

In the matter of a complaint made under section 133 of the *Canada Labour Code*

Before: Dan Butler, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Andrew Astritis, counsel

For the Respondent: Caroline Engmann and Marie-France Boyer, counsel

Heard by videoconference,
February 17 to 19, March 29 to 31, and April 1 and 23, 2021.

REASONS FOR DECISION

I. Complaint before the Board

[1] This is not a case that I wished to decide.

[2] It is not uncommon when hearing a matter to have a sense that the interests of the parties would be far better served were a voluntary resolution of the dispute possible through mediation. More than in most cases, I had that sense in this matter.

[3] I genuinely view it unlikely that a decision in this case can contribute to a resolution of the wider issues that have set the parties in conflict for so long. I expressed this view at several points during the hearing. I asked the parties to consider, even at a late date, the option of mediation. I felt strongly that there was a unique opportunity under the circumstances to resolve the broader issues separating the parties of which the case before the Federal Public Sector Labour Relations and Employment Board ("the Board") was only a part, and perhaps a small part at that. (Note that in this decision, "the Board" refers to the current Board and all its predecessors.)

[4] But, of course, mediation is voluntary. It cannot and should not be compelled. That one of the parties decided not to accept my entreaties must be respected, however unfortunate I might find that decision.

[5] In the end, it is my job to decide. I do so while guarding the hope that the parties will be able to come together before much more time passes and fashion a solution to the wider issues before them. Otherwise, they face the possibility that their dispute will carry on for years.

[6] Kristine Lueck ("the complainant") received a communication from her employer, the Department of Foreign Affairs, Trade and Development (known more commonly as "Global Affairs Canada" and identified in this decision as "GAC" or "the respondent"), dated October 2, 2019, which she alleged threatened her with termination if she did not decide to return to work (RTW), resign, or retire by October 4, 2019. She had been on sick leave without pay (SLWOP) since June 8, 2015, receiving disability insurance (DI) benefits.

[7] In her complaint to the Board dated December 20, 2019, the complainant maintained that the respondent's letter comprised retaliation against her for exercising her rights under Part II of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"), in contravention of s. 147(c), which reads as follows:

> ***147*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*
>
> …
>
> ***(c)*** *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

[8] At the hearing, the complainant outlined a complex history of events dating back to 2013 that she contended established the context within which the respondent's letter must be viewed as retaliation prohibited by s. 147(c) of the *Code*.

[9] Beginning with a social event on December 20, 2013, and over the following months, the complainant maintained that she was the victim of workplace violence that led her to make complaints within her department and externally. Her efforts to secure redress included making two formal complaints to the Minister of Labour alleging that the employer breached its obligations under the workplace violence provisions of the *Canada Occupational Health and Safety Regulations* (SOR/86-304; "the *Regulations*") in force at the time of the complaint. The "first complaint", in 2015, challenged the respondent's failure to appoint a competent person to investigate her allegations of workplace violence. On June 13, 2018, she made the "second complaint", charging that the respondent "… interfered with the impartiality of the competent person appointed to investigate [her] workplace violence complaint."

[10] The Board notes that issues flowing from the two complaints to the Labour Program of Employment and Social Development Canada (ESDC) are the subjects of judicial-review applications to the Federal Court of Canada that were filed on behalf of the complainant. The Board did not adjudicate those matters. Its decision is limited to deciding whether the complainant has proved the alleged violation of s. 147(c) of the *Code*, on a balance of probabilities. For the purposes of that inquiry, it is open to the Board to receive and consider background evidence, including testimony pertaining to

the investigations now under judicial review, to determine whether the history of the dispute sheds light on the respondent's letter to the complainant on October 2, 2019.

[11] As corrective action in this matter, the complainant requested the following:

> (1) a declaration that the respondent violated s. 147 of the *Code*
> (2) an order that the respondent cease violating s. 147, and
> (3) "[s]uch further … relief as counsel may request and that the Board may permit."

II. Disclosure

[12] Both before and during the first session of the hearing in February, the parties indicated that they were addressing a disclosure issue that might require a decision by the Board. On March 12, 2021, the Board was notified that the complainant sought a production order for five documents in the employer's possession that she argued may be relevant to the complaint. In a written submission, the respondent maintained that the requested documents were privileged or contain privileged information and that they should not be disclosed.

[13] The documents that the complainant sought disclosed are identified as Tabs 6, 11, 13, 17, and 18 of Schedule D of the respondent's list of documents (respectively, "Document 6", "Document 11", "Document 13", "Document 17", and "Document 18"). The respondent provided the following descriptions of them:

> …
>
> *6. Email dated March 7, 2019 from Chantal Alarie to Paul Godbout, copied to Charlene Janvier attaching briefing note for the purpose of informing Dan Danagher and the options letter dated June 28, 2018;*
>
> *11. Email April 11, 2019 from Chantal Alarie to Paul Godbout re next steps – contains a recommendation to management regarding the timing of certain events;*
>
> *13. Email dated May 31, 2019 from Natalie Crête to Isabel-Andre□e Lavgne re internal complaint from Kristine Lueck and communication received from Syvain Renaud, ESDC that the Competent person's investigation was not done in a manner consistent with procedural fairness and attaching an Assurance of Voluntary Compliance for the Respondent. Discussion around seeking legal advice on addressing the communication from ESDC;*
>
> *17. Email chain ending December 2, 2019 from Chantal Alarie to Paul Godbout re next steps – contains recommendations to management regarding communications with KL; and,*

> *18. December 17, 2019 – Email from Chantal Alarie re recommendation for next steps – after receiving latest medical information from KL doctor, discuss sending final options letter.*
>
> …
>
> [*sic* throughout]

[14] The respondent offered to provide the Board the five documents for its review, which I accepted. I asked for written submissions to assist my determination and subsequently received the complainant's position as well as a reply from the respondent.

[15] The respondent cited the following decisions in support of its argument that a labour relations privilege attached to the documents: *Horne v. Parks Canada Agency*, 2014 PSLRB 30; *Kubinski v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 87; *Canadian Broadcasting Corp. v. C.U.P.E. (Broadcast Council)* (1991), 23 L.A.C. (4th) 63; *Rodrigue v. Deputy Head (Department of Veterans Affairs)*, 2016 PSLREB 9; *Slavutych v. Baker*, [1976] 1 SCR 254; *Telus Communications Co. v. Telecommunications Workers Union* (2011), 203 L.A.C. (4th) 154 ("*Telus Communications*"); *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46; *British Columbia v. British Columbia Crown Counsel Assn.*, [2019] B.C.C.A.A.A. No. 47 (QL); and *International Union of Elevator Constructors, Local 50 v. Otis Canada Inc.*, [2020] O.L.R.D. No. 2494 (QL).

[16] In addition to *Horne*, *Rodrigue*, *Slavutych*, and *Zhang*, the complainant referred to *Jones v. Amway of Canada Ltd.*, 2002 CanLII 78246 (ON SC); *Klewchuk v. City of Burnaby (No. 2)*, 2019 BCHRT 32; *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52; *Gaskin v. Canada Revenue Agency*, 2008 PSLRB 96; *M. (A) v. Ryan*, [1997] 1 SCR 157; and *Ouimet v. VIA Rail Canada Inc.*, 2002 CIRB 171.

[17] The test to be applied, as argued by both parties, is known as the *Wigmore* test (drawn from *Wigmore on Evidence*, 3rd ed.), which was cited as follows in the ruling of the Supreme Court of Canada in *Slavutych*. To exclude evidence on the basis of confidentiality, these four criteria must be met:

> …
>
> *"(1) The communications must originate in a* confidence *that they will not be disclosed.*

> *(2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.*
>
> *(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.*
>
> *(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation."*
>
> …

[18] The party claiming the privilege bears the burden of proving that all four criteria are met.

[19] The complainant did not dispute that the third element of the *Wigmore* test was met but maintained that the respondent failed to meet its burden of proof with respect to the other three.

[20] The parties' written arguments form part of the record and are available through the Board for review. I have considered all the arguments and cases they presented but will refer only in summary form to the submissions that I found most directly relevant to my rulings.

[21] I turn first to the fourth element of the *Wigmore* test, which is often most crucial. If it is found not to have been met, the other elements need not be addressed.

[22] Discussing the application of the fourth element, the respondent cited recognition in *Canadian Broadcasting Corp.* and *Horne* that serious harm can be caused by the disclosure of confidential information. It referred to the finding in *Telus Communications* that documents "… seeking or providing advice and strategy input on labour relations matters …" generally are privileged. The respondent argued that all five documents fall into that category.

[23] The complainant submitted that the respondent failed to assert the injury that would be suffered were the documents disclosed, alleging that it merely cited cases to the effect that disclosure, in general, is harmful. If disclosure is always harmful, the asserted privilege would be recognized as a class privilege, which it is not. Moreover, the respondent's "bald assertion" of harm did not recognize the countervailing harm that would result if the decision maker could not consider relevant evidence. In the matter before the Board, without the documents, the complainant may be deprived of

evidence that would assist her in meeting her burden of establishing a nexus between the threat of termination and her exercise of rights under the *Code*.

[24] The respondent reiterated in reply that more injury would be caused from disclosure than the benefit gained "… because there is **no benefit** to be gained from the requested disclosure" [emphasis in the original]. Because no connection exists between the process related to the complainant's sick-leave-without-pay status and her exercise of rights under the *Code*, the documents can shed no light. The respondent stated, "None of the documents will assist the complainant in making her case and will have no effect on the just determination of this matter." The respondent closed by invoking *Rodrigue* on the importance of protecting the confidentiality of exchanges with respect to a labour relations situation.

[25] I must note that asserting that no connection exists between the complainant's sick-leave-without-pay status and her exercise of rights under the *Code* cannot serve as a defence against disclosure. From the February hearing dates, it was evident that the existence of a nexus, or lack thereof, lies at the heart of the case that she seeks to prove. To accept the respondent's protest that no such connection exists would, in effect, be a finding that could determine the case in the respondent's favour. That step, obviously, should not be taken until all the evidence has been heard and the arguments made, if then.

[26] How does the fourth element of the *Wigmore* test apply to each of the documents?

[27] On its face, the Document 6 email dated March 17, 2019, does not appear to have significant probative value. Its text does not contain advice or provide strategic input. However, it does reference two attachments: one was admitted into evidence during the February hearing dates, and the second is described as a draft briefing note.

[28] While the respondent may contend that disclosure would be inappropriate because it claimed that a document of this type would have "… no effect on the just determination of the matter", the more fundamental consideration must be the balance between the possible harm of disclosure versus the possible benefit. In my view, the respondent had not offered anything tangible to indicate how the disclosure of the Document 6 email would cause it harm or injury. It is possible that the document would have little value in litigation. On the other hand, for example, providing the

complainant an opportunity to ask the recipient, Paul Godbout, who was scheduled to be a witness, about his recollection of the attached draft briefing note could have informed the litigation. Therefore, I ordered the production of Document 6.

[29] Document 11 is a very brief email dated April 11, 2019. It consists essentially of a one-sentence recommendation concerning the timing of certain events. The lack of further detail in the email casts in serious doubt its probative value. However, it does appear to involve the discussion of a strategic determination of potential importance to the employer — a very brief discussion, to be sure.

[30] Would its disclosure harm the respondent? Without further context, it was difficult to determine. Did that possible harm outweigh the potential benefit to the correct disposal of the matter before the Board? In my view, it did not.

[31] Given that the sequence of events mentioned in the email could bear some importance to the complainant's argument about a nexus between her employment status and other issues in her relationship with her employer, I believed that the complainant should have the opportunity to question Mr. Godbout, the email's recipient, about it. The possible benefit to litigation, in my view, was greater than the possible harm to the respondent, especially given that the respondent has not provided greater insight into the nature of that harm. Therefore, I ordered the production of Document 11.

[32] Document 13, an email dated May 31, 2019, contains advice with respect to an "Assurance of Voluntary Compliance" (AVC) issued to the employer, as referenced in testimony reported in this decision. The document may well have relevance in other litigation between the parties in a different forum, but I did not believe that it would provide any assistance to the complainant in the matter before the Board. For that reason, I found that the possible harm to the employer of disclosing the advice outweighed the benefit of admitting the document as evidence in the hearing. I also found that the first and second elements of the *Wigmore* test were met for reasons similar to those outlined in decisions such as *Horne*, *Kubinski*, and *Rodrigue*. Therefore, I declined to order the production of Document 13.

[33] Document 17 is an email chain covering November 25 to December 2, 2019. Several emails in the chain can be viewed as containing advice about communications with the complainant and relate to factual evidence about those communications put

in evidence at the February hearing dates. I am not satisfied that the respondent established how, and to what extent, disclosing the email chain would cause it harm.

[34] While I was uncertain that admitting the email chain into evidence would materially add to the evidence already before me, particularly because it dates to a period after the respondent's communication of October 2, 2019, which comprised the alleged retaliation, it was conceivable that the document could provide some context that might assist the complainant's case. Notably, one of the emails refers to a letter from her counsel that was admitted into evidence in February. In my opinion, the benefit of disclosure, while potentially minor, still outweighed the possible harm to the respondent, which was not demonstrated to my satisfaction. Therefore, I ordered the production of Document 17.

[35] Document 18 is an email dated December 17, 2019, described by the respondent as containing advice about sending an options letter to the complainant. My review of it confirmed that it does contain recommendations about steps leading up to issuing a "Final Notice Options Letter".

[36] I note that the evidence before the Board at the February hearing dates offered no indication that any such letter was sent or received between the date of the email, December 17, 2019, and the filing date of the complainant's complaint, December 20, 2019. It was not apparent to me that the email would provide any assistance to her case, if in fact it was sent and received during that period, given that her case rests, as indicated, on the allegation that a letter received over two months earlier comprised retaliation prohibited by s. 147(c) of the *Code*. Unlike Document 17, it is not obviously linked to other documentary evidence before the Board.

[37] It is within the Board's purview to decide not to order the production of a document if it concludes that the document has little to no probative value to the matter before it or does not serve to illuminate evidence already before it that could factor into its ruling. In this case, I accept that *Rodrigue*, at para. 75, applies. I also found again that the first and second elements of the *Wigmore* test were met. Therefore, I declined to order the production of Document 18.

[38] In summary, for the reasons outlined, I ordered that the respondent produce Documents 6, 11, and 17, as conveyed to the parties on March 23, 2021.

[39] On the first day of the continued hearing, March 29, 2021, it became evident that the version of the disclosed documents that I reviewed contained a small number of embedded attachments that were not detected on the computer that I used. In accordance with my production order, those attachments were disclosed with the main documents and appeared in a new book of exhibits tendered by the parties. Discovering their presence in the course of Mr. Godbout's testimony, I paused the hearing and reviewed them. I then reported to the parties that had I been able to examine the attachments in the first instance, my disclosure ruling would not have changed.

III. Summary of the evidence

A. The complainant

1. Examination-in-chief

[40] Three witnesses testified: the complainant, and for the respondent, Mr. Godbout, the director who sent the October 2, 2019, communication, and Charlène Janvier, Deputy Director of the Disability Management unit.

[41] The complainant testified for much of the first three hearing days. Her evidence explored the history of her workplace experiences, often in great detail. On several occasions, the witness offered lengthy comments condemning her treatment by the respondent and vigorously criticizing the many obstacles that she feels obstructed her ability to secure redress. In her view, she has never had an opportunity to have her "whole situation" addressed. She stated that she continues to suffer serious health issues as a result and that she has had her personal and professional lives painfully and fundamentally disrupted.

[42] I certainly understand the complainant's desire to tell her whole story. However, the nature of the Board's mandate in this matter requires that I search for information relevant to determining whether the respondent violated s. 147(c) of the *Code* in issuing its letter of October 2, 2019. In my view, many of the details canvassed in the complainant's testimony, describing events dating back several years or more, are not necessary to that end. The following summary, while informed by all her testimony, paints only in broad brush many of the events she described.

[43] The complainant began working for GAC in 2002. Her duties took her abroad, including a posting in Delhi, India. She returned to the respondent's headquarters in

2012, but her position as a physical security implementation officer continued to involve travel to Canadian missions around the world.

[44] In 2013, the complainant applied for a management role classified at the AS-05 group and level. The witness stated that two management positions were to be staffed and testified about a sense in the workplace that two male colleagues were slated to fill them. However, one of the men failed the interview. In November 2013, the complainant learned that her candidacy was successful, and she was asked to provide references.

[45] The complainant outlined that the news of her success in the appointment process resulted in an immediate backlash in the workplace. Employees wrote letters and emails in protest.

[46] Shortly after that, her standing in the appointment process changed. At a meeting in early December 2013, her senior managers told her that she had been screened out of it because it had been determined in the interim that she fell short of the "significant experience criterion" by six months. She contested that finding, providing additional substantiating information. On December 20, 2013, her deputy director informed her that the department had now accepted her experience based on the additional information and that it would proceed with reference checks.

[47] On the same day, December 20, 2013, the complainant attended a workplace Christmas party. She stated that she was subject to vicious harassment and verbal threats at that event and in its aftermath, causing her a serious psychological injury.

[48] Details of the alleged workplace violence and the specific nature of the resulting psychological trauma experienced by the complainant were not explored in her testimony. For the purposes of my decision, I proceed on the basis that she identified the Christmas party and events in the aftermath as the proximate cause of her subsequent disability, a characterization that I do not believe is in dispute.

[49] The complainant emailed her director immediately after the Christmas party, telling him that she needed to raise a concern. She met with him but decided not to discuss her experience at the party because she was worried about possible retaliation. Her director told her that he intended to provide conflict resolution assistance for her

team in the new year to address hostility in the work environment. The witness said that the promised conflict resolution initiative never took place.

[50] Around February of 2014, with the environment "incredibly hostile", the witness testified that she asked her director for help. He did not respond. She stated that she felt frightened every day at work but believed that there was nothing that she could do but "take it".

[51] On March 20, 2014, the complainant was formally appointed as a physical security program manager (AS-05).

[52] Over the following months, according to the complainant, the workplace environment became even more hostile. She identified, in particular, as a "triggering event" her deputy director entering her office, closing the door, and preventing her from leaving. She testified that she felt extremely uncomfortable and that she stated her discomfort to the deputy director, who laughed and then left. The complainant reported the encounter to her director and indicated that she would no longer tolerate such behaviour. Her director consulted with labour relations advisors, and the incident was brought to the attention of the responsible director general, David McKinnon.

[53] Sometime in January 2015, Mr. McKinnon invited the complainant to meet to discuss her allegations and asked her to bring substantiating information. She replied in a letter asking to be warned if Mr. McKinnon intended to take action so that she could protect herself. She expected to hear back but did not. Later, she decided not to participate in an interview that was to be held as part of a facilitated workplace intervention. On March 5, 2015, the date scheduled for the facilitated discussion, the complainant sent a letter stating that she needed time but nonetheless indicated that she was willing to continue discussions.

[54] On March 6, 2015, the complainant left the workplace.

[55] The complainant began her SLWOP on June 8, 2015. She started receiving DI benefits. I note that later, Sun Life Assurance Company of Canada ("Sun Life"), the DI provider, in an email dated September 9, 2017, confirmed that the complainant was unable to RTW in any capacity for the foreseeable future. As of the hearing, she continued to receive long-term DI benefits and remained on SLWOP status.

[56] The witness confirmed that she made a formal workplace violence complaint on September 9, 2015, addressed to the associate deputy minister. She testified that she received a reply from him in early October 2015, informing her that he had not found evidence to substantiate her allegations, with the result that no investigator was appointed.

[57] The complainant proceeded to contest the refusal to appoint an investigator by making the first complaint with ESDC. The assigned investigator determined that the respondent had not met the requirements of the then s. 20.9(2) of the *Regulations* but declined to proceed under s. 20.9(3) to require it to appoint a competent person to investigate because the respondent indicated that it wanted to resolve the situation.

[58] Discussions with the respondent ensued over many months about the appointment of an investigator before it agreed in September 2016 to proceed. The parties agreed in late December 2016 or early January 2017 to the identity of the competent person, Robert Cantin, who signed a contract in March 2017 to conduct the investigation.

[59] The complainant met with Mr. Cantin in May 2017 and gave him a 30-page "log of events", with supporting documents. She did not meet with him again.

[60] The complainant testified that she contacted Mr. Cantin in August 2017 for a status update. She learned that he had concluded his investigation ("the Cantin investigation") and would send his report ("the Cantin report") to the department and that she should expect to hear something within a few weeks.

[61] Only in January 2018 did the complainant receive a 12-page summary of the Cantin report, and only in February 2018 was she provided a heavily redacted version of the full report. Through an access-to-information (ATIP) request, she later secured a version with only a small number of redactions.

[62] The witness explained that the Cantin report substantiated two allegations, which were that she was verbally threatened and that she had been singled out and isolated by three male colleagues. She stated that the respondent did not contact her to discuss the report.

[63] Based on ATIP information received in May 2018, the complainant concluded that the respondent had interfered with the content of the Cantin report and with its

recommendations. She made her second complaint with ESDC on June 13, 2018, to contest that interference.

[64] Ms. Janvier contacted the complainant in June 2018 and met with her and her union representative on July 11, 2018, which, according to the complainant, was the first time that the respondent discussed her SLWOP status with her.

[65] In response to Ms. Janvier's indication that she wanted to discuss options to resolve that status, the complainant outlined her unresolved workplace violence complaints and told Ms. Janvier that she was not in a position to decide about her options because "there was so much going on". Ms. Janvier, in the witness's view, was empathetic to her situation and stated that she would discuss with senior management the possibility of some form of mediation to resolve the workplace issues before further reviewing the complainant's disability options. Ms. Janvier committed to follow up by October 31, 2018. The witness testified that she did not hear back from Ms. Janvier by that date.

[66] The first formal letter from Ms. Janvier explaining the options available to the complainant was dated June 28, 2018 ("the first options letter"). The witness could not recall whether she received the letter before or after her meeting with Ms. Janvier. She confirmed seeing an associated information package for employees on SLWOP.

[67] The witness reported that she received acknowledgment of her second complaint from Sylvain Renaud in September 2018. She then spoke with him. He told her that first, she had to make a complaint with her employer and go through the internal complaint process. He indicated that he would act as a facilitator, watching over the process. The witness testified that she sent a complaint on October 2, 2018, to Associate Deputy Minister Francis Trudel, stating that the respondent interfered in the impartiality of the Cantin investigation. Subsequently, she received an email informing her to expect to receive a contact from her director, Mr. Godbout, to schedule an appointment to discuss her allegations.

[68] The complainant and her union representative met with Mr. Godbout on November 9, 2018. They followed up with a letter to him on November 13, 2018, which summarized her concerns.

[69] The witness testified that by email dated November 26, 2018, Mr. Godbout informed her that he was preparing a comprehensive response. In an email dated December 14, 2018, Mr. Godbout proposed a discussion, assisted by a mediator. Asked whether she ever received the promised comprehensive response, the witness answered that she did not.

[70] The complainant stated that she agreed with the proposal for a facilitated discussion but that she told Mr. Godbout that she could not discuss her specific complaint without addressing the whole situation that she had experienced. Later, when Mr. Godbout invited her to meet with Ben Gray, an informal conflict management practitioner in the department, she replied on January 30, 2019, "… that does not work for me at all". She testified that Mr. Gray had worked with two of the persons who were respondents in her workplace violence complaint. The complainant told Mr. Godbout that she wanted to move on to the second step of the informal conflict management process.

[71] The witness received an email from Mr. Godbout dated February 8, 2019, in which he expressed his regret that she was not participating in the proposed facilitated discussion and told her to expect a letter that would ask her to choose one of three options: RTW if certified as fit, take medical retirement if approved by Health Canada, or take regular retirement.

[72] The complainant contacted Nathalie Brisson, the employer co-chair of the local Occupational Health and Safety (OHS) Committee, to initiate the second step of the informal conflict management process. In response, Ms. Brisson organized a meeting with the complainant, along with her union representative and an employee representative on the committee. On April 4, 2019, the committee issued a report in which it found reasons to conclude that the Cantin investigation had not remained impartial. The complainant believes that the committee then contacted Mr. Renaud at ESDC to bring its decision to his attention.

[73] The witness testified that she met with Mr. Renaud on May 14, 2019. He indicated that he was proceeding with his investigation and that he would speak with Mr. Cantin and departmental personnel. Mr. Renaud issued his investigation report several weeks later. On the basis of the report's findings, ESDC issued the AVC that

required the respondent to appoint by June 13, 2019, a competent person to investigate the complainant's allegations. The AVC was dated May 30, 2019.

[74] On May 29, 2019, Mr. Godbout emailed the complainant, alerting her that she would soon receive a letter about the three options available to her. He also stated in the email that he had initiated a staffing action to fill her position. The letter that he subsequently sent, dated May 30, 2019 ("the second options letter"), asked her to indicate the option that she wished to pursue by no later than June 14, 2019.

[75] Marc Béland, a representative of the complainant's union, responded on her behalf to Mr. Godbout's letter on June 3, 2019. Mr. Béland reported that the complainant was receiving treatment and that she expected to RTW when she successfully completed the treatment regime. Mr. Godbout replied directly to the complainant, in an email dated June 7, 2019. He requested that she undergo a Health Canada medical assessment to determine her ability to RTW if she intended to return. He asked her to indicate by June 14, 2019, whether she agreed to the medical assessment.

[76] Counsel for the complainant replied to Mr. Godbout on June 14, 2019. He requested that the respondent rescind the second options letter until the ongoing complaint processes concluded. He also informed Mr. Godbout that his client was prepared to arrange an independent medical examination (IME) but noted that she did not believe that "… an assessment by a government-employed health care provider at Health Canada [would] provide either an appropriate or reliable assessment …". The witness testified that Mr. Godbout did not reply.

[77] From late June through September 2019, the complainant engaged with Mr. Renaud at ESDC, and with his vacation replacement, to find out whether the respondent had acted on the AVC. In the course of several conversations, she learned that ESDC had granted the respondent an extension and that the respondent had told ESDC that it disagreed with the AVC.

[78] On September 23, 2019, Mr. Renaud informed the complainant that he was authorized to move forward and issue a formal direction to the respondent to comply. The witness recounted that she expected Mr. Renaud to follow through the following week but that did not occur. She then learned from Mr. Renaud that ESDC was

withholding the direction because the respondent had given it reason to believe that the respondent would comply. ESDC expected to receive documentation to that effect.

[79] On November 18, 2019, by registered mail, Mr. Renaud notified the complainant that he had concluded that the respondent had complied with the relevant provisions of the *Code*. He stated that the conduct of the Cantin investigation and its conclusions were not within the jurisdiction of the *Code* or the *Regulations*. He advised the complainant that if she believed that the investigation had been unfair or that it had not respected the principles of natural justice, she could file an application for judicial review before the Federal Court.

[80] The witness testified that she felt betrayed. On her behalf, counsel subsequently filed two judicial-review applications.

[81] Mr. Godbout originally sent a third options letter on September 3, 2019, but to the wrong address. He revised and reissued it, redated October 2, 2019. He sought the complaint's response by October 4, 2019.

[82] Counsel for the complainant emailed Mr. Godbout on October 3, 2019, asking him to hold the matter in abeyance until he could formally respond. Mr. Godbout accepted counsel's request for an extension. Counsel's response, dated November 15, 2019, reported the medical opinion given by the complainant's physician, which stated that she would be psychologically ready for a trial RTW only if her ongoing conflicts with the respondent were resolved satisfactorily. The physician also indicated that the complainant suffered from post-traumatic stress disorder (PTSD). Counsel urged the respondent to maintain her employment until her workplace issues were resolved.

[83] The complainant testified that she viewed Mr. Godbout's letter as an intimidation tactic. The respondent, in her view, continued to refuse to deal with her workplace issues. Every time that she tried to have her issues addressed, the respondent threatened her with disability options. Because it continually focussed on resolving her SLWOP status rather than her workplace issues, the situation at work was never made safe for her, which made it impossible for her to deal with disability options. The witness stated that she always felt left "up in the air" and that she feared that her employment would be terminated. She accused the respondent of acting aggressively toward her and of lying about her. She stated that given the respondent's behaviour since 2013, she believed that it wanted to get rid of her.

2. Cross-examination

[84] In cross-examination, the respondent posed detailed questions about events that the complainant discussed in her examination-in-chief. I report only those elements of the complainant's testimony in cross-examination that I believe bear possible relevance.

[85] The respondent referred to the complainant's January 23, 2015, email to Mr. McKinnon about her meeting with him. The respondent asked the witness to confirm that she asked Mr. McKinnon not to do anything about her workplace violence concerns. She disagreed and stated that if Mr. McKinnon chose to address the concerns, she asked him to let her know, so that she could protect herself. She described the period as very toxic. Her message to Mr. McKinnon was that she liked her job but that she wanted to deal with the whole situation, so that she could feel safe in the workplace. The witness repeated that she did not hear back from Mr. McKinnon.

[86] The respondent referred the witness to Pierre Lamy's email dated April 13, 2015. She identified Mr. Lamy as a union steward. She stated that the January harassment complaint that Mr. Lamy inquired about in his email to Dominque Lyrette, a senior labour relations advisor, was a formal complaint that she made against Susan Gallagher, the person involved in the incident in her office. The witness testified that she had experienced harassment and bullying at the hands of several colleagues but that she had not detailed each incident by way of a formal complaint. However, she did discuss all the incidents with Mr. McKinnon when she met with him.

[87] In an email to Ms. Lyrette on April 16, 2015, the complainant asked about the status of the investigation into the complaint against Ms. Gallagher. In a subsequent email dated April 21, 2015, the complainant expressed her concern as to whether any response from Ms. Lyrette about the investigation would "be of any value". The witness testified that her statement reflected the fact that she had zero faith or trust in what the respondent was doing with respect to her complaint.

[88] Ms. Lyrette outlined in an email the next day that the Labour Relations unit did not have the authority to investigate harassment complaints. The witness confirmed her understanding that based on what Ms. Lyrette said, it was up to management to determine the course of action to take.

[89] The respondent referred the witness to an email she received from Mr. McKinnon dated April 23, 2015. He stated that he had planned to close the loop on their discussion of January 22, 2015, but that operational pressures had prevented him from doing so. The witness expressed her disbelief that neither Mr. McKinnon nor Ms. Lyrette had had time to get back to her. She doubted Mr. McKinnon's sincerity and noted his statement that he had not requested a formal investigation because he felt that she had provided insufficient information. Asked about his suggestion that she speak to the officer assigned to her complaint about its status, the witness replied that she did not take up that suggestion. She was on sick leave at the time and had been close to being hospitalized.

[90] The witness's email reply to Mr. McKinnon stated that she had "… no further interest in discussing this situation with anyone because there is not [*sic*] value in it". Probed about what she meant, the witness indicated that she would not engage further in the respondent's conflict management initiatives, which had not helped her, and that she intended to find other avenues of recourse, which she did. She identified her September 2015 complaint as the recourse that she chose to pursue. She verified that she sent the complaint to Dan Danagher, Assistant Deputy Minister (ADM), and that it covered all her issues.

[91] The respondent asked the witness to confirm that she did not pursue any recourse between April and September 2015. She answered that she was busy dealing with other matters, such as DI and workers compensation.

[92] The complainant verified that she recalled receiving a reply from Mr. Danagher dated October 1, 2015. He asked her to submit more information about her workplace violence allegations, which she stated she did not do.

[93] The respondent referred to a letter Mr. Danagher sent to the complainant, dated November 5, 2015 (Exhibit R-2). In the letter, he stated that Part 20 of the *Regulations* did not apply because the respondent had not determined that the incidents she identified constituted violence. The witness indicated that she understood that in the letter, Mr. Danagher invited her to bring forward any information not previously provided. She also had noted his reference encouraging her to explore other recourse mechanisms. In response to the respondent's question, she confirmed that she did not

file a labour relations grievance but instead, she chose to pursue a workplace violence complaint.

[94] The witness confirmed that she followed up on the respondent's failure to investigate her workplace violence allegations by escalating the matter to ESDC. She agreed that in an email dated February 16, 2016, the ESDC officer assigned to her complaint, Jason Sands, concluded that the conditions of s. 20.9(2) of the *Regulations* had not been met and that he would enforce the employer's responsibility under that section. Shown the text of s. 20.9(2) in an excerpt from the *Regulations*, the witness agreed that that was the provision to which Mr. Sands referred.

[95] Given the appointment of Mr. Cantin to investigate, the complainant accepted that the requirement to appoint a competent person outlined in s. 20.9(3) of the *Regulations* was in motion by March 2017.

[96] The witness recalled receiving a copy of a letter from Sun Life dated July 9, 2017, moving her claim to long-duration status. She confirmed that she had been assessed by a physician and that Sun Life's decision was based on the medical information available to it at the time.

[97] The complainant could not verify that the version of the Cantin report shown to her by the respondent was exactly the summary she received in January 2018 but accepted that she received something similar. Referred to the paragraph of the report in which Mr. Cantin supports two of her allegations, she confirmed that she received that conclusion. She also confirmed that the Cantin report did not resolve her first complaint.

[98] Asked what prompted her to email Minister Chrystia Freeland on April 24, 2018, the witness replied that there had been "lots of back and forth" since February in her unsuccessful efforts to secure the full Cantin report and that she had received ATIP information that showed interference in her workplace violence complaint. She wanted to bring the situation to Minister Freeland's attention. She agreed that she did not receive an options letter at that time.

[99] In an earlier email to Prime Minister Justin Trudeau dated February 21, 2018, the complainant described her interactions with her union about filing a grievance to secure recourse for the workplace violence that she had experienced. Asked about that

reference, she confirmed that she chose not to file a grievance and that she had declined to sign the grievance that the union presented to her.

[100] The witness concurred that by mid-2018, she was aware that the respondent was trying to regularize her SLWOP status. She also accepted that the reasons it wanted to address that status were sufficiently explained to her. She did not believe that she replied to the first options letter from Ms. Janvier because she and her union representative were setting up a meeting with Ms. Janvier. She verified that Ms. Janvier committed at the meeting to get back to her by October 18, 2018, but that the respondent did not follow up further at that time.

[101] The respondent asked the witness about the attempts to organize a facilitated discussion after her meeting with Mr. Godbout on November 9, 2018. The witness explained again that she was willing at that time to participate in the first step of the informal conflict management process but that she did not want to focus only on her specific complaint. When Mr. Godbout identified Mr. Gray as the facilitator, and she was asked to meet with him for a pre-facilitation discussion, she objected. She found it offensive to be asked to work with Mr. Gray because two of his colleagues were respondents in her complaint.

[102] The witness explained that she had repeatedly sought a global settlement of her problems in the workplace but that the respondent had never committed to exploring such a settlement. She had every reason to believe that it was not treating the situation seriously and was not acting in good faith. She confirmed that neither she nor her union representative, Mr. Béland, suggested a different facilitator.

[103] The complainant indicated that she had no concerns with the local OHS Committee's investigation at the second stage of the internal process. She agreed that she had participated in its investigation and that she had met with two committee members on March 4, 2019. She reconfirmed that she received the committee's determination that the overall Cantin investigation process did not remain impartial.

[104] Referred to Mr. Godbout's email of February 8, 2019, the witness agreed that she, her union representative, and ESDC were aware at the time that Mr. Godbout intended to send a letter about disability options. The witness confirmed talking with him after receiving an email from him on May 29, 2019, inviting her to discuss those options and informing her that he was backfilling her position. While she was unable

to identify the exact date, the witness confirmed receiving the second options letter during the first week of June 2019. She reiterated that none of the three options presented to her was acceptable.

[105] Mr. Béland responded to the second options letter on the complainant's behalf. The witness indicated that it was a union form letter and that she did not participate in its drafting. Asked whether Mr. Béland misrepresented her position when he stated in the letter that she expected to RTW on completing her proposed treatment regime, the witness testified that she had been in no position to RTW. She understood that if she chose to go back to work, she would have to undergo an IME, as indicated by Mr. Godbout. However, she repeated that her choice at the time was not to RTW.

[106] With respect to her belief that Health Canada could not provide an appropriate or reliable medical assessment, as outlined by counsel in his letter of June 14, 2019, she confirmed that she did not suggest a different IME option. She explained that her concern during the summer of 2019 was with the AVC and the ESDC direction that she expected to come. With many things happening, the issue of an IME did not subsequently arise.

[107] The respondent put to the witness the proposition that Mr. Renaud later told her that the respondent had complied with the AVC. She answered to the contrary, maintaining that she was 100% certain that it did not respond or comply.

B. Ms. Janvier

1. Examination-in-chief

[108] Since 2017, Ms. Janvier has served as the manager of the Disability Management (DM) Program. Her team provides guidance to managers and employees about the disability program and the RTW process, including required accommodation measures. Ms. Janvier reports to Claude Houde, Director General, Workplace Relations and Corporate Health Bureau.

[109] The DM Program team is separate from the OHS function and does not provide advice to OHS staff.

[110] Within OHS, the responsible person for workplace violence complaints was Nathalie Crête.

[111] The witness was referred to GAC's *Return to Work Policy*, which encourages mangers to communicate with employees about disability issues. The DI Management team seeks to raise managers' awareness about factors that contribute to RTW success and encourages them to monitor the leave status of employees on disability and their possible RTWs. Under the policy, employees are responsible for keeping in touch with their managers, if possible, updating medical records as required, and establishing anticipated return dates.

[112] Ms. Janvier was also referred to the *Guidelines on the Duty to Accommodate in the Workplace*. They help managers understand how accommodation works, encourage them to establish a rapport with each employee, to understand his or her accommodation needs, and emphasize confidentiality and respect for employee privacy.

[113] Advisors on Ms. Janvier's team help managers formally review medical factors relevant to an employee's fitness to RTW. They provide managers with communication tools, including letters addressing medical accommodation requirements. The process involves a 50-50 collaboration between employees and their managers with employees providing required information about their medical restrictions.

[114] Ms. Janvier testified that she first became aware of the complainant's case when Sun Life notified GAC that her return was not anticipated and that her disability status had been changed to a long-term duration.

[115] Ms. Janvier described the process that her team usually follows when an employee is on extended sick leave. It revisits the employee's sick-leave file, gathers the available medical notes, and reconfirms information with Sun Life. It then provides the responsible manager with the information and discusses how to establish options to regularize the employee's SLWOP status. It provides an employee-resolution-options package that explains to the manager how to start to assess the employee's situation when the employee has been on leave for 18 to 24 months.

[116] The required approach, according to Ms. Janvier, is to resolve an employee's status by the two-year mark of SLWOP. At that time, her team presents the options that the manager should communicate to the employee.

[117] Ms. Janvier recalled the contents of the first options letter. The letter referred to the Treasury Board Secretariat's *Directive on Leave and Special Working Arrangements* ("the *Directive*"), which is the normal practice in such letters. The letter also indicated that management may staff the substantive position of an employee on extended SLWOP when the leave exceeds one year, and it alerted the complainant that her position might be filled on an indeterminate basis.

[118] Ms. Janvier's letter set the stage for a subsequent meeting, summarized in her July 12, 2018, email to the complainant. Mr. Béland, the complainant's union representative, accompanied the complainant. Ms. Janvier testified that she reviewed the options letter and the complainant's long-duration DI status. She asked the complainant to provide information from her doctor to establish when her RTW might be possible. If one was not possible, Ms. Janvier outlined the option of medical retirement, which required Health Canada's approval. She stated that the complainant could take the time necessary to explore the retirement option with the government's pension centre.

[119] The complainant indicated that she was upset and disappointed with the handling of her workplace violence complaint and brought up other issues with management's behaviour. When told by Ms. Janvier that Ms. Janvier's only mandate was to discuss the leave options, the complainant insisted that she could not decide on one until her workplace violence complaints were resolved to her satisfaction. Ms. Janvier suggested the possibility of mediation for both the workplace violence issues and the leave options. The complainant agreed with that approach.

[120] Ms. Janvier testified that her team continued to advise management about the complainant's leave status in the months after the July meeting but that she had no further contact with the complainant. After his appointment, Ms. Janvier advised Mr. Godbout to communicate with the complainant and to follow up with respect to the options available to her.

[121] Ms. Janvier confirmed that management has done nothing to regularize the complainant's SLWOP status other than its follow-up with information about her options. The complainant at the time of the hearing remained on SLWOP.

2. Cross-examination

[122] Ms. Janvier confirmed that the work of her team is separate and distinct from the work done elsewhere in the department. While her team interacts with individuals who deal with workplace violence complaints, the interaction focusses solely on providing information about an employee's leave status, any possible RTW, and RTW accommodation measures. Her team does not coordinate its disability management decisions with anything else happening on an employee's file. She reiterated that her team has no mandate to be involved in workplace violence matters. If developments with respect to a workplace violence complaint affect an employee's status, she stated that her team would be "kept in the loop".

[123] Ms. Janvier indicated that Appendix B of the *Directive* provides that the two-year time frame in which to regularize an employee's SLWOP status should be administered with sufficient flexibility to recognize the particular circumstances of each individual case. She agreed that the two-year period is not strictly applied and that factors such as required RTW accommodation measures may inform the application of the *Directive*.

[124] Posed the question of whether the employer ever asks if an employee is fit to RTW immediately, the witness replied that the question would arise only when the employer receives a medical assessment from a doctor. She confirmed that the applicable policies do not refer to an immediate RTW. When the employer sends an options letter to an employee, it is trying to determine if a RTW is feasible in the foreseeable future.

[125] If employees indicate that they can provide medical evidence about a possible RTW, Ms. Janvier's team would take steps to facilitate the process, including providing forms for the employees' physicians or assisting in scheduling IMEs, with the employees' consent.

[126] Ms. Janvier agreed that receiving an options letter could be stressful to an employee, which is why her team emphasizes to managers the importance of communicating with an employee well before a letter is sent. She agreed that it is also important to ensure that an employee has adequate time to respond and stated that a month would typically be an appropriate period. A longer time frame for a response could be required if an employee contemplating a RTW has to obtain a medical

evaluation or if specific factors in an individual case, such as a psychological injury, suggest that an extension is appropriate.

[127] The witness indicated that a senior manager at the director level with the necessary delegated authority normally signs off on an options letter, based on advice from her team. She stated that a director general might be involved if there is an issue of a possible termination of employment.

[128] Starting in March 2018, Ms. Janvier's team was involved in drafting an options letter to be sent to the complainant. Based on discussions with colleagues looking at the complainant's workplace violence complaint, Ms. Janvier agreed that it would be appropriate that she sign the letter herself rather than having the complainant's manager sign it. She agreed that an extremely cautious approach was warranted because the workplace violence issues involving management had not been resolved. The decision that Ms. Janvier sign, she agreed, was driven primarily by a concern for the complainant's well-being.

[129] Ms. Janvier explained that she spoke with Isabelle-Andrée Lavigne, Director of Corporate Health and Safety, several times about how to approach the complainant and to share information about past attempts to engage with the complainant and resolve her issues. Ms. Lavigne's team was responsible for the workplace violence complaints.

[130] Ms. Janvier and Ms. Lavigne discussed how both sets of issues — the complainant's leave status and her workplace violence issues — might be resolved informally. Because the workplace violence complaint was addressed to a more senior official responsible for both Ms. Janvier's and Ms. Lavigne's areas, it was necessary for Ms. Janvier and Ms. Lavigne to coordinate their efforts to "brief up" on both sides. Ms. Janvier testified that she also briefed her director, Danielle Dauphinais (Centre of Expertise, Labour Relations), and Mr. Houde.

[131] Ms. Janvier reiterated that her direct involvement with the complainant was limited to the issue of her leave status. Nevertheless, she was trying to move forward the possibility of resolving all the issues. If mediation occurred, it would necessarily have had to address all the issues.

[132] The complainant pointed to a paragraph in the first options letter, which did not appear in a previous draft, dated May 20, 2018. The paragraph outlined the department's willingness to work with her to reintegrate her into the workplace and the possibility that it might request that she undergo an IME.

[133] Ms. Janvier could not recall whether she had been involved in adding the paragraph. She described the first options letter as typical of the template that her team used. She also explained that she decided not to include a deadline for a response from the complainant. Her decision was influenced by the sensitivity of the file, as described by Ms. Lavigne, and by the fact that her team had not received recent medical information.

[134] Ms. Janvier outlined that the intent had been to send the first options letter earlier. In light of the complainant's April letter to Minister Freeland and her letter to the Prime Minister, she discussed the timing of the options letter with Mr. Houde and then instructed her team to hold off temporarily. After further discussions with her colleagues, she decided to re-engage and called the complainant in late June.

[135] With respect to her July meeting with the complainant and her union representative, Ms. Janvier confirmed that the complainant discussed the full range of her concerns. Ms. Janvier agreed that she understood the connection between the complainant's workplace violence issues and her inability to work. She also agreed that the outcome of the meeting was to place the options process on hold, to allow mediation to take place. There was no need for the complainant to respond to the first options letter. Ms. Janvier did not subsequently speak to her.

[136] In an email to Mr. Godbout dated September 26, 2018, discussing Mr. Godbout's interest in filling the complainant's position on an indeterminate basis, Ms. Janvier explained her advice that such an option be "carefully explored". She testified that she was concerned about the possible impact on the complainant's entitlements and that she suggested the alternative of a term appointment, which would not prejudice the complainant's return to her position.

[137] Ms. Janvier agreed that after her email of September 26, 2018, no concrete next steps were identified; nor was a deadline set for any new steps.

[138] In December 2018, the witness was involved in determining the availability of a mediator from the Board to assist the parties. Once the Board was able to provide a mediator and possible dates for mediation, Ms. Janvier passed on the information to Mr. Godbout. She did not recall speaking with the complainant about the option of using the Board's mediation services.

[139] Chantal Alarie, a member of Ms. Janvier's team, drafted a briefing note sent to ADM Danagher on March 7, 2019. The note indicated that the complainant continued "… to be incapacitated due to her illness …". Ms. Janvier stated that her team had not received any new medical information about the complainant when the briefing note was written.

[140] The complainant referred the witness to her email of April 12, 2019, addressed to Ms. Crête and Ms. Alarie and copied to Mr. Godbout. Ms. Janvier stated that its purpose was to make sure that everyone was on the same page with respect to their respective roles and responsibilities. Although the email thread discussed all the issues involving the complainant, Ms. Janvier was not coordinating those activities. Her contribution involved only the options letter.

[141] In the email, she indicated that the options letter was on hold so that the labour relations side could determine "… that chronological steps have been taken to ensure proper timing to send the letter." Ms. Janvier characterized "proper timing" as referring to when management should communicate with the complainant both about the options letter and about backfilling her position. Ms. Janvier acknowledged that the question of timing also related to the complainant's communication with Minister Freeland.

[142] Mr. Godbout's second options letter to the complainant was originally intended to be sent on May 14, 2019. The witness agreed that the deadline for a response by May 31 that it specified was shorter than the period normally provided. A two-week response time frame also appeared in the letter, which Mr. Godbout actually sent to the complainant, dated May 30, 2019.

[143] Ms. Janvier outlined that she was not concerned that Mr. Godbout, rather than her, sent the letter. Mr. Godbout did not have an earlier working relationship with the complainant, and Ms. Janvier did not feel that his involvement would have a negative impact. As to the possibility that the letter from Mr. Godbout might have an

intimidating effect on the complainant, Ms. Janvier outlined that Mr. Godbout had already engaged her and that the letter was a routine administrative measure that was in no way intended to intimidate.

[144] After Mr. Godbout received the response from the complainant's counsel, Ms. Janvier testified that she was not directly involved in any discussion about arranging an IME as mentioned in the response.

[145] Ms. Janvier stated that Ms. Alarie from her team assisted Mr. Godbout with the letter that he sent to counsel for the complainant dated September 3, 2019. Ms. Janvier was briefed generally about its contents. She was also briefed when the letter was resent in October 2019. She recalled advising management to proceed cautiously and to be prepared to provide an extension of time for the complainant's response, in light of her medical evaluation.

3. Re-examination

[146] In re-examination, the respondent referred the witness to her email of April 23, 2018, in which she mentioned contacting Manon Blais, a representative of the union's National Component. Ms. Janvier stated that she reached out to Ms. Blais for her sense as to how the union might wish to engage with the complainant and Ms. Janvier about the complainant's leave status.

[147] Concerning Ms. Janvier's email of April 25, 2018, containing the words, "Let's abort our approach with Sunlife [*sic*] and the employee for now", the witness reconfirmed that the reason for waiting was to avoid causing more impact on the complainant at that time. The intent was to move ahead later with scheduling a meeting with Sun Life and the complainant. Ms. Janvier stated that in April 2018, she was not aware of any medical evidence that connected the complainant's inability to work to her workplace violence complaint. The only information received from Sun Life had confirmed that the complainant was on long-term disability.

[148] Asked why she addressed her questions about next steps to Ms. Crête in her email of April 12, 2019, Ms. Janvier answered that the complainant's workplace violence complaint was not within her mandate.

C. Mr. Godbout

1. Examination-in-chief

[149] Mr. Godbout has been Acting Director, Physical Security Abroad, within GAC's International Platform Branch since August 2018. The mandate of his division is to ensure that GAC affords duty of care to its people and to its information and assets abroad, to keep them safe and secure through the provision of physical security measures. Approximately 50 indeterminate employees work in support of 178 missions abroad.

[150] Mr. Godbout confirmed that he had not worked with the complainant in the past. When he arrived, she was on SLWOP, her position was vacant, and her duties had been reallocated within the section.

[151] The witness outlined that he relies on subject matter experts in the Human Resources (HR) Branch to resolve the status of employees on extended absences and that he consults Eugene Chown, his director general, as appropriate.

[152] Mr. Godbout did not recall receiving a specific update about the complainant's status when he transitioned into his position, replacing Daniel Lajoie. Following the transition, he discussed the complainant's case with subject matter experts in the HR Branch. By "case", Mr. Godbout meant her leave status and possible RTW and the management of her disability, as well as her workplace violence complaint. The subject matter experts consulted were principally Ms. Janvier and Ms. Alarie for leave and disability issues and Ms. Crête for the workplace violence complaint.

[153] The witness understood based on his discussions that the workplace violence complaint remained unresolved. He worked with HR to try to determine if a resolution acceptable to all parties might be possible within the governing policies. As to the complainant's extended SLWOP, he explored with the experts the possible paths for resolving the complainant's status.

[154] After the complainant indicated in an email dated October 18, 2018, to Mr. Houde that she would be happy to meet with Mr. Godbout "… to satisfy the first step of the complaint resolution process", Mr. Godbout emailed her, proposing a time to meet with her and her union representative, Mr. Béland.

[155] In advance of the meeting, Mr. Godbout communicated with Ms. Crête and Ms. Alarie to ensure that he was properly prepared. He received an action plan that addressed the findings of the Cantin investigation, including how the department would respond to his recommendations concerning her workplace violence complaint. Asked why he addressed an email to Ms. Alarie about the action plan, the witness could not recall but speculated that he either confused her disability management mandate with Ms. Crête's mandate or might have been seeking a consolidated understanding of the complainant's situation.

[156] Mr. Godbout also contacted Alain Roach, a deputy director in the physical security implementation area, who had been the complainant's immediate supervisor. Mr. Godbout felt that Mr. Roach would be able to comment on where it might be most productive to hold the meeting with her.

[157] The meeting took place on November 9, 2018. A subsequent email from the complainant dated November 13, 2018, summarized her recollection of the encounter and provided further background information. She questioned the impartiality of several GAC officials involved in efforts to resolve her complaint. She advanced the view that it would not be possible to resolve a particular aspect of her situation without resolving all the issues — both her possible RTW and the workplace violence complaint. She described the Cantin investigation as unsatisfactory and biased and stated that her legitimate grievances had not been addressed. She referred to the workplace mobbing that she had experienced. The witness could not recall whether she provided details about the mobbing.

[158] Asked whether he was aware of the contact between the complainant and Ms. Janvier in July 2018, the witness responded that he saw references to their meeting during his fact-finding preparation. Asked if he understood that the complainant had been encouraged to take medical retirement, as she alleged, Mr. Godbout disagreed. He testified that Ms. Janvier presented several options to the complainant. He understood that the employer did not encourage one path over any other.

[159] Mr. Godbout could not recall whether at the November 9, 2018, meeting the complainant discussed the attempts she had made in the interim to resolve her issues. He did recall her asserting that the presentation of options was an intimidation tactic. Mr. Godbout testified that he would not have responded directly to that assertion. He

believed that she had perceived the presentation of options in a manner inconsistent with the employer's intent.

[160] Mr. Godbout received an email from the complainant on November 26, 2018, asking for a status update. He replied that he needed more time to respond and that he anticipated being able to not later than the week of December 10, 2018. His response to her came on December 14, 2018. He opened the door to the possibility of a facilitated discussion to attempt to resolve her concerns, referring to Ms. Janvier's earlier suggestion to that effect. The complainant responded, indicating her interest in participating in some form of mediation, accompanied by her union representative, subject to the identity of the mediator.

[161] After internal discussions about possible mediation options, the department decided that a GAC mediator would be a good and responsible choice. Mr. Godbout introduced the selected internal mediator, Mr. Gray, to the complainant in an email dated January 30, 2019. She responded immediately, rejecting Mr. Gray based on her past dealings with his office and indicated that she wanted to move on to the second step of the complaint resolution process. On February 1, 2019, Mr. Godbout outlined to the complainant the requirements should she wish to proceed to the second step.

[162] Mr. Godbout followed up with another email to the complainant dated February 8, 2019. He expressed his regret that she decided not to participate in a facilitated discussion and left the door open to that possibility in the future. Mr. Godbout explained that nonetheless, there remained the requirement to regularize the complainant's SLWOP status, and he alerted her in the email that she would receive a letter explaining the available options.

[163] Mr. Godbout's next email to the complainant was sent on May 29, 2019. Asked why so much time had passed since his February communication, Mr. Godbout stated that he could not remember. He indicated that he had attempted to speak with the complainant by telephone but that he had to leave a voicemail. He confirmed that he did talk with her "on occasion".

[164] Mr. Godbout sent the second options letter on May 30, 2019. The three options presented were a RTW, retirement on medical grounds, or resignation.

[165] Mr. Béland responded on the complainant's behalf on June 3, 2019. Mr. Godbout described the letter as alleging that the employer failed to exercise appropriate discretion when it considered the specifics of the complainant's case. He noted the view expressed that ultimately, she would be able to return to the workplace, and Mr. Béland's request that the options letter be held in abeyance.

[166] On June 7, 2019, Mr. Godbout emailed the complainant in response to the letter from her union representative. If she chose to RTW, he requested that she undergo an IME. He asked for her response by June 14, 2019.

[167] Counsel for the complainant wrote to Mr. Godbout on June 14, 2019. The witness characterized the letter as stating that a consideration of options was premature given the complainant's concerns about the investigation into her workplace violence complaint. He noted counsel's indication that the complainant was prepared to arrange an IME once the complaint process was over.

[168] With respect to the workplace violence complaint, Mr. Godbout testified that he understood that the complainant was pursuing options, including with ESDC, to secure a second investigation. He had earlier referred her to Ms. Brisson of the OHS Committee if she wished to proceed to the second step of the informal complaint process. Mr. Godbout did not recall playing a role with respect to the workplace violence issues past that point.

[169] The witness confirmed receiving the OHS Committee's report dated April 4, 2019, and understood that the committee's view was that impartiality had not been maintained throughout the Cantin investigation. Mr. Godbout wrote to Mr. Renaud at ESDC on April 24, 2019, to express GAC's opinion that the OHS Committee erred in its findings and to ask ESDC to investigate further.

[170] Mr. Godbout emailed Ms. Lavigne on July 25, 2019, seeking her engagement to secure a response from ESDC. He indicated that there was an agreement internally that it was time to update the complainant, stating his belief that it was important to share with her GAC's efforts to expedite the process with ESDC. As of August 2019, his view was that ESDC would consider his letter and make a decision about the next steps. In his words, "the ball was in ESDC's court".

[171] The witness could not recall if he received a response from ESDC. He did recall seeing Mr. Renaud's letter of November 19, 2019, to the complainant. Mr. Godbout summarized the letter as finding that GAC had complied with the *Code* and that the methods used in the investigation did not fall within the *Code*'s jurisdiction. The letter advised the complainant that she could seek judicial review with the Federal Court.

[172] The respondent referred Mr. Godbout to his October 2, 2019, email to the complainant, which referred to the letter he sent to her counsel on September 3, 2019. In that letter, he stated that his request that she resolve her leave status was not related to GAC's receipt of the AVC issued by Mr. Renaud. The department's experts took the view that the two matters were unrelated and not co-dependent. Mr. Godbout's letter of September 3 conveyed the position that a RTW by the complainant would require medical certification from her physician deeming her fit. The witness agreed that the letter specified October 4, 2019, as the deadline date for a response.

[173] In an email dated October 3, 2019, counsel for the complainant informed Mr. Godbout that he had no record of receiving the September 3, 2019, letter. Mr. Godbout testified that he found out that the letter had not been correctly addressed. He then informed counsel for the complainant that he was holding the options letter in abeyance until November 1, 2019. He restated the requirement that the complainant provide medical certification from her physician that she was fit to return, if a RTW was her choice. He later agreed to extend the deadline to November 15, 2019, on request from the complainant's counsel.

[174] The witness could not recall receiving the requested medical information from the complainant.

[175] On November 15, 2019, the complainant's counsel wrote to Mr. Godbout and conveyed her physician's opinion that a RTW was linked to resolving the workplace violence complaint. Counsel proposed that the parties jointly work to ensure that an investigation into the complaint could take place as quickly as possible. Mr. Godbout testified that he advised the complainant that he did not support the view that a new investigation was needed, expressed confidence that the Cantin investigation had been properly carried out, and referred her to the Federal Court judicial-review option if she disagreed.

[176] The respondent returned to questions about events in April 2019, during the preparation of the second options letter. In an email to Ms. Crête dated April 11, 2019, Mr. Godbout wrote about the "… options letter 'chaser' being put on hold …" pending a response to the complainant's letter to Minister Freeland. Mr. Godbout explained that it was typical procedure to place substantive next steps on hold when ministerial correspondence was involved so as not to constrain the management of ministerial correspondence. That consideration explains in part why the options letter was put to the side at that time.

[177] On May 14, 2019, Ms. Alarie emailed Mr. Godbout, proposing text for the second options letter, asking for his sign-off, and suggesting that he contact the complainant first by telephone to tell her to expect a letter. The May 14, 2019, version of the letter specified May 31, 2019, as the deadline for a response. Mr. Godbout suggested a few "minor tweaks" to the letter, describing the only substantive change as adding a reference to make it clear that it was not the first time options had been presented to the complainant.

2. Cross-examination

[178] In the initial stage of the cross-examination, Mr. Godbout confirmed the following:

(1) that the options letter was part of an administrative process;
(2) that that process operates independently of other processes;
(3) that subject matter experts make the required decisions, subject to his approval;
(4) that Ms. Janvier and Ms. Alarie were the experts on whom he relied in seeking to regularize the complainant's status;
(5) that Ms. Lavigne and Ms. Crête were the experts concerning the workplace violence complaint; and
(6) that decisions on the disability management side were not influenced by developments on the labour relations side.

[179] Asked why either Ms. Lavigne or Ms. Crête should have been involved with, or copied on, communications about disability management, the witness stated his opinion that it might have been helpful to them to understand how the department was engaging with the complainant on the disability management side. He also testified that he might have sent an email about a disability matter to Ms. Crête by mistake and that there was no work-related reason for having done so.

[180] Asked if he would have expected disability management staff to be copied on matters exclusively related to the workplace violence complaint, the witness replied that he would not. He agreed that as a director, he could take steps to ensure that the two functions operated independently. Speaking hypothetically, he agreed that failing to maintain separation could raise issues about the integrity of each process.

[181] The witness indicated that the options process had been put on hold after Ms. Janvier's July 2018 meeting with the complainant, to allow for mediation to resolve all the issues. Mr. Godbout confirmed that there was no expectation that as a result, the complainant would reply to the first options letter.

[182] Did Mr. Godbout have any concerns about the complainant returning to work if a medical evaluation indicated that she could? He answered that the question was hypothetical. A determination about her returning to work would be made on more than just medical evidence, in the interests of both parties. Pressed on whether the complainant's initial harassment allegations would be an additional factor, Mr. Godbout stated that he wanted to ensure that a RTW would be successful and that everything possible should be done in advance of a RTW to achieve that objective. With respect to the question of harassment, he indicated that his concern was about steps to prevent a recurrence. He wanted to know that lessons had been learned following the investigation and that the workplace environment would be supportive and engaging for the complainant.

[183] Asked whether he wanted to set up a situation in which harassment complaints would no longer be made against management, Mr. Godbout answered that that was not his primary concern. He wanted to be able to deliver his mandate and to ensure that the complainant would be comfortable contributing to that mandate. He was asked whether if she submitted medical evidence that she was fit to return, he would still be concerned about broader workplace issues. He stated that he would make every effort to respect the RTW determination but suggested that the workplace might not look exactly like it had before. He was unsure whether he would distinguish between a successful return and a safe return, stating instead that a successful return would be a safe return.

[184] Mr. Godbout agreed that the question to ask with respect to regularizing an employee's SLWOP status is whether the person could RTW in the foreseeable future. There is no requirement that the return be immediate.

[185] After his communication with Ms. Janvier in September 2018, the witness did not recall that any formal timeline for the next steps was established.

[186] In response to the complainant's email of October 28, 2018, expressing her interest in meeting with her supervisor as the first step in the informal resolution process, Mr. Godbout confirmed that he had been happy to meet with her. At that time, he had not yet discussed mediation with her.

[187] By the time they met on November 9, 2018, the witness stated that he was familiar with the broad lines of her background and her issues with her experience in the workplace. He confirmed that he knew that her absence was tied to her feelings about the serious harassment and bullying that she had faced. Asked whether he questioned the validity of her feelings, Mr. Godbout replied that he did not question the findings of the Cantin report; he believed that the investigation had been impartial. He also did not question the follow-up action plan.

[188] Mr. Godbout did not accept the broad statement that the Cantin report found substantial aspects of harassment. He stated his belief that the report had concluded that elements of the complaint were founded.

[189] Mr. Godbout agreed that he was cautious about setting up a meeting with the complainant. He did not want "to trigger her" in some way. He accepted that his email to Mr. Roach about a venue for the meeting reflected that concern. He testified that he did not remember knowing at the time that the Cantin investigation had founded allegations against Mr. Roach, although he conceded that it was possible that he knew.

[190] The witness agreed that the complainant outlined her concerns about the department's handling of the Cantin investigation at their meeting on November 9, 2018, and that she surveyed the same concerns in her follow-up email of November 13, 2018. He recalled her making allegations with respect to both Mr. Danagher and Mr. Houde but resisted qualifying the allegations as "serious", stating that he did not feel competent to speculate on that point. Nevertheless, he agreed that an allegation that a director general had interfered in the Cantin investigation would be serious. He also

accepted that the complainant was expressing significant distrust of the department or at least of the parties named in her email.

[191] When Mr. Godbout eventually responded on December 14, 2018, he did not address the particulars of the complainant's concerns and instead proposed a facilitated discussion assisted by a mediator, hearkening back to Ms. Janvier's suggestion from earlier, in July.

[192] The complainant agreed to mediation but listed concerns. She did not want Mr. Houde or anyone from his office to serve as the mediator and indicated that she wanted acknowledgement of her experience, along with fair compensation.

[193] Mr. Godbout introduced Mr. Gray as the mediator to the complainant on January 30, 2019. She did not accept him based on her concern about using an internal facilitator. Mr. Godbout agreed that he had discussed the possibility of bringing in a mediator from outside the department with Ms. Janvier. He disagreed with the suggestion that he would have understood that the complainant would not accept an internal mediator, stating that he would not have proposed Mr. Gray had he thought that Mr. Gray would be unacceptable to the complainant. After her rejection of Mr. Gray, he did not advise her that it would be possible to engage an independent mediator because she wanted to move on to the next step in the internal process.

[194] Asked to confirm that he never provided a comprehensive response to the complainant's email of November 13, 2018, the witness agreed. He testified that events involving the possibility of a facilitated discussion had taken over and that a response would have been redundant. Asked whether he would have been willing to put the options letter on hold had the complainant reconsidered mediation, he answered, "correct."

[195] Would the options letter have proceeded had the complainant gone forward with her complaint? The witness stated that that was "not correct". It was not true that he would have proceeded because the complainant declined mediation. GAC's *Return to Work Policy* required that he pursue the regularization of her status. The only path for the employer was to engage her about her SLWOP — it was not because of a concern that she was advancing her complaint. Had a medical evaluation been underway, the options letter would have been held in abeyance.

[196] Asked specifically whether the complaint was irrelevant to his decision to proceed with respect to the complainant's status options, Mr. Godbout replied that his view was that her SLWOP had to be resolved and that other concerns might proceed in parallel.

[197] The witness confirmed that he did not respond to Mr. Béland's email of February 11, 2019, in which Mr. Béland indicated that he failed to see what the complainant's disability options had to do with the informal conflict resolution process. Mr. Godbout did not inform Mr. Béland that they were unrelated.

[198] Referred to email correspondence of February 15, 2019, Mr. Godbout outlined that he asked the disability management team when the options letter would be issued. He understood at that time that the complainant would not be able to RTW in the foreseeable future. Ms. Alarie indicated that she would prepare a letter as well as a briefing note for Mr. Danagher. Mr. Godbout expected that the options letter would be dispatched that same week and that the briefing note would follow two weeks later. He accepted that it was fair to say that he intended to keep the options letter process moving forward as expeditiously as possible. The timeline was not related to what was happening with the ESDC complaint.

[199] Mr. Godbout testified that his belief that the complainant would not be able to return in the foreseeable future was based on the 2017 information provided by the insurer. As of March 2019, the process of asking for updated medical information was on hold.

[200] The briefing note to Mr. Danagher drafted by Ms. Alarie expressed the view that the complainant did not respond to the first options letter because she viewed it as an intimidation tactic that threatened to end her employment. Mr. Godbout involved Mr. Chown in the briefing process, who became the note's signatory. His version used the expression "separation options". Mr. Godbout testified that the note did not explicitly refer to the possibility of a RTW but that the supporting options letter clearly did. He concurred that he understood at the time that he was conveying to his superiors that the situation was essentially about separation but insisted that the complainant's return to the workplace was not excluded. Nonetheless, he reaffirmed his sense at that time that returning to work was the "less likely outcome", given the events since 2015.

[201] While the briefing note referred to the facilitated discussion that had been proposed to resolve the workplace violence complaint, the witness testified that the complainant's decision to proceed with her complaint, or not, was irrelevant to her separation status.

[202] The witness stated that he could not specifically recall what Ms. Janvier meant in her April 12, 2019, email when she used the words, the "proper timing" of the letter. Ms. Alarie's April 11, 2019, email recommended that the briefing note and the response to the complainant go forward, followed by the options letter, before considering staffing her position. Mr. Godbout agreed that it was likely that the "briefing note" referenced by Ms. Alarie was Ms. Crête's note about the complaint to ESDC. Mr. Godbout stated that Ms. Alarie's advice with respect to staffing was consistent with Ms. Janvier's earlier representations about staffing the complainant's position.

[203] Questioned about his April 24, 2019, letter to Mr. Renaud, Mr. Godbout agreed that he asked ESDC to fully investigate the complaint. The department received Mr. Renaud's AVC on May 30, 2019. Mr. Godbout could not recall whether the employer and ESDC conversed in the intervening period. He also did not recall seeing Mr. Renaud's email to Ms. Crête of June 13, 2019.

[204] The complainant asked the witness whether he was aware of concerns expressed within the department about Mr. Cantin's handling of the investigation. Mr. Godbout replied that he had a vague recollection of some concerns having been raised but could not recall by whom or the specifics, other than a concern about the length of time the process took.

[205] Mr. Godbout agreed that he had decided to proceed with staffing the complainant's position before regularizing her status but specified that he did not implement his decision.

[206] Mr. Godbout asked for a response from the complainant to the second options letter by June 14, 2019. The witness did not believe that he was aware when doing so that the standard response time frame was 20 to 30 days.

[207] The witness agreed with the following points put to him by the respondent:

(1) he did reply directly to the complainant to the response from her union representative requesting a Health Canada assessment if she chose to RTW;
(2) the letter received from the complainant's counsel stated that it was premature to address returning to work and asked Mr. Godbout to rescind the options letter;
(3) counsel also stated that his client was prepared to undergo an IME once the other workplace issues were resolved; and
(4) after receiving counsel's letter, the "ball was in [Mr. Godbout's] court".

[208] The witness confirmed his involvement in the internal follow-up with respect to the ESDC complaint during the summer of 2019. He also confirmed his belief that there was no follow-up with the complainant about the second options letter or her offer to undergo an IME. In his view, nothing happened between the receipt of the letter from the complainant's counsel and the end of August to change his obligation to move forward with regularizing the complainant's status. Asked whether he could explain why he did not respond to counsel's letter, Mr. Godbout replied that it was possible that it was because of the summer leave period. He verified taking leave from August 19 to 30, 2019.

[209] Mr. Godbout testified that he could not recall having been made aware that the department provided information to ESDC concerning the complainant's desire to receive monetary compensation.

[210] Mr. Godbout confirmed that he reviewed his September 3, 2019, letter to counsel before sending it, that he contacted the complainant directly on October 2, 2019, when he did not receive a reply from counsel, and that he resent the letter on October 3, 2019.

[211] The witness reverified that he did not rescind the second options letter as requested by counsel for the complainant and that he knew that the complainant was not fit to RTW immediately. He also confirmed requiring her to provide medical certification immediately if she wished to return, while knowing that it would be unlikely that she could provide medical certification of the type requested.

3. Re-examination

[212] In re-examination, the respondent asked Mr. Godbout about the information he had when he proposed Mr. Gray to lead facilitated discussions about his history with the complainant. The witness replied that he had had no information.

[213] Mr. Godbout outlined that addressing emails to both labour relations experts and disability management experts reflected an effort to ensure awareness by each area of the other's activities and to avoid the situation of the complainant possibly being overloaded with contacts from the department. He also stated that the approach was consistent with her concern to address her situation as a whole.

[214] Mr. Godbout testified that he had not spent much time considering how the different areas within Mr. Houde's division interacted and instead that he concentrated on how to resolve matters affecting both the workplace violence and disability management areas.

[215] In a briefing note to senior executives, Mr. Godbout included a statement that the complainant viewed the options letter as an intimidation tactic. He clarified that that was not, and is not, his view. He simply reported her opinion, with which he disagreed.

IV. Summary of the arguments

[216] The Board is seized of a complaint made under s. 133(1) of the *Code* that alleges a contravention of the prohibition stated in s. 147, which reads as follows:

> ***Disciplinary Action***
>
> ***General prohibition re employer***
>
> ***147*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*
>
> ***(a)*** *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*
>
> ***(b)*** *has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*
>
> ***(c)*** *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

[217] It is uncontroversial that the complainant bears the burden of proving, on a balance of probabilities, the prohibited action by the respondent.

[218] The complainant identified the letter Mr. Godbout sent to her counsel, dated September 3, 2019, as the retaliatory action prohibited by s. 147 of the *Code*. The evidence indicates that the letter was incorrectly addressed in the first instance and that it was not received by the complainant's counsel. In what he believed was the absence of a response from counsel, Mr. Godbout emailed the complainant on October 2, 2019, attaching the September 3, 2019, letter and advising her that a reply was required by October 4, 2019. The text of the September 3, 2019, letter read as follows:

> …
>
> *We have received your letter dated June14, 2019 requesting management rescind the options letter sent to Ms. Lueck to resolve her Sick Leave Without Pay (SLWOP) situation.*
>
> *Ms. Lueck received two "*Options letters*", one dated June 28, 2018, the second dated May 30, 2019. These letters are not related to her workplace violence complaints. In fact, Ms. Lueck received a phone message from her manager the week of May 20th 2019 requesting a meeting with her and informing her that she would be receiving the second options Letter.*
>
> *Ms. Lueck has been on sick leave without pay, which was granted by the delegated authority under Appendix B of the attached* Directive on Leave and Special Work Arrangements (the Directive)*, since June 28, 2015. The* Directive *states that "Such leave without pay situations are to be resolved within* two years *of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances."*
>
> *In making its decision to request Ms. Lueck resolve her sick leave without pay situation via the "*options Letter*", management considered many factors: the lack of medical information indicating a possible return to work within foreseeable future; the likelihood of her return to work; the amount of SLWOP already granted and the intent of the SLWOP, which is to provide an option to bridge the employment gap when management believes a return is possible.*
>
> *We understand that the outcome of the* Internal Complaint Resolution Process *conducted by Employment and Social Development Canada to examine elements of the Investigation regarding the Violence in the Workplace complaint is not finalized. Although we respect your position, the employer's request for Ms. Lueck to resolve her sick leave without pay situation is based on the aforementioned reasons and is not related to the receipt of the Assurance of Voluntary Compliance issued by ESDC Senior Investigator, Sylvain Renaud.*
>
> *Should Ms. Lueck wish to return to work, she must provide management a medical certificate from her treating physician stating that she is fit to do so immediately. We therefore inform you that management has placed its request for resolution of leave*

> *through the "*Options Letter*" in abeyance until October 4, 2019, providing Ms. Lueck sufficient time to obtain medical information in relation to her ability to return to work in the foreseeable future.*
>
> *Lastly, with respect to your position regarding your client's Violence in the Workplace complaint, we refer you to the various appeal mechanisms to appeal any decision that may be made.*
>
> *…*

[219] Not unexpectedly, the parties' final arguments revealed significant disagreements over key facts of the case. Their arguments also underscored different perspectives with respect to the scope of actions encompassed by s. 147 of the *Code*. The complainant urged that I adopt a liberal interpretation of s. 147 consistent with the statute's purpose of creating a safe work environment for employees. The respondent contested her broader interpretation and argued that the complaint did not identify an action on its part that fell under s. 147.

[220] I turn now to outline the parties' respective arguments about the interpretation of s. 147 and how s. 147 applies to the facts of the case. Both parties opened their oral arguments with detailed surveys of key facts. I have not summarized their reviews but have referenced the evidence surveyed, as required, in my analysis.

[221] The summary of the complainant's submissions draws in part from an aide-memoire presented at the hearing.

A. For the complainant

[222] The Board is entitled to look at events before the 90-day period for making a s. 147 complaint, to understand the circumstances that gave rise to it; see *Teamsters' Local Union 91 v. D.H.L. International Express Limited*, 2001 CIRB 129 at para. 79 ("*DHL*"). According to the complainant, the reprisal she experienced can be understood only "… within the context of the pre-existing relationship between the parties."

[223] The complainant referred to *Ouimet*, at para. 56, as follows, for its description of the Board's task:

> *[56] The Board's role is not to determine if the level of discipline was fair, nor even whether the employer had just cause for taking whatever disciplinary action, as an arbitrator would do in a grievance procedure, according to the collective agreement.* ***Its role is to be satisfied that the employer's action is not tainted with retaliation against the complainant for his role as co-***

> ***chairperson of the committee and other related activities.*** *It is therefore not up to the Board to decide if the disciplinary action taken was justified or excessive (see Patrick R. Ridge (1992), 88 di 20 (CLRB no. 934)). An employer may take disciplinary action against an employee for a good reason, a debatable reason or for no reason at all, as long as there is no violation of the provisions of the Code ….*
>
> [Emphasis added]

[224] The complainant referred to two formulations of the test to be applied in a s. 147 reprisal case, the first in *Vallée*, at para. 64, and the second in *Paquet v. Air Canada*, 2013 CIRB 691 at para. 60.

[225] *Vallée* identifies this four-part test:

> *… the complainant would have to demonstrate that:*
>
> *1. he exercised his rights under Part II of the* CLC *(section 147);*
>
> *2. he suffered reprisals (sections 133 and 147 of the* CLC*);*
>
> *3. these reprisals are of a disciplinary nature, as defined in the* CLC *(section 147); and*
>
> *4. there is a direct link between his exercising of his rights and the actions taken against him.*

[226] *Paquet* suggests this three-part test:

> *[60] This interplay of sections 147 and 133 gives rise to a three-step analysis. Each step must be passed successfully in order for the Board to find a* Code *violation.*
>
> *1. Did Air Canada impose, or threaten to impose, discipline?*
>
> *2. Were the employees participating in a Part II Process?*
>
> *3. Did a nexus exist between the Part II Process and Air Canada's discipline?*

[227] The complainant also cited *Gaskin*, at para. 75, for the proposition that the respondent's actions need not be disciplinary, as follows:

> *[75] The term "penalty" in the context of labour relations is most often used in reference to discipline. Because the legislator specifically included the term "penalty" in the list of actions in section 147 of the* Code*, in addition to discipline and the threat of discipline, it must be taken that the legislator intended that the term could refer to something that is different and non-disciplinary. The plain and normal meaning of the word "penalty,"*

> *according to* The New Shorter Oxford English Dictionary, *Oxford University Press (1993), is as follows …*
>
> …
>
> *A punishment imposed for a breach of a law, rule or contract; a loss or disadvantage of some kind, either prescribed by law for some offence, or agreed on in case of a breach of contract … A disadvantage or loss resulting from an action, quality, etc., esp. of one's own …*
>
> …

[228] According to the complainant, the fundamental question in any analysis under s. 147 of the *Code* is, "… has the employer engaged in any of the actions listed in the opening paragraph 'because' the employee engaged in any of the actions listed in (a)-(c)?" The complainant need not demonstrate that the respondent's actions were intended as a reprisal or that they exhibited malice, animus, or bad faith. As stated in *Ouimet*, her burden is to show that the October 2, 2019, email and letter were "tainted with retaliation".

[229] The complainant further maintained that the exercise of rights by an employee must be a proximate cause for the employer's actions but not necessarily the sole cause: see *Chaney*, 2000 CIRB 47 at para. 32; and *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40 at para. 71.

[230] The complainant restated the test to be applied, drawing from *Gaskin* and *Paquet*, as follows:

> …
>
> *a) Did the Respondent take an action against the complainant that is of the type listed under section 147 of the Code?*
>
> *b) Was the action taken for one of the reasons identified under section 147?*
>
> *c) Did a nexus exist between the Part II Process and the Respondent's actions, i.e., did the respondent act because the Complainant exercised her Code rights?*
>
> …

[231] According to the complainant, she experienced a "financial or other penalty" as described in the opening paragraph of s. 147 of the *Code*.

[232] The wording of that opening paragraph makes it clear that a penalty is not limited to a disciplinary or a financial penalty. In *Harris v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 55 at para. 139, the Board ruled that a denial of a shift change can be a penalty. In *Gaskin*, the Board found that there might have been a *prima facie* basis for characterizing as a penalty two letters advising an employee that his sick-leave credits were nearly exhausted. In the Board's view, the letters could be viewed as imposing a "disadvantage or loss" in the form of suspending the employee's regular pay if the employee did not RTW on exhausting his credits; see paragraph 76.

[233] The complainant submitted that the same logic from *Gaskin* applies in her situation. She argued in her aide-memoire as follows:

…

> *30. The Complainant in the present case submits that the same logic applies to the email and letter she received from the Employer on October 2, 2019. Knowing that the Complainant was not able to return to work "immediately," the Employer placed the May 30, 2019 options letter in abeyance for a month, which would require her to medically retire or resign if she could not provide the required medical evidence. Both options would have financial consequences for the Complainant and would impose a disadvantage.*

…

[234] In the alternative, the complainant submitted that the letter, while not itself a dismissal, was the first step in the respondent's procedure for terminating her employment for medical incapacity.

[235] In the complainant's submission, three broad factors support the conclusion that Mr. Godbout's correspondence in September and October 2019 was tainted with retaliation for her attempts to enforce her rights under the *Code*. She described the three factors as follows:

…

> *33. First, Mr. Godbout's communications in February 2019 demonstrate that the decision to proceed with the options process was directly linked to the fact that Ms. Lueck had chosen to proceed with the complaint process under the* Canada Labour Code *rather than a facilitated discussion of these issues with the Employer. These include Mr. Godbout's February 8, 2019 email to*

Ms. Lueck, as well as his February 15, 2019 email to Ms. Alarie and Ms. Janvier.

34. Second, rather than running independently as one would expect, the timelines related to the options letter were tightly connected to the timeline of Ms. Lueck's complaint. Once Ms. Lueck rejected mediation and indicated her desire to proceed with the second stage of the ICMP process, Mr. Godbout sought to move the process for the options letter forward as "expeditiously as possible", explaining that he felt he had a duty to resolve Ms. Lueck's sick leave without pay situation in a timely manner. But this explanation does not fit with the fact that there was almost no action between the July 18, 2018 meeting between Ms. Janvier and Ms. Lueck, and Mr. Godbout's December 14, 2018 offer of mediation, which fell well outside the October 31st timeline Ms. Janvier had provided Ms. Lueck.

35. Moreover, Mr. Godbout received a letter from counsel for Ms. Lueck on June 14, 2019, which offered an independent medical assessment to assess whether she might be able to return to work following resolution of workplace issues. There was no response from Mr. Godbout, however, until the beginning of September. Mr. Godbout acknowledged that the same duty to deal with regularizing status in a timely manner would have applied during this period, and provided no reasonable explanation for this delay, particularly given Ms. Janvier's testimony that she would normally move quickly and follow up if an independent medical assessment were offered. Importantly, throughout this period of delay, Mr. Godbout actively followed the status of the ESDC complaint process through communications that both he and Ms. Alarie were copied on. There is no explanation for why Ms. Alarie would be copied on this correspondence or related briefing notes regarding this complaint process if the two processes were simply moving in parallel.

36. Third, the circumstances surrounding the correspondence from Mr. Godbout for Ms. Lueck in September and October of 2019 confirm this connection. The following factors are particularly relevant:

a. Mr. Godbout knew that Ms. Lueck saw the options letters as an intimidation tactic. Both he and Ms. Janvier acknowledged they understood the need to be cautious to avoid harming her through process in July 2018 and December 2018, given Lueck's vulnerability.

b. Mr. Godbout believed that Ms. Lueck could not return to work in foreseeable future. Documents he had approved had previously made references to "separation letter" and statements an employer briefing note suggest that she was "incapacitated".

c. May 30, 2019, Mr. Godbout sent the second options letter giving Ms. Lueck less than 15 days to respond, despite standard length being 20-30 days.

> *d. Mr. Godbout's focus on filling Ms. Lueck's position on an indeterminate basis, despite advice from the relevant "subject matter experts" who cautioned that doing so could prejudice Ms. Lueck in her priority status if she were to return to work.*
>
> *e. On June 14, 2019, counsel for Ms. Lueck asked for the options letter to be rescinded until the workplace issues were resolved and proposed that she could provide an IME "to assess whether it is possible that Ms. Lueck will be able to return to work once this process is behind her". Mr. Godbout responded on September 3, 2019, in a letter re-sent on October 2, 2019, stating: "Should Ms. Lueck wish to return to work, she must provide management with a medical certificate from her treating physician stating that she is fit to do so immediately". He did so despite knowing how vulnerable she was and that the relevant question was whether she could return to work in the foreseeable future.*
>
> …
>
> [*Sic* throughout]

[236] The complainant concluded by submitting that the options letter and ESDC complaint processes were deeply connected. The nexus between the processes was evident in February 2019, remained in May 2019, and continued in September and October 2019. The options letter was not simply part of an administrative process that operated independently. In the complainant's words, "[o]n balance, the evidence demonstrates that proceeding with her complaint was a proximate cause of the Employer's conduct in October 2019, or that this conduct was tainted by retaliation."

B. For the respondent

[237] The respondent submitted that I should apply the four-part test outlined in *Vallée* to decide the complaint.

[238] The respondent maintained that Mr. Godbout's action — the email and attached letter of October 2, 2019 — was not a dismissal, suspension, lay-off, or demotion. The complainant's burden, then, was to demonstrate that the action fell into one of the remaining categories under s. 147 of the *Code*, which are "other penalty", "disciplinary action", or threaten discipline. The required determination is a pure question of fact; see *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4 at para. 86.

[239] In *Leary v. Treasury Board (Department of National Defence)*, 2005 PSLRB 35 at para. 73, the Board indicated that a penalty must be viewed objectively, stating as follows:

> *[73] I do not believe that an action can be deemed to be a "penalty", as I understand that term to be construed in section 147 of the Code, simply because the complainant views the action as a "penalty". If Mr. Leary liked the job that he was moved into, then I would venture to say that the action of removing him from the MTF would not be seen by him as a "penalty". The scheme of section 147, as I see it, is not to be dependent on the personal views of the complainant, but rather it is designed to prevent the employer from taking certain action which, if looked at objectively, would violate the Code.…*

[240] In *Martin-Ivie*, at para. 33, as follows, the Board adopted the definition of "penalty" from *Tanguay v. Statistical Survey Operations*, 2005 PSLRB 43, requiring that a penalty involve a punishment to ensure performance or to prevent a prohibited act:

> *33 … At paragraph 19 of the* Tanguay *decision, the Board member accepts the definition of "penalty" as a "punishment or award to ensure the performance of an action" or as a "punishment established or inflicted by a law or some authority to prevent a prohibited act."…*

[241] As to what qualifies as disciplinary action, in *Canada (Attorney General) v. Frazee*, 2007 FC 1176 at para. 22, the Federal Court of Canada found that the analysis must determine whether the employer intended to impose discipline and whether its decision "… was likely to be relied upon in the imposition of future discipline …".

[242] In *Lapointe v. Canada Revenue Agency*, 2020 FPSLREB 19 at para. 129, the Board cited *Frazee* to emphasize the need to consider the purpose and effect of a decision. To comprise discipline, there must be an intent to correct bad behaviour.

[243] The respondent submitted that the letter attached to the email of October 2, 2019, to the complainant from Mr. Godbout did not impose a penalty. Each of the options presented to her led to the continuation of her remuneration. If she chose to RTW, Mr. Godbout testified that he would take the steps necessary to ensure that she would be successful. If she chose a medical retirement, she would receive a pension, with no financial penalty. If she resigned, it would not be a forced decision.

[244] The respondent maintained that it never exercised the option of terminating the complainant's employment for medical incapacity but simply indicated that it was an option that the respondent could consider if she failed to choose one of the three alternatives it had outlined.

[245] The respondent also argued that the letter was not disciplinary. As Mr. Godbout testified, it was part of an administrative process that conformed with the requirements of the *Directive*. Nothing in the letter was meant to ensure the continued performance of or to prohibit an action. There is no other evidence that the respondent intended to impose discipline or that it intended to rely on the letter for the possibility of future discipline. There is no evidence that it intended to correct bad behaviour.

[246] The respondent argued further that nothing in the tone of the letter evinced disciplinary intent; see *Gaskin*, at para. 72. There was no real or contemplated discipline, no allegation of misconduct, and no remedial intent or intent to correct.

[247] In *Belisle v. Deputy Head (Department of Aboriginal Affairs and Northern Development)*, 2016 PSLREB 88 at para. 49, as follows, the Board found that there was no requirement that an employer maintain an employee's status if the employee is not able to RTW:

> *49 A respondent should not be expected to continue to employ someone who has been unable to work due to illness for a considerable time and who has for all intents and purposes been declared unable to work for an indeterminate period.…*

[248] The respondent maintained that an employee cannot "hide" from the exercise of requirements under the *Directive* by pursuing rights under the *Code*; see *Vanegas v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 60 at para. 77.

[249] *Vanegas* also found at paragraph 67 that "[r]etaliatory action must … be inextricably linked to the complainant's exercise of her rights under section 128 of [the *Code*] …"; see also *Larivière v. Treasury Board (Department of Employment and Social Development)*, 2019 FPSLREB 73 at para. 86.

[250] The respondent disputed the complainant's contention that its burden, based on *Ouimet*, was to show that the October 2, 2019, email and letter were "tainted with retaliation". *Ouimet* is the only decision that refers to tainting and then only in one passage and in the context of discipline. The singular reference to tainting in *Ouimet* is not sufficient to justify modifying the required test for retaliation under s. 147 of the *Code*. Parliament did not intend to include tainting, and doing so would water down the existing statutory framework. The case law indicates that proximity or simple links

are not sufficient to establish retaliatory intent. Under *Vallée*, there must be a direct link, not just any link.

[251] The respondent submitted that any link between Mr. Godbout's second options letter of May 30, 2019, and the respondent's receipt of the AVC on the same date was purely coincidental. ESDC operates independently, and the respondent would have had no knowledge as to when the AVC would be issued. Moreover, as early as February 8, 2019, Mr. Godbout informed the complainant that she would receive a letter outlining the options for regularizing her SLWOP status.

[252] The complainant alleged that the respondent waited through the summer of 2019 to see what ESDC would do before taking further action with respect to her status options. The evidence, according to the respondent, is to the contrary; Mr. Godbout's letter of September 3, 2019, was not a response to anything that ESDC was doing. Moreover, as indicated in *Vallée*, at para. 71, a coincidence in timing does not itself establish a causal link.

[253] The respondent also pointed out that any link between the complaints and leave status reflected the complainant's frequently expressed determination to deal with her situation "as a whole".

[254] The respondent concluded by submitting that the complainant failed to meet her burden to establish a violation of s. 147 of the *Code* under the *Vallée* test. The Board should dismiss the complaint.

C. Complainant's reply

[255] The complainant maintained that the respondent's actions imposed a disadvantage on her because the options presented to her were backstopped by the possibility of termination. The respondent identified termination as a contingency because it took the view that she could not RTW.

[256] The Supreme Court of Canada has consistently focussed on the fundamental nature and value of work. For the complainant, the possibility of losing the opportunity to work and the sense of identity that comes with working must be considered a disadvantage. The respondent's actions took the first steps toward termination.

[257] The complainant noted that the reference in *Ouimet* to tainting was also cited in *Babb v. Canada Revenue Agency*, 2008 PSLRB 38 at para. 47.

[258] The complainant disputed that considering whether the respondent's actions were tainted with retaliation would not have the effect of watering down s. 147 of the *Code*. Reading real protections into s. 147 is what gives that provision life and effect, consistent with the intent of the legislation to protect employees from reprisals for pursuing health and safety issues.

V. Analysis

[259] The onus of proof was on the complainant in this matter. In filing a complaint under s. 133 of the Code, she had to demonstrate through the evidence that the respondent acted in a fashion prohibited by s. 147 of the *Code*, meeting the civil standard; that is to say, on the balance of probabilities.

[260] The test for determining a breach of s. 147 was outlined in *Vallée* which I apply to this case:

> (1) Did the complainant exercise her rights under Part II of the *Code*?
> (2) Did she suffer a reprisal?
> (3) If so, was the reprisal of a disciplinary nature within the meaning of s. 147?
> (4) Was there is a direct link between the complainant's exercise of her rights and the actions taken against her?

[261] The evidence is clear that the complainant exercised rights under Part II of the *Code* by making her workplace violence complaint, by pursuing her concerns through the internal complaint process, and by twice referring complaints to ESDC. The controversy in the case before the Board focusses on whether the email and attached letter that Mr. Godbout sent to the complainant on October 2, 2019, comprised retaliation, i.e. reprisal, against her for her exercise of rights under the *Code*.

[262] The complainant had to establish both that the communication of October 2, 2019, fell within the scope of employer actions identified by s. 147 and that the respondent's actions were linked to her pursuit of her workplace violence concerns under the *Code*. The wording of s. 147 frames the first requirement; the second requirement involves a fact-based inquiry.

A. Did the respondent's action fall within the scope of s. 147 of the *Code*?

[263] When the Board interprets s. 147 of the *Code*, it understands that the underlying intent of the legislation is to ensure that employees can pursue concerns about the health and safety of their workplaces while protected from the threat of reprisals from their employers. A Board ruling should give life to that intent in keeping with requirement outlined in s. 12 of the *Interpretation Act* (R.S.C., 1985, c. I-21), as follows:

> ***Enactments deemed remedial***
>
> ***12*** *Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.*

[264] The decision in *DHL*, cited by the complainant, offered this supportive note, drawn from a ruling of the Ontario Court of Appeal in *Ontario (Ministry of Labour) v. Hamilton (City)*, [2002] O.J. No. 283:

> …
>
> *… Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.…*
>
> …

[265] Giving s. 147 of the *Code* a "fair, large and liberal construction" must nonetheless recognize the legislator's intent to define through specific words the scope of the provision. Those words must be given meaning consistent with the norms of statutory interpretation.

[266] A considerable part of the wording of s. 147 of the *Code* alludes to employer actions that fall under the rubric of discipline. Indeed, the main title preceding the first paragraph of s. 147 is "Disciplinary Action". While the respondent cited case law on what comprises discipline, there is no need to apply that case law in this case. I do not interpret the complainant's submissions as arguing in any sense that discipline was imposed or threatened. The evidence reveals no wrongdoing on the part of the complainant or any intent by the employer to correct her behaviour.

[267] The complainant's principal argument was that the email and attached letter that Mr. Godbout sent her on October 2, 2019, comprised a financial or other penalty. In the alternative, she submitted that the letter, "… while not in itself dismissal, constituted the first step in the Employer's procedure for termination for medical incapacity." She added in reply that the possibility of losing the opportunity to work and the sense of identity that comes with working can also be considered a disadvantage.

[268] Citing *Harris* and *Gaskin*, the complainant maintained that the term "penalty" should be given a broad interpretation. *Gaskin*, in particular, recognized that the "plain and normal meaning" of the word included a "loss or disadvantage" (at paragraph 75). The complainant submitted that her case involved a loss or disadvantage following the same logic in *Gaskin* when the complainant in that case received letters that prospectively suggested the suspension of his pay if he did not RTW on exhausting his sick-leave credits.

[269] On the latter point, I must note that *Gaskin* did not rule that the letter suggesting suspending the employee's pay violated s. 147 of the *Code*. The "logic" to which the complainant referred appeared in a highly qualified comment in paragraph 76 as follows:

> *76 Given that it is at least arguable that suspending regular pay on the exhaustion of sick leave credits can be viewed as imposing a "disadvantage or loss" due to the complainant's action (presumably, his failure to return to work), I accept that there may be a* prima facie *basis for characterizing the respondent's letters of May 13 and June 27, 2008, as imposing a "financial or other penalty," at least prospectively.*

[270] The respondent argued that the letter attached to Mr. Godbout's email of October 2, 2019, did not impose a penalty. Each option he presented to the complainant would have led to the continuation of her remuneration. There was no loss or disadvantage.

[271] On its face, nothing in Mr. Godbout's letter appears to suggest the respondent's intention to act in a manner that would impose a loss or disadvantage on the complainant. While the letter does require her to submit a medical certificate certifying her fitness to RTW "immediately", "[s]hould [she] wish to return to work …" — a

reference apparently not in keeping with normal practice — it does not identify a consequence in the event she failed to.

[272] Mr. Godbout's letter refers to, and must be understood in the context of, his second options letter. The second options letter does outline a consequence should the complainant not choose either to return to duty, resign or retire, or retire on medical grounds. Mr. Godbout wrote as follows:

> …
>
> *Please advise me in writing no later than **June 14, 2019** as to which option you wish to pursue. If no decision is made by this date, we may proceed with the termination of your employment for reasons other than breaches of discipline or misconduct pursuant to section 12 (1) I of the Financial Administration Act (FAA).*
>
> …
>
> [Emphasis in the original]

[273] The wording of Mr. Godbout's second options letter appears to support the complainant's contention that the options offered to her to regularize her SLWOP status were backstopped by the contingency of termination. It stands in distinction to Ms. Janvier's first options letter, which did not refer to the option of termination for incapacity. I believe that in that sense, the complainant characterized Mr. Godbout's communication on October 2, 2019, as the "first step" toward the termination of her employment; that is to say, a dismissal.

[274] Has the complainant then satisfied the requirement to establish that Mr. Godbout's letter of September 3, 2019, resent on October 2, 2019, comprised a penalty or dismissal within the meaning of s. 147 of the *Code*, given that it anticipated the possibility of a termination for medical incapacity?

[275] The complainant's contention has some initial appeal but, in my mind, is not sufficient to prove that Mr. Godbout's communication is appropriately viewed as imposing a loss or disadvantage — and thus comprising a penalty within the meaning of s. 147 of the *Code* — or that it can be brought under the s. 147 reference to dismissal.

[276] As made clear in the *Directive*, termination pursuant to the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*) is an option available to the respondent, as outlined in the following passage:

> …
>
> *Persons with the delegated authority are to regularly re-examine all cases of leave without pay due to illness or injury in the workplace to ensure that continuation of leave without pay is warranted by current medical evidence. Such leave without pay situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances.*
>
> *All leave without pay due to illness or injury in the workplace will be terminated by the person's:*
>
> - *return to work*
> - *resignation or retirement on medical grounds*
>
> …
>
> - *termination for reasons other than breaches of discipline pursuant to the* Financial Administration Act.
>
> …

[277] The options outlined in the *Directive* other than termination do not, in my view, involve a loss or disadvantage that could be considered a financial or other penalty under s. 147 of the *Code*. With a RTW, presumably at the same classification level, the complainant's financial situation would be returned to normal. Unless coerced, a decision on her part to resign or retire on medical grounds would voluntarily accept the financial circumstances that would attend either option.

[278] That she faced choosing those options was not in itself irregular. The evidence is clear that employees on extended SLWOP can expect to be asked to consider the options outlined in the *Directive*. In the complainant's case, a long period had passed since she began receiving disability benefits. To be sure, as of the hearing of this case, she remained on SLWOP.

[279] Given that termination for medical incapacity in circumstances of a protracted SLWOP was an option properly available to Mr. Godbout under the *Directive* (as a person with delegated authority), the question is whether identifying that option in the specific circumstances of the complainant's case brought the respondent into a breach of s. 147 of the *Code*.

[280] I believe that much caution is required in this instance. There is more than a little distance between evidence that Mr. Godbout raised a termination option under the *FAA* in the second options letter and a conclusion that the *Code* was breached by that reference. This is the same issue faced in *Gaskin*. Does the possibility or threat of an action have the same status under s. 147 as taking that action?

[281] In *Gaskin*, I considered whether a "threat of dismissal" qualified as a prohibited action under s. 147. I wrote as follows:

> *68 … With respect to the characterization, I find that the reference to "dismissal" in section 147 of the* Code *cannot be read as including a "threat of dismissal." The legislator specifically mentions both "disciplinary action" and threatened disciplinary action in the same part of section 147. If it intended that the concept of a threat of action should apply equally regarding dismissal, section 147 would have specified so.*

[282] I continue to believe that the plain wording of the opening paragraph of s. 147 of the *Code* does not contemplate threatened action other than with respect to discipline. The wording "… take any disciplinary action against or threaten to take any such action against an employee …" is clearly distinct. When the legislator listed other types of actions in the opening paragraph, including dismissal and a financial or other penalty, it did not include any reference to the threat of such actions. That distinction should be given meaning.

[283] The complainant's characterization of the reference to termination for incapacity in the second options letter as the first step toward dismissal is telling. I read the reference as situating termination for incapacity as a contingency, should she not choose one of the options for regularizing her SLWOP status, but not as the inevitable outcome. A contingency is a future event or circumstance that is possible, but not guaranteed. The imagery of a first step suggests that there could be other steps along the way before the contingency becomes a reality — or that intervening events could come into play that would take the contingency off the table.

[284] When Parliament used words such as "… shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee …" in s. 147 of the *Code*, I believe that it identified real actions, not contingencies. Raising the possibility of termination for incapacity, even if characterized as a threat of dismissal, is not an action that falls under s. 147. Similarly, I am unable to accept that the

wording of s. 147 encompasses the contingency that the complainant **might** experience a financial or other penalty or **might** be subject to a threat of such a penalty. I am more persuaded that there would have to be proof that a financial or other penalty — a loss or disadvantage — was actually imposed, or would necessarily eventuate, to answer in the affirmative the question, "Did the respondent's action fall within the scope of s. 147 of the *Code*?"

[285] The foregoing analysis thus finds that the complainant failed to prove that the respondent's actions fell within the scope of s. 147 of the *Code*. Even had the respondent threatened a penalty or dismissal, s. 147 requires more than a threat of a penalty or a threat of a dismissal. The balance of the evidence does not take me that further step.

[286] In the event that I have erred in finding that s. 147 of the *Code* does not include the possibility or threat of a penalty or dismissal as prohibited actions, I have decided to go further to entertain the second question: Assuming for that purpose that the respondent's actions can be viewed as contemplating a penalty or a dismissal within the scope of s. 147, were those actions linked to the complainant's exercise of rights under the *Code*?

B. Was the action linked to the complainant's exercise of rights under the *Code*?

[287] The parties appear to disagree on what is required to establish a link or nexus between the respondent's actions and the complainant's exercise of rights under the *Code*.

[288] The complainant submitted that her burden was to establish that the respondent's actions were tainted with retaliation. She further maintained that the exercise of rights by an employee must be a proximate cause for the employer's actions but not necessarily the sole cause; see *Chaney*, at para. 32; and *Martin-Ivie*, at para. 71.

[289] Citing *Vanegas* and *Larivière*, the respondent argued that retaliatory action must be inextricably linked to the complainant's exercise of her rights under the *Code*. It also disputed her contention that based on *Ouimet*, its burden was to show that the October 2, 2019, email and letter were tainted with retaliation. According to the respondent, reading tainting into s. 147 would improperly water down the existing

statutory framework. It argued further that proximity or simple links are not sufficient to establish retaliatory intent. Under *Vallée*, there must be a direct link, not just any link.

[290] I am not convinced that the concepts of "proximate cause" and "inextricable link" necessarily conflict. My understanding is that a proximate cause is one that is sufficient to produce the alleged result. When an inextricable link exists, the cause and the result cannot be separated or disentangled. In both senses, the linkages must be direct, as contemplated by the test in *Vallée*. When a direct link exists, there may be other contributing factors, but the stipulated cause sufficiently explains the result.

[291] I prefer then to ask whether the complainant has proven through the evidence that there was a direct link between the respondent's actions (the email and attached letter that Mr. Godbout sent her on October 2, 2019) and her exercise of rights under the *Code*. Was her exercise of her *Code* rights the sufficient reason or cause behind the respondent allegedly taking the alleged retaliatory action?

[292] As to the concept of tainting, I find the term somewhat vague and difficult to apply. It might be said that a result is tainted to the extent that it has been touched or coloured by a consideration without that consideration in and of itself being sufficient to bring about the result. What degree of tainting is sufficient to establish retaliation? If the retaliatory taint on a respondent's action were to be considered minor, or a secondary factor, would it still signal a violation of s. 147 of the *Code*?

[293] The reference to tainting in *Ouimet* appears at paragraph 56, as cited by the complainant in argument. It seems to me that paragraph 56 must be understood in the context of what the decision maker wrote earlier, at paragraph 48, as follows:

> *[48] The complainant has the duty to convince the Board that the disciplinary action the employer took against him resulted from the fact that, as the union representative on the Health and Safety Committee, he was involved in Mr. McGrail's refusal to work, and from the fact that he is co-chairperson of this committee, and that it is therefore a violation by the employer of section 147 of the* Code *….*

[294] To my understanding, the expression "resulted from" has a stronger sense than the notion of tainting. It conforms more closely to the requirement outlined in *Vallée* to prove a direct link between a respondent's alleged retaliatory actions and the

exercise by a complainant of rights under Part II of the *Code*. The preponderance of the case law also supports the need to establish a more direct link than, I believe, the term "tainting" connotes. For that reason, I decline to adopt the concept of tainting as part of the test for a violation of s. 147.

[295] Apart from submissions that I have already addressed, the complainant offered three principal arguments supporting her position that Mr. Godbout's communication of October 2, 2019, was directly linked to her exercise of *Code* rights, and thus was a prohibited retaliation.

[296] The complainant's first argument, as stated in the aide-memoire as follows, addressed Mr. Godbout's communications in February 2019:

> …
>
> *33. … Mr. Godbout's communications in February 2019 demonstrate that the decision to proceed with the options process was directly linked to the fact that Ms. Lueck had chosen to proceed with the complaint process under the* Canada Labour Code *rather than a facilitated discussion of these issues with the Employer. These include Mr. Godbout's February 8, 2019 email to Ms. Lueck, as well as his February 15, 2019 email to Ms. Alarie and Ms. Janvier.*
>
> …

[297] The texts of the two communications from Mr. Godbout specifically cited by the complainant read as follows:

> [Email of February 8, 2019, to the complainant:]
>
> …
>
> *I wish to express my sincere regret that you have decided not to participate in the proposed facilitated discussion. As you know, part of the discussion would have been to discuss your current leave situation and how it could be regularized.*
>
> *I must inform you that you will be receiving a letter in which you will be asked to choose from the following options:*
>
> *1) Return to work if medically certified as fit,*
> *2) A Medical Retirement (Subject to Health Canada approval),*
> *3) Regular Retirement*
>
> *Please be aware that you may, at any time during this process, reconsider your decision and choose to participate in a discussion with me, facilitated through a mediator.*
>
> …

[Email of February 15, 2019, to Ms. Alarie, copied to Ms. Janvier:]

…

As we've been unable to connect via telephone, I thought I'd try email.

It is now 2 weeks since Kristine rejected the proposed facilitated discussion and requested to proceed with ICMP.

What is HWL's plan for next steps?

…

[298] According to the complainant, the nexus between her workplace violence complaint and Mr. Godbout's efforts to address her SLWOP status was already apparent in his February 2019 communications, as illustrated by the foregoing emails.

[299] It is important to be clear that evidence of what Mr. Godbout said or did in February 2019 cannot directly prove the retaliation alleged by the complainant. If that were the case, she could have made but did not make a complaint under s. 147 of the *Code* within 90 days of the events of February, as required by s. 133(2). The February evidence, or any evidence from a period outside the 90-day filing time frame, is relevant only to the extent that it sheds light on the nature of his subsequent communication in October 2019.

[300] Given that qualification, I reviewed the evidence of developments in February 2019, including the two emails highlighted by the complainant, for an indication of the alleged nexus. I did not reach the same conclusion she did.

[301] Sometime after his arrival in August 2018, Mr. Godbout learned about both the complainant's workplace violence issues and the question of her leave status. He testified that he depended on experts in the different sections of the organization responsible for the two matters to brief and advise him. By the time of his meeting with the complainant on November 9, 2018, he was prepared to discuss all the outstanding issues.

[302] With her follow-up email of November 13, 2018, Mr. Godbout clearly understood her insistence that her concerns about workplace violence would have to be resolved if there was to be a discussion about regularizing her leave status. In essence, for Mr. Godbout, both the complaint and leave processes were actively on the table from that point forward.

[303] Both processes continued to be on the table after the complainant refused the proposed facilitated discussion. In cross-examination, Mr. Godbout rejected the proposition that in the wake of the failed mediation initiative, he addressed the complainant's SLWOP status because she was taking steps to advance her workplace violence complaint. He maintained that he acted in line with policy requirements to regularize the leave status of an employee on long-term disability. He stated his view that the two processes could move forward in parallel.

[304] On balance, I find that the evidence tends to support Mr. Godbout's depiction. As the second sentence of his email of February 8, 2019, made clear, he had hoped that a facilitated discussion would offer an opportunity to discuss leave options in addition to the workplace violence matters raised by the complainant. He was disappointed that that opportunity to resolve both matters had not occurred. The wording of the email states nothing more that would convince me that Mr. Godbout was linking his desire to proceed with the leave issue to the complainant's persistent pursuit of her workplace violence concerns.

[305] The timeline of communications during this period is of interest. The complainant declined the proposed facilitated discussion on January 30, 2019, leaving Mr. Godbout to decide what to do with respect to both processes. Notably, he addressed the complaint process immediately and separately in an email to her on February 1, 2019. The detailed email explained the internal complaint resolution process under the *Code* and advised her about contacting the committee co-chair about the second step in that process. The email made no mention of her leave status.

[306] Instead, Mr. Godbout chose to address the leave issue as a separate subject one week later in the February 8, 2019, email. The separation of his communications about the two processes tends to support his description of those processes as operating in parallel. When he then asked Ms. Alarie on February 15, 2019, about the next steps with respect to the complainant's leave status, he again did so separately. In this instance, he did not copy the email to advisors on the complaint process side. In my opinion, the wording of the February 15, 2019, email to Ms. Alarie does not establish that next steps were necessary because the complainant was forging ahead with her complaint, only that they were needed because the opportunity to discuss her leave status in the proposed facilitated discussion had not come to pass.

[307] The essential point is that evidence showing that Mr. Godbout wanted to move forward with the leave process after the effort to engage the complainant in a facilitated discussion failed does not itself establish that moving forward with the leave process was the result of her continued efforts to press her rights under the *Code*. Both the complaint and leave processes remained active because mediation did not take place. In that sense, both processes were unresolved for the same reason. Taking the further step of arguing that there was thus a nexus between the two processes of the type prohibited by s. 147 of the *Code* makes more of the evidence than I believe can be justified.

[308] The complainant's second principal argument focusses on Mr. Godbout's efforts to move the leave process forward as "expeditiously as possible" beginning in February 2019, as follows:

> …
>
> *34. Second, rather than running independently as one would expect, the timelines related to the options letter were tightly connected to the timeline of Ms. Lueck's complaint. Once Ms. Lueck rejected mediation and indicated her desire to proceed with the second stage of the ICMP process, Mr. Godbout sought to move the process for the options letter forward as "expeditiously as possible", explaining that he felt he had a duty to resolve Ms. Lueck's sick leave without pay situation in a timely manner. But this explanation does not fit with the fact that there was almost no action between the July 18, 2018 meeting between Ms. Janvier and Ms. Lueck, and Mr. Godbout's December 14, 2018 offer of mediation, which fell well outside the October 31st timeline Ms. Janvier had provided Ms. Lueck.*
>
> …

[309] The complainant's second argument extends her first by positing that the timelines related to the leave process going forward were "tightly connected" to the timelines of her complaint. The argument appears to suggest further that the contrast between Mr. Godbout's desire to move forward with issuing an options letter as "expeditiously as possible" after the complainant rejected mediation and the alleged lack of action between Ms. Janvier's June 2018 letter and the December 2018 offer of mediation reinforces her argument for the existence of the nexus.

[310] If I have properly understood the significance of the contrast alleged by the complainant, I find it unpersuasive. The relevant periods must be reckoned in terms of

Mr. Godbout's involvement because his actions in October 2019 were the subject of the complaint.

[311] Mr. Godbout arrived in August 2018. He met with the complainant on November 9, 2018. If the intervening period is construed as inactive — despite the evidence that he actively reviewed the complainant's situation with his advisors in the interim and prepared to meet her — the alleged period with "almost no action" was something less than three months. The period between the failure of the effort to hold a facilitated discussion with the complainant and Mr. Godbout's first subsequent outreach to her after February — his attempt to call her in late May about the forthcoming options letter — was also about three months. On a very simple level, one might well wonder whether Mr. Godbout actually proceeded more expeditiously during the latter period compared to the former.

[312] To be sure, the evidence does indicate that Mr. Godbout was active in his attempts to move forward with the leave issue between February and the end of May 2019, whether expeditiously or not. Among other actions, on March 26, 2019, he signed off on a briefing note from Mr. Chown to Mr. Danagher about options to resolve the complainant's SLWOP status. He emailed Ms. Alarie on March 28, 2019, to inquire about the status of the draft of a new options letter. He received a draft from Ms. Alarie on May 14, 2019, and responded to her with "… one or two tweaks and a couple of Q's…" on the same day. Ms. Alarie returned a revised draft to him on May 16, 2019. In turn, Mr. Godbout sent a briefing email to Mr. Chown with the draft options letter, also on May 16, 2019. (I note parenthetically that Mr. Godbout's email contained no reference to the continuing complaint process.) Mr. Godbout then attempted unsuccessfully to contact the complainant by telephone within days. His second options letter followed on May 30, 2019.

[313] What was happening during the same period with respect to the complainant's workplace violence complaint? On that front, there were important developments. On March 4, 2019, she and her union representative met with Ms. Bisson and one other member of the local OHS Committee. The committee issued its decision on April 4, 2019, recommending that the matter of the impartiality of the Cantin investigation be referred to ESDC. ESDC then issued the AVC on May 30, 2019, requiring that the respondent appoint a competent person to investigate.

[314] Mr. Godbout was involved. He testified that he received the OHS Committee's report dated April 4, 2019, and that he understood that the committee's view was that impartiality had not been maintained throughout the Cantin investigation. He wrote to Mr. Renaud at ESDC on April 24, 2019, stating the department's position that the OHS Committee erred in its findings. He asked ESDC to investigate further.

[315] There is no question that the evidence establishes that both processes were moving forward at the same time in the period from February 2019 to the end of May 2019. The complainant's argument takes the evidence further to claim a tight connection indicative of a prohibited nexus. The underlying proposition appears to be that when two processes are active at the same time, it is more likely than not that they are closely linked, and further that developments in one process are more likely than not to account for what happens with the other.

[316] The linkage argued by the complainant is not entirely implausible but, in my opinion, is not the more likely explanation. I am more persuaded once again that the evidence better supports Mr. Godbout's characterization of two processes moving forward in parallel.

[317] Reviewing all the testimonial and documentary evidence about this period, I am unable to find convincing signs that for Mr. Godbout, it was imperative to move forward to address the complainant's SLWOP status **because** her workplace violence complainant remained active and was reaching a more serious stage with ESDC's involvement. He clearly denied such a linkage in his testimony when pressed on the point multiple times and in different ways in cross-examination. While there were several concerning lapses in his testimony when his memory seemed to fail, overall, I found him to be a truthful and credible witness.

[318] I should note that the evidence did indicate that at least once, the two processes were subject to a common concern about timing. On April 12, 2019, Ms. Janvier identified an issue about the "proper timing" of the options letter in an email, copied to Mr. Godbout, which also mentioned a briefing note that Ms. Crête was to send about the referral of the complaint to ESDC.

[319] On its face, the email suggests the possibility of a strategic link between the two processes. However, I was dissuaded by Ms. Janvier's explanation in cross-examination that the email demonstrated the nexus argued by the complainant. She testified that

the purpose of the email was to clarify the roles and responsibilities of the two sections in the department dealing with the complainant's issue but not to coordinate those activities. Her contribution, the options letter, was on hold so that the labour relations side could determine "… that chronological steps have been taken to ensure proper timing to send the letter." Sequencing the options letter with developments on the labour relations side indicates a certain level of internal co-ordination but not, in my view, one that would be sufficient to establish prohibited action under s. 147 of the *Code*.

[320] The further evidence that discussions were occurring at the time at senior leadership levels in the department to coordinate a response to the complainant's letters to Minister Freeland and the Prime Minister offered good reason that the timing of communications with the complainant about **any** matter would be a sensitive subject for all involved staff.

[321] The timing of the two processes came together again on May 30, 2019. Mr. Godbout sent the second options letter to the complainant. On the same day, ESDC issued the AVC to the department. Quite clearly, this was purely a coincidence. Nothing in the evidence suggests that Mr. Godbout, or anyone reporting to him, had foreknowledge that ESDC would issue the AVC on May 30, 2019. Nothing establishes that Mr. Godbout acted on his long-standing intent to send a second options letter because of the possibility that ESDC was about to issue a decision with respect to the complaint's workplace violence case.

[322] After May 30, 2019, through to September 3, 2019, when Mr. Godbout attempted to send the complainant's counsel a follow-up letter about her options, he continued to be involved with the leave process. The most important developments were his receipt of the letter from the complainant's union representative, Mr. Béland, on June 3, in which he indicated that the complainant was receiving treatment but that she expected to RTW when she successfully completed the treatment regime. Mr. Godbout replied directly to the complainant on June 7, requesting that she indicate her willingness to undergo a Health Canada medical assessment to determine her ability to RTW by June 14. Counsel for the complainant responded on her behalf on June 14. He asked Mr. Godbout to rescind his options letter until the ongoing complaint processes concluded. He also addressed the possibility of an IME. Mr. Godbout apparently did not

reply, and there is no further evidence of major developments on the leave options issue before September 2019.

[323] On the complaint front, the evidence of Mr. Godbout's involvement from mid-June to the end of summer 2019 is limited. He exchanged emails with Ms. Lavigne on July 25, 2019, about the lack of a response from ESDC to that date to a letter sent by Ms. Crête on June 21, 2019, to ESDC, which responded to the AVC. He indicated that he had briefed his superior and that he had told Ms. Lavigne that he thought it would be time to reach out to the complainant, explaining that the department was waiting for a response from ESDC to the issues raised by the AVC. Ms. Lavigne committed to keeping Mr. Godbout informed about next steps once ESDC's position clarified. The evidence does not reveal further exchanges of substantive importance involving Mr. Godbout about the AVC or about communications with ESDC or the complainant through the summer of 2019.

[324] To my satisfaction, the evidence of developments during the period from June through August 2019 does not provide any compelling indication of a tight connection between the leave and complaint processes. As in the case of the previous period, on balance, I am more persuaded that the two processes continued to move forward in parallel, as maintained by Mr. Godbout. The June 14, 2019, reply from counsel for the complainant obviously linked the two processes by urging Mr. Godbout to set aside the issue of leave options pending the resolution of the workplace violence complaint. However, he did not respond, and the documentation of his limited subsequent involvement with the complaint file makes no mention of leave options.

[325] As stipulated earlier, evidence from periods before the 90-day time frame in which to make the complaint under s. 147 of the *Code* is relevant only to the extent that it sheds light on the nature of Mr. Godbout's communications in September and October 2019. My analysis to this point has not revealed a background context that would cast his September and October communications as the culmination of an approach to the complainant's situation that was retaliatory in nature.

[326] The third main argument submitted by the complainant brings us to the circumstances around Mr. Godbout's September and October communications, which are the direct subject of the s. 147 complaint. It should be noted that Mr. Godbout's letter to counsel for the complainant was, in part, a delayed response to counsel's

representations of June 14, 2019, which linked the leave and complaint processes and asked Mr. Godbout to rescind his letter until the ongoing complaint processes concluded. Mr. Godbout addressed the alleged linkage twice in the September 3, 2019, letter and insisted as follows that there was no such linkage:

> …
>
> *Ms. Lueck received two "*Options letters*", one dated June 28, 2018, the second dated May 30, 2019. These letters are not related to her workplace violence complaints. In fact, Ms. Lueck received a phone message from her manager the week of May 20th 2019 requesting a meeting with her and informing her that she would be receiving the second options Letter.*
>
> …
>
> *We understand that the outcome of the* Internal Complaint Resolution Process *conducted by Employment and Social Development Canada to examine elements of the Investigation regarding the Violence in the Workplace complaint is not finalized. Although we respect your position, the employer's request for Ms. Lueck to resolve her sick leave without pay situation is based on the aforementioned reasons and is not related to the receipt of the Assurance of Voluntary Compliance issued by ESDC Senior Investigator, Sylvain Renaud.*
>
> …

[327] Obviously, Mr. Godbout's denial of the linkage is not definitive proof that no such linkage existed. Nonetheless, his statements clearly comport with his repeated testimony that the leave and complaint processes moved forward in parallel and that decisions in the former process were not a response to developments in the latter process. The complainant's burden to establish that the communication exhibited a prohibited action within the meaning of s. 147 of the *Code* must show that in effect, Mr. Godbout was wrong or untruthful. Certainly, I have no reason to believe that he failed to comply with his oath to provide true evidence.

[328] The complainant's third argument identified five factors at paragraph 36 of her aide-memoire to support her contention that "… the circumstances surrounding the correspondence from Mr. Godbout for the complainant in September and October of 2019 confirm [the] connection." The first factor read as follows:

> *a. Mr. Godbout knew that Ms. Lueck saw the options letters as an intimidation tactic. Both he and Ms. Janvier acknowledged they understood the need to be cautious to avoid harming her*

> *through [sic] process in July 2018 and December 2018, given Lueck's vulnerability.*

[329] The evidence supports the complainant's contention that Mr. Godbout knew that she would very likely view his second options letter as intimidating. He testified that in a briefing note to senior executives, he included a statement that she viewed the options letter as an intimidation tactic, although he disagreed with her. The evidence also shows that at times, there was caution in his consideration of how and when to approach her, given her personal circumstances. For example, he testified that he consulted a colleague for advice about the appropriate venue for his November 2018 meeting with her. In his words, Mr. Godbout did not want to trigger her in some way.

[330] If I understand the inference underlying the complainant's argument, the fact that Mr. Godbout sent his letter in September 2019 and then copied it to her on October 2, 2019, despite knowing that she would likely view it as a continued intimidation tactic, revealed something about how he linked the leave and complaint processes. I struggle to understand how. For example, I am unable to identify a proximate development on the complaint process front that somehow explains why and how he communicated about leave options the way he did in September and October.

[331] In his testimony, Mr. Godbout could not recall if he received a response from ESDC to his original letter to Mr. Renaud. He testified that as of August 2019, he still considered that "the ball was in ESDC's court". To be sure, the evidence does not reveal a significant development involving ESDC during the summer months of 2019, which might have caused Mr. Godbout to move forward with the leave options process if it were in fact the case that the two processes were tightly connected.

[332] Mr. Godbout did recall eventually seeing a letter from Mr. Renaud. However, it was not a response to Mr. Godbout but rather an explanation to the complainant of his finding that GAC had complied with the *Code* and that the methods used in the investigation did not fall within the *Code*'s jurisdiction. Mr. Renaud's letter was dated November 19, 2019, well after Mr. Godbout's September and October communications.

[333] Apart from the absence of a clear development on the complaint side that might explain why Mr. Godbout acted on leave options in September and October, I am left

without a sense of how, as inferred by the complainant's submission, his recognition of the need to be cautious approaching her or him being concerned about her vulnerability says something about the retaliatory nature of his communications. Does she contend that given her state of mind or situation, any effort on his part to move ahead with regularizing her SLWOP status could or would have brought him into breach of s. 147 of the *Code*? Was he required not to apply the *Directive* unless and until there was no risk of harming her further?

[334] I do not believe that the complainant would take her argument quite that far, but nonetheless, there is a sense in her submissions that moving forward on the leave options front — whenever — without a resolution of the workplace violence complaint in a manner satisfactory to her would always be deemed offensive. However, the reality was that Mr. Godbout had the right to try to regularize her leave status, provided he did so in accordance with the *Directive*, and unless how he sought to move forward, or its timing, could be proven retaliatory.

[335] The second factor is this:

> *b. Mr. Godbout believed that Ms. Lueck could not return to work in [sic] foreseeable future. Documents he had approved had previously made references to "separation letter" and statements [sic] an employer briefing note suggest that she was "incapacitated".*

[336] Mr. Godbout testified that he based his belief that the complainant would not be able to return in the foreseeable future on information provided by the insurer. Sun Life wrote to the complainant on September 7, 2017, stating that her benefits continued to be approved "… because at this time, your health prevents you from working at any occupation". In a covering email sent by a representative of the insurer to the department, the representative wrote that she did not anticipate "… that Ms. Lueck will be able to return to work, in any capacity, for the foreseeable future." To the extent that he relied on that medical evidence, Mr. Godbout's belief was sound unless, of course, newer information became available that suggested something different.

[337] The reference to "separation letter" relates to a briefing note prepared in March 2019 by Ms. Alarie and signed by Mr. Chown. Asked about the reference, Mr. Godbout testified that the note used the expression "separation options" and that it did not explicitly refer to the possibility of the complainant returning to work. Pressed on that

point, he agreed that he had conveyed to his superiors that the situation was essentially about separation. Nevertheless, he insisted that the complainant's return to the workplace, while the "less likely outcome", was not excluded.

[338] The principal reference in the record to the complainant being "incapacitated" is found in a draft briefing note to Mr. Danagher from Mr. Godbout, again prepared by Ms. Alarie. The main paragraph describing the complainant's status reads as follows:

> …
>
> *KL is currently on indefinite SLWOP and has been off work since March 6th, 2015. She has exhausted all paid sick leave credits and is in receipt of disability insurance benefits from Sunlife since June 4th, 2015, the Government of Canada's insurance carrier. On September 7th, 2017, Sunlife advised the Department that they do not anticipate the employee's medical condition to improve to a point where she will be able of return to any type of commensurate work. She continuous to be incapacitated due to her illness and has passed the 24 month threshold for the elimination period for disability benefits. Sunlife has deemed her unable to work and she continues to receive monthly income replacement benefits, which are equal to 70% of her monthly salary (reduced by any other sources of income). She is eligible to receive these benefits until the age of 65.*
>
> …
>
> [*Sic* throughout]

[339] Ms. Alarie's description indicates that there had been no change in the department's understanding of the complainant's medical condition since the 2017 communication from Sun Life.

[340] The issue of updating the complainant's medical information through her physician or through an IME was subsequently the subject of several communications. Mr. Godbout himself addressed the need for medical information when he responded directly to the complainant in reply to a communication from Mr. Béland, who on June 3, 2019, had reported that the complainant was receiving treatment and expected to RTW when she successfully completed the treatment regime. In his email dated June 7, Mr. Godbout requested that the complainant undergo a Health Canada medical assessment to determine her ability to RTW if she intended to return. If she agreed, Mr. Godbout reassured her that her "… sick leave without pay will be extended during the medical assessment process." Counsel responded on June 14, indicating his client's willingness to arrange an IME "… once this [complaint] process is behind her."

[341] In his September 3, 2019, letter to counsel. Mr. Godbout wrote that the complainant "… must provide management a medical certificate from her treating physician stating that she is fit to do so immediately." The response that he eventually received from counsel two months later, on November 15, had attached an opinion from the complainant's physician that read as follows:

> …
>
> *… MS. LUECK would only be psychologically ready for a possible trial of returning to work if there was a satisfactory resolution to the conflict… She will need a very gradual trial of returning to work before assessing if she is able to work full time in the future.*
>
> …

[342] The underlying question, in my view, does not concern the medical evidence as such but rather whether Mr. Godbout was determined that the complainant not RTW, whether he was focussed on "separation", **and** whether the reason for his determination to regularize her status — that is to say, to arrange her separation — was linked directly to her workplace violence case.

[343] The evidence suggests that Mr. Godbout was realistic in his belief that the complainant's return to the workplace was the "less likely outcome". His belief was supported by the limited medical evidence to which he had access, particularly before fall 2019. The evidence does not take me further to conclude that he had made up his mind to achieve the separation of her employment.

[344] Instead, the evidence fairly suggests that Mr. Godbout had serious concerns about the complainant returning to work. As was appropriate in applying the *Directive*, he needed medical assurance that she was fit for duty, although he erred when he seemed to have in mind evidence of her fitness to return "immediately". He admitted to that error in his testimony.

[345] The best indication in the evidence about Mr. Godbout's concerns, or at least his cautious perspective on the complainant's return, came in cross-examination. Asked how he felt about her returning to work if a medical evaluation indicated that she could, he answered that a determination would require more than just medical evidence. He stated that he wanted to ensure that a RTW would be successful and that everything possible would be done to achieve that objective. He wanted to prevent a recurrence of the harassment that she had experienced and to be confident that

lessons had been learned and that the workplace environment would be supportive and engaging for her. Mr. Godbout indicated that he would make every effort to respect a determination that the complainant could RTW but suggested that the workplace might not look exactly like it had before.

[346] While based on his testimony, I suspect that in the end, Mr. Godbout preferred that the option of the complainant returning to work was off the table, the salient point is that he never definitively wrote off that option or took deliberate and concerted steps to ensure that it could not occur. Had he done so, an allegation that he acted in a retaliatory manner would perhaps have some resonance. As is, the evidence falls short.

[347] The third factor is this:

> *c. May 30, 2019, Mr. Godbout sent the second options letter giving Ms. Lueck less than 15 days to respond, despite standard length being 20-30 days.*

[348] In cross-examination, Ms. Janvier agreed that the deadline for a response in the second options letter was shorter than the period normally provided. Beyond finding that Mr. Godbout deviated from established practice, I fail to see how that deviation related to the alleged linkage between the leave and complaint processes. Even if it did reveal something about that linkage, the short response period in the second options letter was not replicated in Mr. Godbout's September 3, 2019, letter to counsel for the complainant. That letter sought a response by October 4, 2019, in keeping with normal practice. When on October 3, 2019, counsel for the complainant informed Mr. Godbout that he had no record of receiving the letter, Mr. Godbout extended the time frame for a response, once more in keeping with normal practice.

[349] The fourth factor is this:

> *d. Mr. Godbout's focus on filling Ms. Lueck's position on an indeterminate basis, despite advice from the relevant "subject matter experts" who cautioned that doing so could prejudice Ms. Lueck in her priority status if she were to return to work.*

[350] The fourth factor accurately reflects the evidence. In an email dated September 26, 2018, Ms. Janvier advised Mr. Godbout that the option of filling the complainant's position on an indeterminate basis should be "carefully explored". Her concern was

that staffing the complainant's position on an indeterminate basis could affect the complainant's entitlements under the staffing regime. Ms. Janvier suggested a term appointment as an alternative.

[351] I believe that it is undisputed that Mr. Godbout was entitled under policy to proceed with an indeterminate staffing action and that the respondent could have done so earlier. *Belisle*, cited by the respondent, confirmed that an employer is not required to maintain an employee's status if the employee is unable to RTW. How Mr. Godbout's reference in the second options letter to the possibility of indeterminate staffing can be taken not just as a statement of an option sanctioned by policy but further as showing the alleged linkage between the leave and complaint processes is not apparent to me. My reticence to accept that depiction is amplified by the fact that Mr. Godbout's reference to the possibility of indeterminate staffing was virtually identical to a passage in Ms. Janvier's options letter. Ms. Janvier wrote as follows:

> …
>
> *The* Directive on Leave and Special Working Arrangements *also stipulates that a substantive position occupied by an employee on leave without pay can be staffed on an indeterminate basis if the period of leave or consecutive periods of the same type of leave exceed one year. Should your position be filled on an indeterminate basis, Global Affairs Canada will advise you accordingly. In such a case, you will be entitled to a leave of absence priority pursuant to section 41(1) of the* Public Service Employment Act.
>
> …

[352] Here is the comparable passage from Mr. Godbout's second options letter:

> …
>
> *The Directive on Leave and Special Working Arrangements also stipulates that a substantive position occupied by an employee on leave without pay can be staffed on an indeterminate basis if the period of leave or consecutive periods of the same type of leave exceed one year, however for leave without pay situations for reasons of illness, this period is usually extended to two years. Should your position be filled on an indeterminate basis, Global Affairs Canada will advise you accordingly. In such a case, you will be entitled to a leave of absence priority pursuant to section 41(1) of the Public Service Employment Act.*
>
> …

[353] The complainant's argument did not impugn Ms. Janvier's letter for its reference to the option of indeterminate staffing. It does not follow then that the same reference in Mr. Godbout's letter, almost identically worded, should be found inappropriate, or worse. The clear similarity of both passages, in my view, strongly supports a characterization of Mr. Godbout's communication as conforming to a standard format used by the respondent. I note further that the reference to indeterminate staffing does not reappear in his September 3, 2019, letter to counsel.

[354] Mr. Godbout's September 3, 2019, letter was not entirely problem-free. By stating that the complainant should provide "… a medical certificate … stating that she is fit to [RTW] immediately", if she wished to RTW, he incorrectly stated the required medical determination, as indicated previously. In her letter, Ms. Janvier wrote that the operative consideration was whether an employee is able "… to return to duty within the reasonably foreseeable future …". Mr. Godbout repeated that reference in his second options letter. Why he departed from the correct formulation in his September letter is unclear. That he did so is troubling, but I can draw no further inference from the departure.

[355] The fifth factor reads:

> *e. On June 14, 2019, counsel for Ms. Lueck asked for the options letter to be rescinded until the workplace issues were resolved and proposed that she could provide an IME "to assess whether it is possible that Ms. Lueck will be able to return to work once this process is behind her". Mr. Godbout responded on September 3, 2019, in a letter re-sent on October 2, 2019, stating: "Should Ms. Lueck wish to return to work, she must provide management with a medical certificate from her treating physician stating that she is fit to do so immediately". He did so despite knowing how vulnerable she was and that the relevant question was whether she could return to work in the foreseeable future.*
>
> …

[356] I believe that I have substantially addressed the complainant's fifth factor in discussing the first and second factors and in evaluating other arguments.

[357] At the hearing, the complainant asked what one would have expected to see if the leave options and complaint processes were truly independent. She answered that there should have been a real, functional separation of decision making that kept the

two processes much more apart. Someone exclusively concerned with disability management, like Ms. Alarie, should not have been copied and kept in the loop with respect to matters exclusively dealing with the ESDC complaint. In the complainant's submission, those responsible for disability issues had "no business whatsoever" following the complaint process; yet, during summer 2019, everyone was allegedly monitoring developments with ESDC. For his part, Mr. Godbout did not keep communications about the two processes separate as should have been the case. Many of his emails crossed over what were supposed to be the boundaries of sectional responsibilities.

[358] I must note that I believe that the complainant's proposition that everyone was monitoring developments with ESDC during summer 2019 might have stretched the evidence to some extent. It seems clear that Mr. Godbout and others waited throughout the summer for ESDC to pronounce on the complaint, but the evidence of active monitoring is not extensive.

[359] The issue of discussions and communications crossing between sections attracted considerable attention in the oral evidence. Ms. Janvier, for example, testified that her team interacted with individuals who dealt with workplace violence complaints but maintained that the interaction focussed only on providing information about leave status, the possibility of a RTW, and RTW accommodation measures. She stated that disability management decisions were not coordinated with other events taking place on an employee's file. If developments with respect to a workplace violence complaint affected an employee's status, her team would be "kept in the loop". Ms. Janvier also testified that it was necessary for her and Ms. Lavigne to coordinate their efforts when "briefing up" to senior managers who were responsible for both their sections.

[360] In cross-examination, the complainant asked Mr. Godbout why either Ms. Lavigne or Ms. Crête should have been involved with, or copied on, communications about disability management. He answered that it might have been helpful to them to understand the department's engagement with the complainant on the disability management side. He also testified that he might have mistakenly emailed Ms. Crête on a disability matter and that there would have been no work-related reason for having done so. Equally, he testified that he would not have expected disability management staff to be copied on matters exclusively related to the workplace violence complaint.

As a director, he agreed that he was in a position to ensure that the two functions operated independently and that at least hypothetically, failing to maintain separation might raise issues about the integrity of each process.

[361] In re-examination, Mr. Godbout testified that addressing emails to both labour relations experts and disability management experts was an effort to ensure each area's awareness of the other's activities and to avoid the situation of the complainant becoming overloaded with contacts from the department. He also stated his view that the approach was consistent with the complainant's wish to have her situation addressed as a whole.

[362] In my view, expecting different sections of the department involved with the complainant's file to strictly avoid interaction to ensure their independence is too demanding a requirement. It is also unrealistic when the ease of electronic communications so readily facilitates the wider sharing of information, whether purposeful or inadvertent. To be sure, at times, interaction between sections was appropriate and necessary. Ms. Janvier's explanation of the need for some level of coordination when briefing up to senior managers stated the point well.

[363] I cannot make more of the evidence of cross-sectional communications. While I might accept that those communications should sometimes not have occurred, the real issue is whether they revealed a linkage between actions on the leave options side and actions with respect to the workplace violence complaint that could be taken to prove retaliation within the meaning of s. 147 of the *Code*. As in other elements of my analysis, I cannot find that the complainant has proven a direct linkage of a retaliatory nature, on the balance of the evidence.

VI. Conclusions

[364] The evidence in this case was relatively dense. In my analysis, I sought to address what I believed to be the most relevant testimonial and documentary evidence and the parties' principal submissions about that evidence. However, my decision about the merits of the complainant's case reflects an appraisal of the full testimony, documentation, and case law offered by the parties.

[365] As indicated, the complainant's burden was to prove that on the balance of the evidence, Mr. Godbout's communication of October 2, 2019, fell within the scope of

employer actions identified by s. 147 of the *Code*, specifically s. 147(c), and that his actions were directly linked to her pursuit of her workplace violence concerns under the *Code*.

[366] On the first question, I was not convinced that the complainant established that the respondent's actions fell within the scope of s. 147 of the *Code*. It seemed to me that even were it the case, contrary to my analysis, that the respondent threatened a penalty or dismissal, s. 147 requires more than a threat of a penalty or a threat of a dismissal.

[367] My exploration of the second question did not lead me to conclude that on the balance of the evidence, the complainant proved that Mr. Godbout's communication on October 2, 2019, referencing his undelivered letter to her counsel of September 23, 2019, was a retaliatory act in response to her pursuit of rights under Part II of the *Code*.

[368] Evidence questioned the propriety of some of Mr. Godbout's actions, most notably his incorrect reference to the complainant's fitness to return immediately to duty. It also was apparent that he might not have been as careful about maintaining a clear separation between the two sections of the department dealing with the complainant's leave status and her workplace violence complaint as might have been warranted. Nonetheless, in my view, the evidence was insufficient to justify a conclusion that he breached s. 147(c) of the C*ode* when he pressed the complainant about leave options in his October communication.

[369] Therefore, I rule that the complaint is unfounded.

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

(The Order appears on the next page)

VII. Order

[371] The complaint is dismissed.

July 30, 2021.

Dan Butler,
a panel of the Federal Public Sector
Labour Relations and Employment Board