Date: 20220404

Files: 566-34-14861, 14863 to 14867, 38197, 38198, 43727, and 43728

Citation: 2022 FPSLREB 27

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

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

BETWEEN

YVES MAYRAND

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Mayrand v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Raphaëlle Laframboise-Carignan, counsel

For the Employer: Andréanne Laurin, counsel

Heard via videoconference,
December 13 to 17, 2021, and March 7, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] Yves Mayrand ("the grievor") was an excise tax auditor/examiner ("auditor") with the Canada Revenue Agency ("the Agency" or "the employer"). On September 20, 2021, the employer terminated him for reasons of medical incapacity. He filed a grievance in which he alleged that the employer had no valid grounds to end his employment in September 2021 and that it failed to accommodate his disability to the point of undue hardship. He also filed two grievances in which he alleged that the employer discriminated against him in November 2016 and March 2017 as it failed to accommodate his disability to the point of undue hardship. He also filed two grievances, in which he alleged that the employer discriminated against him in his December 2016 performance evaluation and in his March 2017 interim evaluation. He also filed a grievance in which he alleged that the employer discriminated against him by implementing a performance improvement plan in December 2016. Finally, he filed three grievances in which he alleged that the employer failed to reimburse him for travel costs incurred for medical assessments.

[2] The grievances were referred to adjudication on different dates. Files 566-34-14861 and 14863 to 14867 were referred on February 26, 2018. Files 566-34-38197 and 38198 were referred on April 9, 2018. And files 566-34-43727 and 43728 were referred on November 5, 2021. The first grievances were referred to adjudication before the Public Service Labour Relations and Employment Board, which later changed its name.

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*).

[4] For the reasons set out in this decision, I conclude that the employer reached the point of undue hardship in this case and that the grievor's termination for medical incapacity was justified in this circumstances. In the pages that follow, I state my conclusions on the other grievances.

II. Summary of the evidence

[5] The facts relevant to these grievances were summarized using documentary evidence that the parties filed jointly as well as the testimonies of Cindy McDonald, Audit Manager at the East Central Ontario Tax Services Office ("East Central Ontario TSO") from 2011 to 2015; Lori Parris, Team Leader, East Central Ontario TSO; David Beamer, Assistant Director, Audits, East Central Ontario TSO; Christine Stewart, Acting Director, East Central Ontario TSO; and the grievor.

[6] The applicable collective agreement was between the Agency and the Public Service Alliance of Canada for the Program Delivery and Administrative Services group ("the collective agreement").

[7] On June 5, 2002, the grievor began working at the Agency as an auditor at the SP-05 group and level.

[8] The grievor holds two bachelor's degrees from the Université du Québec, the first in business administration with a finance specialty, and the second in accounting. He has been a member of the Chartered Professional Accountants of Ontario since 1994. After returning from sick leave in 2007, he had performance issues.

[9] Ms. McDonald, who was the audit manager at the time, explained that the grievor repeatedly made errors in his audit files, which significantly impacted the employer, as he audited Canadian taxpayers' financial data. Ultimately, in his annual evaluations, the management team stated that he was not performing at the expected level.

[10] Later, with his union's support, the grievor disputed the negative evaluations, alleging that he was affected by a medical condition. So, the management team requested a medical assessment of his condition and informed the employer that it would address the situation. At the same time, it gave him different SP-05 duties and tasks; however, it did not see an improvement in his performance.

[11] The grievor consulted his family doctor about it, who referred him to a neuropsychologist, Dr. Duncan Day.

[12] In September 2013, he consulted Dr. Day at a private clinic, at the employer's request.

[13] Ms. McDonald explained that after that consultation, she had difficulty obtaining Dr. Day's report because when the grievor read the report, he withdrew his consent to share it with the employer.

[14] He explained that Dr. Day's report contained diagnoses that he did not want to share with the employer. He asked Dr. Day to modify the report to include only his limitations and restrictions as the employer needed that information to accommodate him.

[15] On September 24, 2013, Dr. Day sent his occupational fitness assessment form ("OFAF") to the employer. In it, he stated that the grievor had limitations, among others, at the following 3 levels: deadline demands, social/emotional demands, and cognitive/mental demands. For the last one, he checked all the boxes, indicating that the grievor had the following 14 limitations:

> *1) Continuous alertness, sustained concentration/focus*
> *2) Working under specific instructions*
> *3) Attaining precise limits/standards*
> *4) Multitasking*
> *5) Problem solving, decision making*
> *6) Adaptability*
> *7) Sound judgement*
> *8) Attention to detail*
> *9) Self-supervision/autonomy*
> *10) Retention of information*
> *11) Organizational ability, time management*
> *12) Initiative*
> *13) Analytical thinking*
> *14) Effective written communication*

[16] Dr. Day indicated that the grievor was fit to work with certain limitations or restrictions, which he described in more detail in section D of his report. On the limitations and restrictions, he also stated as follows: “Depending on investigation/treatment outcomes, likely at least one year possibly more”.

[17] Later, other doctors referred to the third and fourth paragraphs (“section D”) of the report, which read as follows:

> *Modification of work environment, and pacing will be important parts of his workplace integration, training and adjustment treatment. He will likely require accommodations at the workplace, reducing workload demands, and allowing greater time for certain tasks. He would benefit from a distraction-free or at least distraction-reduced work environment, as well as the introduction of some flexibility in timelines to complete tasks he is assigned, where possible. It will also be beneficial to make all of the demands of his position, such as work output expectations, timelines, quality requirement, etc. very clear in writing at the outset, These accommodations are likely going to need to be permanent, but some improvements are possible with rehabilitation, and treatment.*
>
> *The issue of permanence or duration of these problems is an important one when designing accommodation, but the above noted investigations (neurological consultation, psychiatric consultation) should be carried out before any definitive determination of duration is established. In my opinion, Mr. Mayrand's workplace issues are rooted in heretofore undiagnosed relatively mild cluster A personality disorder, but the possibility of a spectrum disorder remains viable as well (Asperger's syndrome). The likelihood of an organic brain dysfunction is minimal, but should be investigated further.*

[18] Given that Dr. Day stated that neurological and psychiatric consultations were required, on October 22, 2013, Ms. McDonald requested a second OFAF to gather more information about the grievor’s limitations and restrictions. The management team believed that he was taking steps to obtain a more advanced diagnosis and treatment.

[19] The grievor stated that he did not believe that additional information was necessary. Therefore, he took no further action. He also did not inform his employer.

[20] On November 19, 2013, while waiting for the results of the grievor’s actions, the management team decided to put an accommodation plan in place. It established that

the employer would not impose time limits so that he could complete his files. He would also be moved to a quieter work area, with fewer distractions.

[21] Ms. McDonald stated that despite those accommodations, the management team noted that in his SP-05 position, he still made several errors in his audit files. For example, he failed to record an adequate number of bank accounts, or he mixed up names and information between files. The management team noted his poor attention to detail and his repeated errors, despite the clear instructions.

[22] Ms. McDonald explained that on December 30, 2013, the management team met with the grievor and a bargaining agent representative. It asked him to take sick leave as he was no longer fit to work. He refused. He said that it was preferable for him to work. His immediate supervisor, Bruce Pettipas, prepared a summary of the meeting that read as follows:

> *I met with* [the grievor] *at 1:00 p.m. I explained to him that, based on my review of the work he had shown me since he had been on the Accommodation Plan, I did not think that it was working. He was continuing to make the same kinds of errors that he had made in the past, and I was not seeing any improvement in the quality of his work. I told him that I had discussed the situation with Roxanne, Cindy and HR, and we had decided that we could no longer keep him at work. He needed to focus all his energy on getting himself properly diagnosed and treated, so that he could return to work well. I explained how our Long Term Disability plan worked and told him I would get him the forms, but that he was to go home on sick leave. I told him that his health was the most important thing, and when a doctor certified that he was fit to return to work, he could do so. I said that I hoped this would be soon and that he could keep his building pass for when he did return.*
>
> …
>
> [The grievor] *told me that he did not have any further doctors' appointments scheduled.*
>
> *I told him that I thought he was a very smart man, but that whatever condition he had was preventing him from doing his job. I told him he needed to go home and get treatment so he could get better.*
>
> [The grievor] *denied there was anything wrong with him, and I was the only one who was saying he was sick. I pointed out that we had his doctor's report, which said that he had limitations for which accommodations were required. I said that I didn't know his*

> *exact condition, and my understanding was that there was more diagnostic work to be done, but limitations noted in doctors' reports were an indication of some kind of medical condition.…*
>
> [The grievor] *asked if he could continue to stay at work while he was being treated. I told him that no, we didn't think that was an option. He was unfit to carry out his duties because of his condition, and the best thing for him was to devote all his attention to getting fully diagnosed so he could get better and return to work. The most important thing for him was to look after himself and his health.*
>
> *I wished him good luck and shook his hand, and told him to look after himself.*

[23] The grievor consulted his union representative. Together, they persuaded the employer to allow him to continue to work. With the management team, they developed a customized accommodation plan for him. Ms. McDonald suggested assigning him SP-03 administrative tasks pending further diagnosis and treatment. Therefore, the management team renewed the accommodation plan from February 3 to March 31, 2014, with additional accommodations. Specifically, beginning on February 3, 2014, he was assigned SP-03 administrative tasks.

[24] He performed those tasks until September 2015. He was paid at the SP-05 level during that time. These accommodations were agreed to in the plan:

> *…1) Management will continue not to make time demands on completion of* [the grievor's] *work, as we are currently doing.*
>
> *2)* [The grievor] *will be moved to a different workstation in a quieter area of the office, where there will be fewer distractions and interruptions. He was assigned workstation 215 just outside the area formerly assigned to the Enforcement Division.*
>
> *3) Management has changed* [the grievor's] *workload to the Job Number above … and his team leader to David Webster effective February 3, 2014.*
>
> *4) Management is in the process of procuring WordQ 3 (English) software. (Pending approval by Adaptive Technology Program, (ATP).*
>
> …

[25] A qualified person was also tasked with conducting an ergonomic assessment of the grievor's work environment. Changes were then made to his physical environment, including adding equipment and a reorganization.

[26] Since October 2013, the management team had been waiting for the grievor to submit the results of a further diagnosis and treatment.

[27] Throughout 2014, the team continued to observe serious deficiencies in the grievor's performance. For example, in his new tasks, he failed to follow established procedures or to return files to their proper locations as they were to be filed alphabetically. At that time, his team leader helped him do his job and prepared a series of checklists for him but continued to observe serious deficiencies in the grievor's performance.

[28] The grievor disagreed with being assigned SP-03 administrative tasks because he felt that they did not match his skills.

[29] Still having not received new medical information from the grievor, on August 28, 2014, the management team asked him a second time to undergo another fitness-to-work evaluation.

[30] The grievor agreed to meet with a neurologist, Dr. Richard Riopelle. He said that he was pleased with his consultations with that specialist.

[31] In the meantime, in September 2014, Mr. Beamer took over as the assistant director of audits at the East Central Ontario TSO. Ms. McDonald brought him up to speed on the grievor's situation.

[32] On December 8, 2014, the management team, which at that point included Ms. McDonald and Mr. Beamer, received an OFAF completed by Dr. Riopelle. Ms. McDonald and Mr. Beamer were surprised to note that the report stated that the grievor was fit to work without restrictions or limitations. It stated that he had no limitations with respect to these 3 levels, namely, deadline, social/emotional, and cognitive/mental demands. And Dr. Riopelle did not check any of the 14 limitations that Dr. Day had identified on September 24, 2013.

[33] Dr. Riopelle also checked the box indicating that he did not consent to being contacted should clarifications be needed.

[34] At the very end of the report filed as evidence, Dr. Riopelle or someone else added a photocopy of an excerpt of section D that Dr. Day prepared on September 24,

2013. That excerpt, which does not appear to be related to Dr. Riopelle's report, contains this information:

> *… the likelihood of benefitting from treatment. Other factors such as language barrier (English is not his native language), and previous findings of depression may also be contributing to his current neuropsychological profile, and in turn to workplace performance issues, but the current findings cannot be accounted for by these factors alone. As such, poor command of English, and previous problems with depression are not, in my view, sufficient reason to account for his difficulties in the workplace.*
>
> *Modification of work environment, and pacing will be important parts of his workplace integration, training and adjustment treatment. He will likely require accommodations at the workplace, reducing workload demands, and allowing greater time for certain tasks. He would benefit from a distraction-free or at least distraction-reduced work environment, as well as the introduction of some flexibility in timelines to complete tasks he is assigned, where possible. It will also be beneficial to make all of the demands of his position, such as work output expectations, timelines, quality requirement, etc. very clear in writing at the outset, These accommodations are likely going to need to be permanent, but some improvements are possible with rehabilitation, and treatment.*

[35] The grievor testified that Dr. Riopelle added that excerpt to the end of the report supposedly because according to the grievor, he concluded that the grievor was "Fit to work with limitations/restrictions". However, in his report, Dr. Day clearly checked the box "Fit to work (capable of all duties)", not the box "Fit to work with limitations/restrictions".

[36] Therefore, according to the grievor, Dr. Riopelle "[translation] reiterated" Dr. Day's recommendations. Consequently, he expected to receive the following accommodations: 1) a reduced workload and more time to complete his tasks, 2) a work environment with no or fewer distractions; 3) flexibility with respect to the deadlines to complete his tasks; and 4) all requests being clear and in writing.

[37] According to Ms. McDonald, the management team suspected that the grievor added the excerpt to the end of Dr. Riopelle's report himself, given the inconsistency between the doctor's two apparent conclusions. However, it had no way to verify it. Dr. Riopelle had not authorized it to ask him for clarification.

[38] In June 2015, Ms. McDonald changed jobs. Mr. Beamer continued to deal with the grievor's file.

[39] The grievor explained that in 2015 and until March 3, 2016, he continued in a clerk position. However, in September 2015, his bargaining agent representative asked that he be reinstated as an auditor.

[40] The management team felt bound to honour that request and to respect Dr. Riopelle's (signed) conclusion that the grievor was fit to work without limitations or restrictions. Therefore, the team drafted the grievor's performance expectations for the SP-05 position from September 2015 to August 2016 and gave them to him. The auditors' annual training and evaluation period is from September 1 to August 31.

[41] From September 2015 to March 3, 2016, the grievor completed several courses, including self-guided learning, to refresh his knowledge and update his audit skills. The management team gave him audit manuals and asked him to complete job-related training through self-guided learning. During that time, the grievor did not perform any job-related duties. The management team still had some concerns about his attention to irrelevant details.

[42] On March 3, 2016, he returned to his SP-05 auditor position. He met his new team leader, Ms. Parris. Mr. Beamer had asked her to help the grievor resume his audit duties. She was expected to mentor him and assist him every day. That approach allowed him to always be paired with an experienced auditor as a team leader.

[43] On that topic, I note that typically, a team leader supervises eight or nine auditors. However, Mr. Beamer explained that the grievor was the only auditor reporting to Ms. Parris. She was specifically tasked with going over the audit steps with him and to make sure that he could work autonomously afterwards.

[44] Ms. Parris filed as evidence the auditor work description. The key activities of that position are as follows:

…

> *Audits taxpayers' returns, books, records, taxpayer requests, and supporting documents to confirm and enforce compliance with the statutes administered by the CRA. Prepares working papers, letters*

> *and reports to support work completed and compiles asset information to assist in the collection of taxpayer indebtedness.*
>
> *Plans how the audit will be conducted; reviews documents and researches legislation, jurisprudence, publications and policies.*
>
> *Discusses with taxpayers and/or their representatives technical and contentious issues, proposed (re)assessments, and recommendations regarding penalties and consideration of waiving of interest. Supports compliance by encouraging early payment.*
>
> *Identifies and gathers data for use in referring compliance issues (e.g. tax avoidance, tax evasion, non-remittance and third party non-compliance) to the appropriate program areas.*
>
> *Presents and disseminates program specific information to the public, other areas within the CRA, and external stakeholders to encourage voluntary compliance. This may include participation in public information sessions and professional seminars.*
>
> …

[45] Ms. Parris explained that with the grievor's previous manager, George Deszpoth, she prepared the performance agreement for September 1, 2015, to August 31, 2016, on which the grievor then commented.

[46] On March 4, 2016, the management team, including Mr. Beamer and Ms. Parris, met with the grievor and his union representative. It informed him that he was being reinstated full-time as an auditor at the SP-05 group and level. It explained the performance objectives for the current performance evaluation period. He was informed that for the next few months, he would work closely with Ms. Parris.

[47] At the grievor's request, Ms. Parris gave him older, redacted files to review. She also gave him a checklist containing specific instructions that would help him closely follow the audit process steps so that he could plan his time. They agreed that she would first review all his work before he moved on to the next step or before sending communications to a taxpayer. To better help him, she also gave him decision flow charts. At that point, he had already taken courses. She submitted a list of those courses at the hearing.

[48] When they met, he thought that she asked him to produce work without errors. Therefore, he requested access to the Antidote software to help him with his spelling and grammar errors.

[49] On March 7, 2016, he asked her again to provide Antidote. He said that his English spelling and grammar did not meet her expectations and that the software would help him improve.

[50] Ms. Parris explained that the Agency was not authorized to purchase stand-alone software because it constituted a licence violation. However, the software could be provided to Agency employees who had documented disabilities or injuries. She explained to him that the software was designed for people with learning disabilities. She reiterated that his most recent assessment, the OFAF dated December 8, 2014, confirmed that he was fit to work without restrictions or limitations. Specifically, on March 7, 2016, she replied to him as follows:

> *Hi Yves,*
> *Unfortunately, the Canada Revenue Agency is not allowed to purchase standalone software as it imposes a licencing [sic] violation. You may certainly refer to your French/English dictionary or ask a bilingual coworker to help translate the occasional phrase. I will also be reviewing your working papers, letters and reports, and can assist you if errors remain after you have proofread your own work.*
>
> *Also, when you are conducting your work in Microsoft Word, you can set your language to English (Canada) and the software will pick up the more common spelling errors and grammar.*
>
> *I hope that helps!*
>
> …

[51] In response to questions from Ms. Parris on March 9 and 14, 2016, a Human Resources representative informed her that she would look into the grievor's request to provide him with Antidote.

[52] Ms. Parris met frequently with the grievor in the 13 months from March 2016 to April 2017, to give him feedback on his work and performance both verbally and in writing. She identified many errors in his work. She noted all her communications with him beginning in March 2016.

[53] Specifically, she explained that between March 2016 and March 2017, she assigned him 7 audit files. The first 2 were identified as training files. Therefore, expectations were lower. The employer allowed him to spend more time on those files, 1.5 times the standard of direct hours allowed per audit file. For the files that followed, the expectations were also adjusted case by case, after his work was reviewed. She explained that it was impossible to assign him just 1 file until it was completed because a file has considerable downtime while the auditor waits for additional information from the taxpayer.

[54] During that performance evaluation period, Ms. Parris observed major deficiencies in the grievor's performance. She noted that he used the wrong audit techniques, did not follow instructions, was unable to analyze information, and lacked attention to detail. She also repeatedly noted confidentiality and security breaches involving taxpayer information. She described the errors as cross-contamination, meaning that one taxpayer's information ended up by error in another taxpayer's file. Each time, she took steps to remedy the confidentiality breaches.

[55] On June 7, 2016, she emailed him to express concerns about his job performance and asked him to participate in an OFAF. She explained that he did not consent to one because he considered that the employer's Human Resources section already had all the information it needed about accommodations. However, Human Resources had Dr. Riopelle's report that stated that the grievor was fit to work without limitations or restrictions.

[56] Since he refused to participate in an OFAF, she informed him that she felt bound to respect his decision and that she had no choice but to put in place a performance improvement plan as he did not meet the performance expectations of his position.

[57] On that subject, Ms. Parris introduced into evidence a 190-page document entitled "[translation] Performance log" ("the Performance log") containing her observations about the grievor's performance and difficulties and her interactions with him on those matters from March 3, 2016, to March 24, 2017. She also took the time to explain his errors that she had noted in the Performance log. She also filed as evidence screenshots to substantiate her explanations. One of her examples was that he did not

appear to have a "[translation] social filter", which negatively impacted his performance when he interacted with taxpayers or colleagues.

[58] On August 9, 2016, she met with the grievor to discuss a performance improvement plan that was put in place from August 11 to October 31, 2016. Thus, she followed up with him immediately on the progress of his files, including the direct hours that he spent on them and the growing number of days that he spent waiting on his audits. She encouraged him to complete other courses that were relevant to his work, including those entitled "[translation] *Clear and Simple Language at the CRA*" and "[translation] *Written Communication for Auditors*".

[59] He stated that he felt that Antidote would help him prevent spelling and grammar errors, which he shared with Ms. Parris on August 23, 2016.

[60] She explained that without an OFAF, she could not approve his request. However, she told him that if an OFAF indicated that the software would help him perform better, she could consider it. On August 23, 2016, she replied to him as follows:

…

> *I can assure you that I meant no insult to you or the users of this software, but unfortunately, the CRA considers it an adaptive technology for individuals seeking assistance with the French language due to learning disabilities, developmental disabilities or dyslexia. Unfortunately, you currently do not meet any of the criteria noted above. If you feel otherwise, I invite you to complete an Occupational Fitness Assessment Form.*

…

[61] She informed him that his current work hours were high compared to the budgeted hours. She explained that despite the considerable latitude that he was given to complete the tasks in his files, his work pace varied considerably and did not correspond to the lower objectives that were set to accommodate him. She wrote her observations in his annual performance evaluation for September 2015 to August 2016, which she and Mr. Deszpoth, the grievor's former manager, prepared. Among other things, she noted the following:

…

> *… Yves resumed his duties at a much slower pace than anticipated and showed difficulty in timeliness and effectively managing his* [work in progress] *and case completions, despite the fact that he was provided with a Time Budget intended to help guide him through his files. Three files reached the 180 day benchmark. The remaining four files had accumulated at least 150 days, and were still in the initial stages of audit as of 2016-08-31. Yves was advised that an average file for his level should typically be completed in 50-60 hours but was budgeted 75 hours for each of his files, in an effort to acknowledge that he may need more time in his initial files as he redeveloped his audit skills. Additionally, he was given time and a half, or 112.5 hours, on his first two files to be treated as training files. As of 2016-08-31, these training files were at 223 and 309 hours, with the lower of the two not yet at the proposal stage.*
>
> …

[62] On September 1, 2016, Ms. Parris submitted a copy of the grievor's new performance agreement for September 1, 2016, to August 31, 2017. At that time, significant performance deficiencies had been observed and documented between August 11 and 31, 2016, which she stated were still present when she wrote the report.

[63] The grievor agreed to participate in an OFAF with his family doctor, Dr. John Erb. The management team wondered if his medical condition had changed.

[64] In October 2016, Ms. Parris prepared a letter and an OFAF for the grievor's family doctor to complete. She shared the information with him, to obtain his feedback on the draft letter that contained a background of the situation and specific questions about his ability to carry out audit work. The grievor had his family doctor complete the OFAF. He might not have provided the doctor with Ms. Parris's unsigned draft letter dated October 14, 2016, which contained questions.

[65] Ms. Parris had not yet signed that letter. She wanted the grievor's feedback before finalizing it. She planned to send it to the doctor herself, with the OFAF. However, she did not get the chance because the grievor took it upon himself to request the assessment. She explained that as a result, she was unable to confirm that the doctor saw her questions about the grievor's ability to carry out audit work.

[66] On October 29, 2016, the management team received a letter and an OFAF form dated October 25, 2016, from Dr. Erb. On the form, he checked the box "Fit to work with limitations/restrictions (capable of performing modified/alternative duties or

work schedule)". Then, he wrote as follows: "See attached document from neuropsychologic evaluation in 2013. (Dr. Day) I have nothing more to add. If further information required, please contact Dr. Day, or refer Mr. Mayrand for re-assessment".

[67] In short, the "attached document" to which Dr. Erb referred was his letter in which he had copied and pasted an excerpt from a photocopy of section D of Dr. Day's 2013 report, which reads as follows:

> *25/10/2016*
>
> *To be appended to OFAF completed Oct 25, 2016.*
>
> *Excerpt from report by Dr. Duncan Day, Neuropsychologist*
>
> *September 17, 2013*
>
> *This excerpt was appended to the Occupational Fitness Assessment Form completed by Dr. Day on Sept 17, 2013, which was provided to Cindy MacDonald, Audit Manager, CRA, East Central Ontario Tax Services.*
>
> *"While a complete neuropsychological report is not included with this form.*
>
> *Modification of work environment, and pacing will be important parts of his workplace integration, training, and adjustment treatment. He will likely require accommodations at the workplace, reducing workload demands, and allowing greater time for certain tasks. He would benefit from a distraction-free or at least distraction-reduced work environment, as well as the introduction of some flexibility in timelines to complete tasks he is assigned, where possible. It would also be beneficial to make all of the demands of his position, such as work output expectations, timelines, quality requirement, etc. very clear in writing at the outset. These accommodations are likely going to need to be permanent, but some improvements are possible with rehabilitation, and treatment."*

[68] The management team was uncertain that Dr. Day had received the list of questions in its letter to the doctor about the grievor's ability to carry out audit work.

[69] The management team, which had already offered the grievor accommodations, without seeing any improvement (fewer files, flexible deadlines, etc.), considered that assessment insufficient to put new accommodations in place.

[70] According to the management team, Dr. Erb appeared not to have reassessed the grievor's condition in 2016 but rather appeared simply to indicate that the

limitations and restrictions were necessary based on the 2013 assessment. Ms. Parris thought that the grievor likely did not give her questions to his doctor because he had said before that he disagreed with their tone. She said that she explained to him that she could modify the questions before finalizing the letter. However, he took it upon himself to obtain Dr. Erb's medical opinion before she signed her letter.

[71] On October 31, 2016, the management team informed the grievor that it felt it necessary to keep the performance improvement plan in place until the employer could evaluate the details of his limitations and restrictions. Ms. Parris explained that she then prepared the second performance improvement plan for November 1, 2016, to January 31, 2017, which was later extended to February 28, 2017.

[72] The grievor disagreed with the implementation of that performance improvement plan. He wrote as follows in it:

> *This plan was never discussed since the union stipulated that an accommodation have to be put in place.*
>
> *I have requested such and I am with no responses at this time. A person of your education can read the letter provided by my doctor. It is in plain language. Accomodation can be started from there, I suggested you to buy Antidode, this is a start an a simple solution that respect my dignity by providing to a tool that will make things better and you said no.*
>
> *You cannot have performance expectation and [improvement plan] before the accommodation this is contrary to CRA policy.*
>
> …
>
> [*Sic* throughout]

[73] On November 10, 2016, the grievor gave the employer a medical note from Dr. Trickey dated November 8, 2016, in which the doctor recommended that the grievor use Antidote.

[74] Ms. Parris forwarded the note to the Human Resources representative advising her in this matter. Ms. Parris explained that the employer had to consider a number of related issues, as stated earlier.

[75] On November 18, 2016, the management team met with the grievor, with his union representative present. Ms. Parris explained that his performance in the 2015-

2016 evaluation period was at level 1. For that reason, the second performance improvement plan had to be put in place. She answered his questions about expectations for the 2016-2017 evaluation period. She also explained why the management team requested a new medical assessment. The reason was that Dr. Erb's assessment did not include a recent update on the grievor's medical condition or answers to the employer's questions. She said that if necessary, she was open to making certain changes to the letter that would be sent to the specialist who performed the assessment. She also explained that Dr. Trickey's medical note dated November 8, 2016, did not set out limitations or restrictions that explained the need to obtain Antidote for the grievor.

[76] Therefore, I note that Ms. Parris took the time to explain to the grievor why she required clarification of his limitations and restrictions as Dr. Erb's letter simply referred to Dr. Day's report and did not specify how the grievor's limitations and restrictions influenced or affected his ability to work as an Agency auditor. Consequently, the employer asked him to undergo a new medical assessment with a specialist. He refused. In the circumstances, she explained to him that she had no choice but to maintain a performance improvement plan.

[77] On November 24, 2016, the management team finalized the performance agreement for September 1, 2015, to August 31, 2016. It included comments from Mr. Deszpoth, the grievor's first manager during that period, and from Ms. Parris, his second manager then. The two managers agreed that he had serious difficulties performing his audit work. For him, completing audit tasks was very arduous and even impossible. That is why he received an evaluation of level 1, which meant that he did not meet the performance objectives. The agreement specified that the employer had prepared a performance improvement plan.

[78] In his feedback on the agreement, the grievor stated as follows:

> …
>
> *It is unfortunate, that no actions were made on my request for accommodation.*
>
> …
>
> *"Duty to accommodate is a legal obligation (from the Canadian Human Rights Act) that requires employers to eliminate barriers that have an adverse impact on employees … and to implement*

> *measures necessary to allow these employees to perform their duties to the best of their abilities." ….*
>
> *…*

[79] On November 29, 2016, he filed his first grievance (file no. 566-34-14864; "grievance A"), which reads as follows:

> [Translation]
>
> *I deplore that following the letter from my family doctor that was received on October 25, 2016, my manager, Lori Parris, failed to apply in good faith my family doctor's directives about the accommodations that were presented. That Ms. Parris did not abide by the CRA's policies and the Canadian federal laws in force.*

[80] On December 1, 2016, he filed a second grievance (file no. 566-34-14867; "grievance B"), about the 2016-2017 performance agreement. The grievance statement reads as follows:

> [Translation]
>
> *In my 2016-2017 performance agreement, Ms. Parris failed to put in place the accommodations indicated in the letter dated October 25, 2016, from my family doctor. In addition, my request for a simple work tool such as Antidote was denied on November 18, 2016.*

[81] He explained that his work situation worried him greatly. His stress affected not only him but also his entire family, including his three children.

[82] On December 1, 2016, he filed a third grievance (file no. 566-34-38198; "grievance C"), which reads as follows, in response to the 2016-2017 performance improvement plan:

> [Translation]
>
> *I grieve the 2016-2017 performance improvement plan that Lori Parris implemented for me because it was prepared while ignoring the CRA's accommodation policy and Canadian federal laws.*

[83] After that, he agreed to an assessment with a specialist of his choice in Gatineau, Quebec. During a discussion about the choice of specialist, Ms. Parris emailed him on December 7, 2016, about the reimbursement of the assessment costs, as follows:

> *This email is a follow up [sic] to our conversation earlier this morning. Unfortunately, the Approach to Early Intervention and Return to Work policy does not cover your travel and accommodations to see a specialist. If you choose to see Dr. Benzimra, whose practice is in Gatineau, Quebec, you would have to pay for the costs associated with travelling to your appointments with him. The CRA will, however, reimburse costs incurred to complete a medical assessment by Dr. Benzimra as soon as you provide a receipt of payment from the doctor.*
>
> *As I advised you this morning, you have three options available to you:*
>
> *1. You may choose to see Dr. Benzimra, and assume all travel and accommodation costs that you may incur;*
>
> *2. You may choose to seek a referral through Workplace Health and Cost Solutions (WHCS) and the CRA will cover any travel incurred; or*
>
> *3. You may choose to resume your treatment with Dr. Day. You would still assume all travel costs, but these would be small, as he is located in Kingston.*
>
> …

[84] On December 9, 2016, he replied to her as follows:

> …
>
> *Please do not use my doctor's name in your email(s). This is a privacy issue. You can use a general terminology, use John Doe or send me an email and copy my union, if you have to use it otherwise in order to obtain my consent.*
>
> *I did not give you consent for disclosing my doctor [sic] names to my union, as you did last Wednesday morning, December 7, 2016, during our meeting. I was flabbergasted by the way, you seem so comfortable using that information. The sole interest of my union is the accommodation.*
>
> …

[85] He explained that he is Francophone and that he felt more comfortable communicating in French with a psychologist. He did not find a French-speaking psychologist in Kingston who had the specialty he was looking for. Therefore, he decided to meet with Dr. Yanev Benzimra, a French-speaking psychologist with expertise in medical assessments, in Gatineau.

[86] On December 20, 2016, the grievor filed a fourth grievance (file no. 566-34-14865); "grievance D"), against the employer's decision not to reimburse the travel costs for his medical assessment in Gatineau. It reads as follows:

> [Translation]
>
> …
>
> *I deplore that my employer's representative decided not to comply with the accidents and illnesses policy about reimbursing travel costs to go to Gatineau with the goal of completing my medical assessment.*

[87] On January 3, 2017, the employer sent a letter and an OFAF to Dr. Benzimra, to gather more information about the grievor's limitations and restrictions.

[88] On January 4, 2017, Mr. Beamer informed the grievor that the employer agreed to reimburse his travel, parking, and meal costs for the day of the medical assessment in Gatineau. He also agreed to exercise his discretion to grant the grievor 7.5 hours of medical leave for the day of his evaluation.

[89] On February 2, 2017, Ms. Parris also informed him that while waiting for his OFAF of February 2, 2017, his performance improvement plan was extended to February 28, 2017.

[90] On February 2, 2017, the grievor met with Dr. Benzimra's colleague, Charles Leclerc, Neuropsychologist, in Gatineau. He left his house in Kingston at 6:30 a.m. His appointment was at 9:00 a.m. His assessment went until 5:15 p.m. He arrived home in Kingston around 7:30 p.m.

[91] Later on, he gave Mr. Beamer a record of his travel costs. The grievor explained that he had to travel 2 hours by car to and from Gatineau. He thought that the employer should pay him overtime at time and a half for his hours over and above 7.5 hours of work, along with his half-hour for lunch. Mr. Beamer confirmed that the grievor claimed 5 hours of overtime for February 2, 2017.

[92] On February 13, 2017, Ms. Parris informed the grievor that the employer could not authorize overtime for attending a medical assessment. She reminded him that the management team had confirmed that the travel costs could be claimed as per the

employer's policies and that the grievor's time, 7.5 hours, would not be taken from his sick-leave bank. In addition, she wrote this:

> *… It was your decision to seek a specialist in another province, rather than request a referral to another local area medical practitioner. Mr. Jackson's concerns in his December 16, 2016 email to Mr. Beamer and myself were that:*
>
> *a) the employer pay for related travel costs; and*
>
> *b) the employer cover all salary related costs (allow you to use medical appointment leave rather than sick leave).*
>
> *It is my understanding that both of those issues were addressed in Mr. Beamer's January 4, 2017 email to you and Adam Jackson, in which he stated that:*
>
> *a) the employer "will reimburse the costs of the travel (travel to/from appointment, parking, meals) for the day of the appointment"; and*
>
> *b) to cover your salary related costs "the employee will be on paid leave (medical appointment) for the actual time spent up to a maximum of a day as defined by the collective agreement". Your salary for the day was covered by the paid medical leave.*
>
> …

[93] On February 14, 2017, the grievor replied as follows:

> …
>
> *Again, In the past that was never an issue, management paid for transport cost and time for travel to send me in Ottawa.*
>
> *There were proactive by giving me the best option and provided me with an advance.*
>
> *I understand you feel that Kingston can provide the service but this is medical and you do not have expertise on this since you are not A certified medical practitioner… Yes, it is my choice to go to Gatineau in the province of Québec. I am sorry you feel that way.*
>
> *I respect your decision but I do not agree with it. My only recourse available his to file a complaint as per the collective agreement to our superiors.*
>
> …
>
> [*Sic* throughout]

[94] On February 16, 2017, the grievor filed a fifth grievance (file no. 566-34-14866; "grievance E"), against the employer's refusal to reimburse his costs incurred on

February 2, 2017, including travel time at overtime rates. His grievance reads as follows:

> *I deplore and grieve that my employer denied my total cost incurred on February 2, 2017, following its request to complete the "Fitness to Work Evaluation (FTEW)", as per the Injury and Illness Policy.*

[95] In the meantime, he informed Ms. Parris that he had to return to Gatineau to complete his medical assessment. In response, the management team reiterated that travel costs and paid leave for a medical appointment would be authorized but not the overtime required to travel to and from his appointment.

[96] Mr. Beamer explained that the grievor's appointment was scheduled for February 28, 2017, at 3:30 p.m. In the circumstances, he used his discretion to grant the grievor 4.5 hours of medical leave to compensate for the travel and the assessment during work hours, which corresponded to the grievor's time from 12:30 to 5:00 p.m. The travel time required was 2 hours by car.

[97] Mr. Beamer specified that the time spent after the grievor's normal work hours could not be counted in the medical leave (code 5300) because that leave applies when an employee is absent from work during his or her normal work hours. Given that the grievor's normal workday ended at 5:00 p.m., Mr. Beamer did not believe that he could exercise his discretion to apply that leave to time after 5:00 p.m. And he could not authorize paid overtime, at time and a half, for the time after normal work hours because the grievor was not performing work as stipulated in the collective agreement.

[98] In short, Mr. Beamer could exercise his discretion to grant the grievor medical leave under code 5300 for the hours between 9:00 a.m. and 5:00 p.m. because those hours were within the grievor's normal workday.

[99] On February 27, 2017, the grievor emailed Mr. Beamer to request the following: "… would it be possible to start work tomorrow at 10:00 a.m. Instead of 9:00 a.m. This way, my normal travelling time will end up at 6:00 p.m. or before and not 5:00?"

[100] Mr. Beamer replied that the grievor's work hours were from 9:00 a.m. to 5:00 p.m. and that therefore, he could not grant the grievor's request. He explained that he

was not comfortable authorizing a change to the grievor's work hours for only that reason.

[101] On February 27, 2017, Ms. Parris met with the grievor to discuss his mid-year performance. She informed him that he was still not meeting his objectives. She reminded him that the performance improvement plan could be updated when the employer received the medical assessment results. At that time, the second meeting to complete his medical assessment had been scheduled for February 28, 2017. In the meantime, she told him that his performance improvement plan had been extended to March 31, 2017. She also informed him that the significant number of days that he spent on some files was well beyond the 180-day maximum. I note that the Agency had adopted a 180-day standard to decide a claim. The grievor found that moment difficult. He wanted to improve.

[102] On February 28, 2017, he returned to Gatineau to complete his assessment, which was from 3:30 to 5:15 p.m. He explained that he took personal leave that morning. He left home at 11:30 a.m. to arrive early at his appointment. However, Dr. Leclerc was unable to meet with him before 3:30 p.m. He had to travel 2 hours by car to and from Gatineau. According to him, the employer should have paid him overtime at time and a half for the 2.5 hours after 5:00 p.m., from 5:00 to 7:30 p.m., he took to return to Kingston.

[103] On March 1, 2017, the grievor filed a sixth grievance (file no. 566-34-14863; "grievance F"), against the employer's refusal to pay him overtime on February 28, 2017. The grievance reads as follows:

> *I deplore and grieve that my employer denied my total cost incurred on February 28, 2017, following its request to complete the "Fitness to Work Evaluation (FTWE)", as per the Injury and Illness Policy.*

[104] That same day, he also filed a seventh grievance (file no. 566-34-38197; "grievance G"), against his mid-year evaluation. His grievance reads as follows: "I am grieving the content of the email dated February 27, 2017, subject 'mid term review' sent from my interim team leader."

[105] On March 3, 2017, Dr. Leclerc provided the OFAF to the employer. He informed it that the grievor had limitations or restrictions for capacities related to his work that were not physical. His opinion was that "… there are medical limitations that affect Mr. Mayrand's behaviour or actions." He also stated, "The nature of the limitation (temporary or permanent) remains to be confirmed by a health professional who specializes in this field. Mr. Mayrand has been informed of this." He replied to the employer's questions about the grievor's limitations and restrictions. Among other things, he noted the following:

> …
>
> *When we were assessing him, we identified problems with interpretation and communication and challenges in terms of expression. These may lead to erroneous reasoning or a misunderstanding of expectations and instructions. However, these challenges will have to be defined by a professional who specializes in this area. Mr. Mayrand can therefore misinterpret things, which affects the analysis and/or the final product. The way he responds to feedback can also be affected because of limitations in terms of language pragmatics. Clear and concrete instructions, ideally in writing, can help to a certain extent, but will not entirely offset these limitations.*
>
> …
>
> *Yes, in my opinion, there are medical limitations that affect Mr. Mayrand's behaviour or actions. As mentioned, the client has been referred to resources where his condition will be assessed, because this is outside my field of expertise.*
>
> …
>
> *I confirm that the client has limitations that are preventing him from meeting deadlines.*
>
> …
>
> *In my view, it is not the amount of work that Mr. Mayrand cannot handle, but rather the nature of some of the tasks associated with these files. In my opinion, Mr. Mayrand is unable to perform tasks that require interpretation (verbal or written) or communication (verbal or written) skills, writing summaries/reports, judging abstract material, meeting tight temporary deadlines, or attention to detail. It will be up to the employer to determine whether these types of tasks can be accommodated or removed from Mr. Mayrand's duties.*
>
> …
>
> *In my opinion, there are medical limitations that affect Mr. Mayrand's ability to remain consistent in his files.*

[106] In the form, Dr. Leclerc specified that the grievor had limitations, among other things at the following 3 levels: deadline, social/emotional, and cognitive/mental demands. For the last one, he checked all the boxes on the form, indicating that the grievor had the following 14 limitations:

> *1) Continuous alertness, sustained concentration/focus*
> *2) Working under specific instructions*
> *3) Attaining precise limits/standards*
> *4) Multitasking*
> *5) Problem solving, decision making*
> *6) Adaptability*
> *7) Sound judgement*
> *8) Attention to detail*
> *9) Self-supervision/autonomy*
> *10) Retention of information*
> *11) Organizational ability, time management*
> *12) Initiative*
> *13) Analytical thinking*
> *14) Effective written communication*

[107] Lastly, he checked the box "Fit to work with limitations/restrictions (capable of modified/alternative duties or work schedule)".

[108] Ms. Parris explained that the management team noted that Dr. Leclerc recommended a medical follow-up for the grievor but that in the meantime, he was able to confirm certain information. She summarized as follows her understanding from what he had confirmed:

> [Translation]
>
> *1) All the limitations are temporary pending the suggested medical follow-up.*
> *2) In the context of the assessment, he has difficulty interpreting communication and struggles with expression. This can lead to faulty reasoning or misunderstanding of expectations and instructions.*
> *3) He may misinterpret things, affecting his analysis and/or the final product.*
> *4) Clear and concise instructions, ideally in writing, may help to*

> *some extent but will not fully offset these limitations.*
> *5) The assessment cannot confirm that he is able to exercise sound judgment when performing his duties.*
> *6) Medical limitations impact his actions and behaviour.*
> *7) Limitations exist that prevent him from meeting deadlines.*
> *8) The nature of some file tasks exceed his abilities. In particular, tasks that require interpretation (verbal or written), communication (verbal or written), drafting summaries/reports, judging abstract materials, meeting sometimes tight deadlines, and attention to detail.*
> *9) Medical limitations impact his ability to maintain continuity in his files.*

[109] Ms. Parris explained that the management team then realized that medical limitations affected the grievor's ability to do his job. Considering the specific limitations and restrictions that Dr. Leclerc set out, the team struggled to determine the measures that would allow accommodating the grievor in his position.

[110] In the circumstances, Mr. Beamer asked Ms. Parris to analyze the duties of each position at the East Central Ontario TSO, which are equivalent to positions at the Agency's headquarters. The goal was to identify the duties suitable to the identified limitations and restrictions. However, after all Dr. Leclerc's stated limitations and restrictions were considered, Ms. Parris found that none of the positions' duties would allow respecting the identified abilities.

[111] She filed as evidence her analysis of all the positions that she considered in her search for a position that would accommodate the grievor. She compared the requirements of nine potential positions, ranging from SP-05 to SP-02, to the grievor's abilities. The SP-03 position that she analyzed was as a compliance program support clerk. The SP-02 position was as a general duties clerk.

[112] Therefore, she did not find any position that could be adapted to the grievor's abilities. She explained that in 2014 and 2015, the employer agreed to offer him reduced tasks under the general duties clerk position, to accommodate him. Unfortunately, the management team identified serious deficiencies in his work and his ability to complete his tasks. Therefore, she did not identify any position that might fit his abilities.

[113] I note that the witnesses confirmed that the tasks associated with the Agency's SP-02 and SP-03 positions overlap. The grievor also confirmed that when he worked for Mr. Deszpoth, he performed tasks related to the general duties clerk position.

[114] Ms. Parris explained that the management team remained open-minded, given that Dr. Leclerc recommended a further assessment in another field of expertise. She wanted the grievor to seek treatment and care.

[115] On March 24, 2017, in a letter to the grievor, Mr. Beamer confirmed that the management team had reviewed his limitations and restrictions, which Dr. Leclerc had identified. Mr. Beamer stated that the team was worried about his ability to perform his position's duties because the mistakes that he made in his files affected the Agency's credibility. Mr. Beamer informed him that the team had tried to find him a temporary accommodation and that it had analyzed positions to determine if other positions were available in the East Central Division. However, it concluded that none of the positions that it examined were suitable, given his limitations and restrictions.

[116] In his letter, Mr. Beamer also asked the grievor to participate in another medical assessment with the specialist that Dr. Leclerc recommended. He explained that the management team wanted to consider up-to-date information about his limitations and restrictions. He indicated that given the severity of the grievor's limitations and restrictions, it was now necessary that he not to return to work until the new assessment was completed.

[117] A meeting was organized that day, March 24, 2017, for the management team and the grievor, who was informed of his new status as an employee "[translation] on sick leave". Mr. Beamer encouraged him to take care of himself and expressed hope that he could receive the proper care and return to work.

[118] The management team asked the grievor to consent to Dr. Leclerc's recommended medical assessment. Mr. Beamer gave him the Disability Insurance Plan application form. That day, Mr. Beamer went with the grievor to his office so that the grievor could hand over the files that had to be reassigned. That day was sad and difficult for both of them.

[119] The grievor explained that he felt "[translation] dismissed" and sent home. He was discouraged. He felt humiliated. He was asked to hand in his access card to the management team. He was stunned.

[120] The grievor used his sick leave credits. He was on sick leave as of March 27, 2017, pending the assessment by the specialist that Dr. Leclerc recommended. Mr. Beamer explained that the management team advanced him sick leave credits to cover the 13-week waiting period until he received disability insurance benefits from Sun Life in June 2017. Later, he was subjected to unpaid leave, but he could receive disability insurance benefits. He confirmed that the employer applied his sick leave balance until it expired on June 26, 2017.

[121] The grievor said that he felt crushed. Despite everything, he started to look for a job. His family situation worsened. It was a very difficult time for him. He insisted that he could work and that he wanted to work.

[122] On March 24, 2017, the grievor filed his eighth grievance (file no. 566-34-14861; "grievance H"), which stated as follows: "I grieve that the employer has not accommodated me based on the OFAF received from Dr. Leclerc".

[123] That day, he also filed a ninth grievance (file no. 566-34-14862; "grievance I") that reads as follows: "I grieve the letter dated March 24, 2017 issued by the Assistant Director of Audit, as it is constructive dismissal." However, he withdrew that grievance on January 28, 2022.

[124] He was on sick leave without pay from June 26, 2017, to the day on which his employment was terminated: September 21, 2021.

[125] On April 12, 2017, Mr. Beamer confirmed in a letter to the grievor that the employer required a new medical assessment by the specialist that Dr. Leclerc recommended, to determine the accommodations required for him to return to work. The employer wanted to see if he was fit to work and asked that the OFAF and answers to its questions be sent before May 24, 2017.

[126] On May 15, 2017, the grievor completed the disability insurance application form. He marked the "No" box in response to the following question: "Did the doctor recommend a change in, or certain restrictions on, the type of work that you could

do?" In addition, to the following question: "What has your doctor told you about returning to work?", the grievor wrote as follows: "IT [*sic*] is good and it will be beneficial for me."

[127] On May 24, 2017, Mr. Beamer wrote to the grievor to ask him to confirm the name and address of the specialist who was to assess his fitness to work. He also asked the grievor to explain why he wanted to see Dr. Leclerc again about it as Dr. Leclerc had referred him to a specialist in a different field.

[128] His question went unanswered.

[129] On June 2, 2017, Mr. Beamer completed the employer's portion of the grievor's disability insurance application.

[130] The grievor did not want to be reassessed. He emailed Dr. Leclerc on October 3, 2017, to ask him to provide an opinion on the necessity of meeting with other specialists who could assess his condition.

[131] On October 4, 2017, Dr. Leclerc wrote a letter in which he gave details of the situation and replied that a psychiatric follow-up would be beneficial if the issues persisted. His opinion was as follows:

> [Translation]
>
> …
>
> *During Mr. Mayrand's neuropsychological assessment, we established that cognitively, his functioning is normal, with no major deficiencies. However, we suspected challenges that might affect his functioning socially, in relationships, and in the workplace. Therefore, he was referred to a specialist with expertise to pursue in part this aspect of the assessment. From what I understand, a screening was done, without revealing any specifics. For more information about the second assessment, I refer you to the specialist who performed it (I will leave it to Mr. Mayrand to share that information with you and to provide you with adequate consent to communicate with that expert). Finally, as I indicated to the patient, a psychiatric follow-up would be beneficial, in my opinion, if issues persist. At this time, I am unaware if that avenue has been explored.*
>
> …

[132] The grievor stated that on April 13, 2017, he consulted Dr. Rouillard, a psychologist. However, he did not inform the employer of that appointment or of the outcome of that medical assessment.

[133] Mr. Beamer explained that he received the October 4, 2017, letter with Dr. Leclerc's update, which included that a screening was done but that it did not reveal anything specific. Dr. Leclerc referred the employer to the grievor for his consent to obtain the second assessment's results. Then, Dr. Leclerc added that a psychiatric follow-up would be beneficial if the issues persisted.

[134] During that time, Ms. Stewart began her position as the assistant director of audits at the East Central Ontario TSO.

[135] On January 3, 2018, she wrote to the grievor to ask him to send the employer the medical assessment to which Dr. Leclerc referred in his October 4, 2017, letter.

[136] Her request went unanswered.

[137] On January 26, 2018, she received a letter from the grievor. He requested authorization to apply to positions at professional services firms.

[138] He stated that on March 12, 2018, he consulted the doctor retained by Sun Life, Dr. Gilles Fleury, a psychiatrist, for an assessment. However, he did not inform the employer of that medical assessment or its results.

[139] He explained that on April 16, 2018, after several months of job searching, he secured a full-time job as a resource officer with the Association canadienne-française de l'Ontario, Conseil régional des Mille-Îles ("ACFOMI"). He explained his duties in that position. They included, among other things, providing personalized support to clients at each stage of their job searches, coaching, entering data, compiling statistics, and preparing analysis reports. ACFOMI provided Antidote at his request. He did not request any accommodations.

[140] On April 25, 2018, Hank Koudsi, Director, East Central Ontario TSO, replied to the grievor that the ACFOMI officer position did not conflict with his Agency position.

[141] On May 8, 2018, Ms. Stewart wrote to the grievor to remind him that she was looking for information about his limitations and restrictions. She told him that it was

important to keep the employer apprised of his health. She informed him that the manager of his disability file at Sun Life told her that he had undergone a medical assessment in March 2018 and that a final report was prepared. As the management team had done in its letters dated May 24, 2017, and January 3, 2018, she reminded him that the medical assessment request was available and that it would be submitted on reception of the name of the doctor who would carry out the medical assessment. The employer wanted to send the assessment request to the specialist as soon as possible.

[142] Her request went unanswered.

[143] The grievor admitted that he did not inform the employer of his appointments with Dr. Rouillard and Dr. Fleury. He explained that his family doctor had already informed the employer that he was fit to work. Therefore, he did not see the point of reminding the employer.

[144] During that time, according to the grievor, no major changes occurred in his medical condition that required updating the last OFAF. However, he did discuss it with his family doctor.

[145] On May 26, 2018, Dr. Erb wrote a letter confirming that the grievor's health had remained unchanged since March 2017 and that the accommodations requested in the OFAF of October 2016 still applied. He gave that letter to the grievor.

[146] On May 29, 2018, Sun Life informed the grievor that his long-term disability benefits claim was denied because the company had no medical proof that he could not work. It noted that the work stoppage occurred at the employer's request. That letter was not sent to the employer. It included the following:

> [Translation]
>
> …
>
> *The information on file clearly shows that the main reason for your work stoppage is that your employer requested it. We read the assessment report prepared by Charles Leclerc, Neuropsychologist, on February 2, 2017, and found no evidence of any psychiatric medical condition to support your work stoppage. However, we decided to secure an opinion from a psychiatric expert doctor who confirmed that the diagnosis was a major depressive disorder that is in complete and sustained remission. He*

> *also identified no major psychiatric limitations or restrictions in his assessment.*
>
> *One of our psychiatric health partners reviewed all the information on file and the conclusion of the expert report and confirmed the expert's conclusion.*
>
> …

[147] On May 30, 2018, the grievor communicated with Ms. Stewart. He provided her with Dr. Erb's letter of May 26, 2018, which stated that the grievor's health had remained unchanged since March 2017 and that the accommodations requested in the October 2016 OFAF still applied.

[148] On August 7, 2018, Ms. Stewart wrote to the grievor. She informed him that Dr. Erb's information dated May 26, 2018, was insufficient and that it did not confirm his restrictions and limitations on that date.

[149] As a reminder, in the OFAF dated October 25, 2016, Dr. Erb checked the box "Fit to work with limitations/restrictions (capable of modified/alternative duties or work schedule)". Then, he wrote this: "See attached document for neuropsychologic evaluation in 2013. (Dr. Day)". He also added as follows: "I have nothing more to add. If further information required, please contact Dr. Day, or refer Mr. Mayrand for re-assessment".

[150] Again, as a reminder, at that time, the management team was unable to confirm whether Dr. Day had received its list of questions about the grievor's ability to perform audit tasks. Recall that in his letter, Dr. Erb copied and pasted the following from Dr. Day's assessment dated September 17, 2013:

> *25/10/2016*
>
> *To be appended to OFAF completed Oct 25, 2016.*
>
> *Excerpt from report by Dr. Duncan Day, Neuropsychologist*
>
> *September 17, 2013*
>
> *This excerpt was appended to the Occupational Fitness Assessment Form completed by Dr. Day on Sept 17, 2013, which was provided to Cindy MacDonald, Audit Manager, CRA, East Central Ontario Tax Services.*
>
> *"While a complete neuropsychological report is not included with this form.*

> *Modification of work environment, and pacing will be important parts of his workplace integration, training, and adjustment treatment. He will likely require accommodations at the workplace, reducing workload demands, and allowing greater time for certain tasks. He would benefit from a distraction-free or at least distraction-reduced work environment, as well as the introduction of some flexibility in timelines to complete tasks he is assigned, where possible. It would also be beneficial to make all of the demands of his position, such as work output expectations, timelines, quality requirement, etc. very clear in writing at the outset. These accommodations are likely going to need to be permanent, but some improvements are possible with rehabilitation, and treatment."*

[151] Ms. Stewart explained that the management team, which as of then had offered the grievor accommodations in 2014, 2015, and 2016 and saw no improvement, considered that assessment insufficient to put new accommodations in place. According to the employer, Dr. Erb did not reassess the grievor's specific condition in 2016 but rather indicated that the limitations and restrictions were necessary based on the 2013 medical assessment. Therefore, she wanted to offer to the grievor to coordinate an assessment of his fitness to work through the Agency's health services provider.

[152] On September 27, 2018, she wrote to the grievor to inform him that for the moment, the management team did not know his intentions. She reminded him that the team had been informed that Sun Life had made its final decision that he was fit to work. However, she reminded him that in March 2017, the team had had serious concerns about his fitness to work at the Agency. In both his audit position and the general duties clerk position, he had had serious difficulties. Therefore, she informed him that if he felt ready to return to work, he had to confirm it, and that an OFAF would be requested. He had the choice of either providing the name of the doctor of his choice for the OFAF or considering undergoing an independent medical assessment, to identify the necessary accommodations.

[153] On October 10, 2018, the grievor sent a letter to Ms. Stewart that included a letter from Dr. Erb dated October 5, 2018. Dr. Erb's letter contains the following:

> *Mr. Mayrand has requested this letter.*
>
> *His health has not changed significantly since March 2017. The accommodations requested as per the OFAF of October 2016 would be unchanged.*

[154] The grievor explained that he was in good health. He considered the employer's position incomprehensible. He wanted to work.

[155] On January 23, 2019, Ms. Stewart and the grievor exchanged emails about an update on his health.

[156] On February 3, 2019, the grievor forwarded to Ms. Stewart a new note from Dr. Erb dated February 1, 2019. The note reiterated that the grievor's health had remained unchanged since March 2017 and that the accommodations recommended in October 2016 still applied.

[157] On March 12, 2019, Ms. Stewart wrote a letter thanking the grievor for the medical information that he had provided. In that letter, she provided several pages of background on all the difficulties that the employer had encountered since his health problems began. She informed him that sufficient and up-to-date information had to be provided before any attempt was made to return to work. She took the initiative of signing the letter for the doctor who would complete the grievor's OFAF, and she included that letter with hers so that the grievor could give it to the specialist himself, to make things easier.

[158] In April 2019, the grievor was promoted to a finance officer position at ACFOMI. From then on, his responsibilities increased to include all tasks relating to employee compensation. He explained that he was given the key to a locked cabinet. He explained that nothing got past his director and that she corrected and approved his work. He insisted that no errors were permitted in employees' pay and that the two of them checked the data for accuracy. He also started to look after a budget. He said that he had no accommodations in his position because he did not need them. His job performance caused no issues because his director gave him immediate feedback on his performance, which made life easier.

[159] He explained that he had not felt it necessary to inform the Agency of his ACFOMI promotion.

[160] On June 15, 2019, he forwarded another medical note from Dr. Erb, dated June 14, 2019, which confirmed again that the grievor's health had remained unchanged and that the accommodations recommended in October 2016 still applied.

[161] On July 29, 2019, Ms. Stewart sent a letter to the grievor to remind him that he had been on unpaid leave for injury or illness since June 26, 2017. The letter included his options or choices and the Agency's applicable policy instruments. It indicated that he had to let the employer know of his choice before August 31, 2019, to resolve the issue of his unpaid leave. These options were offered to him:

> [Translation]
>
> *a. Medical retirement …*
> *b. Retirement (other than medical) …*
> *c. Resignation …*
> *d. Return to work, subject to an updated medical assessment identifying limitations and restrictions ….*

[162] On August 21, 2019, he informed Ms. Stewart that he had chosen the option to return to work. He explained that his Agency salary appealed more than his ACFOMI salary.

[163] Ms. Stewart received that letter and believed that he would take the necessary action to provide the information that the employer requested, given that the option to return to work came with the condition that he obtain a medical assessment to identify his limitations and restrictions. He already had the information he needed; namely, the employer's form and questions.

[164] No developments took place in the period that followed.

[165] On October 21, 2019, Mr. Deszpoth, the acting assistant director as he was replacing Ms. Stewart, informed the grievor that if the grievor did not provide the employer with information by November 21, 2019, he would recommend withdrawing the option to return to work.

[166] On December 3, 2019, Mr. Deszpoth wrote to the grievor, to follow up again. He extended the deadline to provide the necessary information to January 3, 2020, and again stated that if the grievor failed to provide the information, the option to return to work would be withdrawn.

[167] On December 6, 2019, Mr. Deszpoth and Ms. Stewart received a letter and an OFAF from Dr. Erb. He confirmed again that the grievor's health had remained unchanged since March 2017 and that the accommodations recommended in October

2016 (those of 2013) remained unchanged. He recommended that the employer provide the grievor with Antidote (version 10). He confirmed that the employer was sent the 2013 medical assessment, which set out the necessary accommodations. In the OFAF, he stated that the grievor had limitations, among others, at the following 3 levels: deadline, social/emotional, and cognitive/mental demands. On the last one, he checked all the boxes in the report, indicating that the grievor had the following 14 limitations:

> *1) Continuous alertness, sustained concentration/focus*
> *2) Working under specific instructions*
> *3) Attaining precise limits/standards*
> *4) Multitasking*
> *5) Problem solving, decision making*
> *6) Adaptability*
> *7) Sound judgement*
> *8) Attention to detail*
> *9) Self-supervision/autonomy*
> *10) Retention of information*
> *11) Organizational ability, time management*
> *12) Initiative*
> *13) Analytical thinking*
> *14) Effective written communication*

[168] On February 6, 2020, Ms. Stewart wrote to the grievor. She stated that Dr. Erb did not answer the employer's questions about the grievor's ability to perform auditor tasks at the Agency. She requested that Dr. Erb answer the questions in the letter dated March 12, 2019, which included the background and the questions. She asked that he initial each page of the letter and that the grievor sign and return the consent form. The deadline to complete these tasks was March 16, 2020. Ms. Stewart informed the grievor that the employer did not accept the information that Dr. Erb provided on December 6, 2019, because it was insufficient. She informed him that if he failed to fully comply with the employer's request, it would withdraw the option to return to work.

[169] On March 7, 2020, Dr. Erb sent a letter to the employer, stating that he read the letter that Ms. Stewart wrote to the grievor on February 6, 2020. On one hand, he

stated that he did not receive the March 12, 2019, letter, and that for that reason, he was unable to answer the questions in it. On the other hand, he said that he reviewed the February 6, 2020, letter in depth and that the employer's questions were outside his field of expertise. He recommended that another medical assessment be completed by a neuropsychologist. In closing, he added the following:

…

> *Mr. Mayrand was referred to another specialist by Dr. Leclerc. (I think this was a psychologist, rather than a medical specialist, but am not sure) Mr. Mayrand informs me that individual did not provide him with a written report, and I do not have any further information from that specialist. I therefore am unable to liaise with that specialist. I am also unaware of any "medical" specialists in the community who would be able to carry out any relevant evaluation, other than a neuropsychologist, or a psychologist specialized in specific workplace issues.*
>
> *There have not been any treatments provided since he was assessed by Dr. Leclerc.*
>
> *I believe that Mr. Mayrand would likely require another neuropsychological assessment to determine as to the current nature of his restrictions and limitations, and whether these are permanent or temporary. Again, this is not within my sphere of expertise.*
>
> *I have no comment as to the number of hours it should require Mr. Mayrand to complete a file. It would be inappropriate for me to even suggest a time frame. I would not wish an auditor to comment on the length of time I should spend examining and evaluating a patient with a medical condition.*

[170] Because of the COVID-19 pandemic, some time passed before the management team could follow up.

[171] On June 3, 2020, Ms. Stewart read Dr. Erb's letter of March 7, 2020.

[172] On July 2, 2020, she wrote to the grievor. She informed him of the employer's expectation that he consult a specialist to determine his fitness to return to work. She also informed him that the information in Dr. Erb's report of March 7, 2020, was insufficient to examine the possibility of a return to work. She asked him to have Dr. Erb refer him to a specialist. If he could not, she offered to coordinate an assessment of his fitness to work through the Agency's health services provider. She requested an answer before July 27, 2020.

[173] On July 24, 2020, the grievor received a letter of thanks from the Agency because in his job at ACFOMI, he volunteered through the Community Volunteer Income Tax Program in 2020. At the hearing, he also presented the certificate of appreciation that he received for it as well as another one for volunteering again the next year in the program, for 2021.

[174] On July 24, 2020, Ms. Stewart received a letter from Dr. Erb. He informed the employer that the grievor agreed to consult Dr. Leclerc for a further assessment. Therefore, he invited the employer to contact Dr. Leclerc directly with questions about the grievor's abilities.

[175] On August 26, 2020, Ms. Stewart wrote to Dr. Leclerc with additional questions to clarify his earlier responses. She included a questionnaire with her request.

[176] On October 20, 2020, the grievor met with Dr. David Joubert, a psychologist who worked at the same practice as Dr. Leclerc. Dr. Joubert conducted the grievor's medical assessment. The grievor explained that later on, he reading the results of Dr. Joubert's tests described in his report difficult.

[177] On November 12, 2020, Ms. Stewart received Dr. Joubert's report.

[178] In summary, he concluded that given the grievor's multiple functional limitations relating to the different duties of his position, he could not perform in that position at a level that would be satisfactory to his employer. He stated that if the employer was unable to assign the grievor to duties or a position that might increase the chances of improving his performance, he recommended that the employer consider speaking to the grievor about medical retirement.

[179] Dr. Joubert's answers, as follows, to the management team's first two questions gave the employer an overview of the situation:

> ***1.*** *…* ***please indicate if any of the temporary limitations and restrictions identified by Dr. Leclerc in 2017 are now permanent in nature, based on your assessment and any other specialist assessment(s)*** *….*
>
> …
>
> *The current psychological assessment converges with Dr Leclerc's conclusions on many points. Results from the current evaluation*

have uncovered cognitive and behavioral patterns characterized by suspiciousness, rigidity, lack of insight, difficulties with verbal communication as well as deficits in the capacity to discriminate between essential and superfluous aspects of situations, particularly when these involve a degree of ambiguity. These difficulties in Mr. Mayrand's functioning are likely to have a significant impact on his performance at work as well as his capacity to complete tasks in a timely manner.

…

2. Do you recommend that Mr. Mayrand undergo rehabilitation or treatment? If it is recommended to Mr. Mayrand at this time, please indicate the duration of this treatment.

As mentioned above, limitations and restrictions that were identified are permanent rather than temporary. An eventual improvement in any of these limitations is not impossible in the context of significant efforts on Mr. Mayrand's part towards improving his cognitive and behavioral flexibility. This being said, it is worth noting that given the stable and chronic nature of these difficulties, as well as the pattern of rigidity observed in the employee, it is unlikely that such improvement will take place in a foreseeable future. Furthermore, Mr. Mayrand's position is that problems at the workplace are largely the responsibility of the employer, in that the latter failed to put into place reasonable accommodations for him. In sum, Mr. Mayrand believes that he is a victim of a revenge-driven initiative to drive him out of the workplace. It is of course not part of our mandate to take a stance in the conflict that opposes the employee to the employer, or to determine the truthfulness of various statements.

An active participation in a remediation program leading to positive and stable change requires an acknowledgment and awareness of one's personal contribution to the problem.…

Currently, we do not see much motivation in the employee to take part in such programming given that he does not appear to see the necessity of it. His position seems to be that the primary solution to the conflict experienced with the employer lies in the provision of the Antidote software, accompanied by a transfer to a different supervisor. This is in spite of the fact that some difficulties have been present since 2006.…

In sum, given the functional limitations impacting several aspects of Mr. Mayrand's current functioning at work, we consider that he is not currently capable of conducting his work in a way that is consistent with the employer's expectations. Consequently, should remediation efforts fail and, in the case that the employer is unable to assign him to a different position that is better suited to his capacities and limitations, it is recommended that the possibility of a medical retirement be raised with the employee.

3. (as applicable) If Mr. Mayrand has already completed treatment, please advise when the treatment was completed

> ***and comment on the success of the treatment plan as it relates to his current ability to perform the duties of his position.***
>
> *Based on the available information, it does not appear that Mr. Mayrand took part in any substantial rehabilitative programming since Dr Leclerc's assessment (2017).*
>
> …
>
> [Emphasis in the original]

[180] His report went on to provide many other details. Then, in summary, Dr. Joubert recommended the following to the employer:

> *• In the context of the current position, allow access to the Antidote writing assistant software, as requested by the employee, so as to allow for a better quality in written expression.*
> *• In the context of the current position, if possible, establish a sequential approach to file assignment, on a one-at-a-time basis rather than processing several files in parallel. This is to avoid the employee having to split his attention between files, which heightens the cognitive load on him. This is especially true if the files involve complex cases.*
>
> *• In the context of the current position, facilitate the development and maintenance of a collaborative relationship with the employee by organizing regular meetings in which Mr Mayrand's preoccupations are discussed. It is also recommended that such meetings include a person whose role will be to act as a mediator, so as to maximize the likelihood of positive outcomes.*
> *• In the context of the current position, facilitate the participation to one or more remediation programs designed to improve cognitive, behavioral and vocational functioning. For instance, a structured, directive psychotherapy can allow for the development of introspection, flexibility, adaptability, and the development of more structured cognitive processes. Participation in such a program could be facilitated via the provision of flexible working hours, for example.*
>
> *• In the context of the current position, consider making use of a colleague who could act as a mentor, or possibly a professional coach on an external basis, in order to help the employee to better understand and adapt to challenges that he is faced with on a daily basis in the work environment.*
>
> *• Explore with Mr. Mayrand, in a collaborative manner, the possibility of a transfer into a position that is better suited to his assets as well as his limitations and restrictions in the cognitive, behavioral and interpersonal domains (see comments on question 2).*
>
> *• Should Mr. Mayrand reintegrate his current position, it is recommended that the employer reassess whether some aspects of*

> *the work could be accomplished differently so as to take his limitations into consideration (e.g., lack of judgment, problems interpreting situations, lack of suitability for team work). For instance, reducing the necessity of interpersonal interactions in his daily work (e.g., less contact with the public) could lead to improvements in the amount of time required to complete files. Another possibility would be to explore whether it is possible to use the employee primarily in a supporting role, where colleagues would do the "interpersonal" part of the work and Mr. Mayrand would conduct select aspects of the analysis for which he is better suited, and is less likely to make errors. Given that the prognosis regarding significant change is reserved, in the event of a lack of progress, the possibility of a medical retirement should be discussed with the employee.*
>
> *• It is recommended that efforts towards discussing potential return to work options could be started as soon as the employer has had the time to reflect on present assessment report and developed a strategy to facilitate these discussions (i.e., having a mediator to help with options).*

[181] At the hearing, the grievor gave his opinion on Dr. Joubert's recommendations. He began by stating that he informed Dr. Joubert that he disagreed with some of his comments in the report. He felt that Dr. Joubert incorrectly considered the information that he obtained from the employer. In the grievor's opinion, the employer never acted in good faith.

[182] From the grievor's perspective, he did not believe that the employer could act in good faith and accommodate him. He explained that he did not believe that the employer would provide him with Antidote; nor did he believe that it was possible to assign him one file at a time, given the wait times on each file. He also did not believe that a mediator could help resolve the issue, although he acknowledged that this option was not chosen.

[183] He added that another indication of the employer's bad faith was that it did not offer him structured psychotherapy as suggested in Dr. Joubert's fourth recommendation. Similarly, the employer did not offer him an internal mentor or an external professional coach (Dr. Joubert's fifth recommendation). He said that the employer also did not give him the option of being reassigned or transferred to another position (Dr. Joubert's sixth recommendation); nor did it offer him a different role on the audit team (Dr. Joubert's seventh recommendation). Finally, the eighth recommendation touched on the appropriateness of a medical retirement, and the

ninth recommendation was to encourage the parties to initiate a discussion as soon as possible.

[184] At the hearing, the grievor explained that he believed that his grievances and his responses to the employer's information requests demonstrated beyond any doubt that he could work. It was wrong to deny him a return to audit duties. In short, he felt that his only option to resolve the issue was through adjudication. In his view, the Board would eventually confirm that the employer wrongly failed to provide him with a reasonable accommodation.

[185] Ms. Stewart found that a return to work would not be possible for the grievor in the foreseeable future. She explained why Dr. Joubert's recommendations to facilitate the grievor's return to work were in fact not possible.

[186] Ms. Stewart said that she was aware that accommodations had been in place since 2013 but that they had not been successful. Among other things, in 2014 and 2015, the grievor was assigned simplified duties from a different position, at the SP-03 group and level, to help him succeed, but it was to no avail. Then, at his request, the employer agreed to allow him to resume his audit duties in his position at the SP-05 group and level with help from a team leader who mentored him full-time. The mentor was dedicated to helping him and guiding and directing him so that he could learn to work independently. However, it was done in vain. In addition, he was assigned a limited number of files, and deadlines for completing his audits were extended, to no avail.

[187] Despite all those measures, the grievor was unable to deliver acceptable work. Therefore, Ms. Stewart felt that adding a mediator likely would not fix the issues. Continuously, despite all the flexibility that he was given to complete his files, despite the limited number of files assigned to him, and despite all the teaching that Ms. Parris offered him, his work was inaccurate, error-ridden, and unreliable. His errors risked harming the Agency's effectiveness and credibility.

[188] In particular, Ms. Stewart explained that one of the Agency's commitments to taxpayers is to guarantee the confidentiality of their information that it possesses. However, some of the grievor's errors, made because of inattention or cognitive problems, were described as cross-contamination, meaning that one taxpayer's data

mistakenly ended up in another taxpayer's file. Such errors had a true impact on the Agency. Ms. Stewart explained that the Agency had to avoid the negative effects and repercussions of such errors on its credibility. Allowing them would prevent the Agency from being effective and credible.

[189] Like Ms. Parris, Ms. Stewart stated that it was not possible to adopt the suggested sequential approach, which would have allowed the grievor to process one file at a time until it was completed. The reason was that a file has significant downtime while the auditor waits for additional information from the taxpayer. During that waiting period, the employer asks auditors to perform their duties on other files. Similarly, a file clerk cannot work on one file at a time until it is completed. That approach would be counterproductive and inconsistent with the Agency's practice of working efficiently and productively.

[190] Ms. Stewart also explained that in 2014, the adopted accommodation plan called for the grievor's workstation to be moved to another one in a quieter area of the office where there would be fewer distractions and interruptions. That accommodation was made. The employer also gave him a choice of location. If he found that the choice was not a good fit, it was up to him to say so. The employer wanted him to be able to work in a quiet space.

[191] She also explained that at that time, she felt that constant supervision of his work would be difficult if he was not on-site with his team leader to help him with his duties. Specifically, when he carried out audit or other duties, his team leader or his supervisor when he was a clerk spent significant time working with and regularly advising him.

[192] Ms. Stewart chose not to encourage the grievor's participation in a remediation program involving the cognitive, behavioural, and vocational spheres. Dr. Joubert gave the example of structured psychotherapy aimed at developing introspection, flexibility, and structuring skills at the cognitive level. She simply mentioned that the grievor claimed that everything was fine and that he had no problems with his work. He seemed in denial and therefore closed to any service, care, or treatment options. It was a difficult subject for him.

[193] Ms. Stewart also explained that she carefully reviewed the job analysis that Ms. Parris completed in 2017. She also tried to find duties in those positions that the grievor could perform. However, she found nothing. Each duty required judgment and attention. Therefore, it was not possible to combine duties to create a position tailored to him.

[194] Ms. Stewart also said that the Agency could not require public service agencies and departments to try to find a position in themselves for an Agency employee. One reason, among others, is that the Agency is not governed by the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13).

[195] Finally, with respect to Antidote, Ms. Stewart explained that comparable software (WordQ 3) was offered to the grievor beforehand, in 2014. She explained that software compatibility with the operating system that the Agency uses is not automatic and must be tested before software can be distributed. There was also an operating licence issue. That is why WordQ 3 was initially offered to the grievor. At that point, the management team could have taken further steps to obtain authorization to provide him with Antidote. However, the management team was well aware that the grievor's difficulties with attention, analysis, judgment, and learning were not limited to his writing.

[196] As a result, Ms. Stewart decided to take the most appropriate action for the Agency, which was to terminate the grievor because keeping him on the job would have imposed undue hardship. She clarified that it did not mean that the Agency considered him unfit to work but that further accommodation would cause undue hardship and would significantly damage the credibility and viability of the Agency's services.

[197] Therefore, on June 2, 2021, she sent him an option letter and attached the Agency's relevant policy instruments. The options offered to him to resolve his leave without pay were as follows, and she asked that he inform her of his choice by July 7, 2021:

> [Translation]
>
> *a) Medical retirement …*
> *b) Retirement (other than medical) …*
> *c) Resignation ….*

[198] The grievor consulted his union representative. He said that he was advised not to respond to Ms. Stewart's letter. His representative would file a grievance for him.

[199] He continued to work as a finance officer with ACFOMI and did not respond to Ms. Stewart.

[200] On July 29, 2021, she wrote to him to inform him that if she did not receive his decision about the resolution of his leave without pay by August 15, 2021, his employment could be terminated for reasons not related to discipline.

[201] She did not hear back from him.

[202] On September 17, 2021, Ms. Stewart resigned herself to terminating the grievor. She explained that she considered the following: the nature of the limitations identified, the unavailability of a position that could accommodate his limitations, Dr. Joubert's opinion that the limitations would not improve in the foreseeable future, her conclusion that access to Antidote would be insufficient to improve the situation, the risks to the Agency's credibility in fulfilling its mandate, the importance of preserving the health and well-being in the workplace of those who regularly interacted with the grievor, and the need to fill his position, which had been vacant for four years. She advised him that his termination was effective September 20, 2021.

[203] On September 23, 2021, he filed a final grievance, contesting his termination (file nos. 566-34-43727 and 566-34-43728; "grievance J"), which reads as follows:

> [Translation]
>
> *I grieve the employer's decision to terminate me effective September 20, 2021, and the termination letter dated September 17, 2021. This is discriminatory, and it violates article 19 - the No Discrimination clause of my collective agreement and the Canadian Human Rights Act, as well as the employer's duty-to-accommodate policies.*

[204] The grievor explained that he left ACFOMI in late September 2021. On October 18, 2021, he started a new job with ASM Global (Leon's Centre) as an accountant. He said that he is very happy in that job. He stated that he is an active and productive employee. He submitted evidence of his job posting to show the duties that he carries out in his job. They include helping the director prepare financial statements

(monthly, annual, on request, etc.), making journal entries in the accounting system, and performing analyses and reconciliations on general ledger accounts. He has no accommodations in his work.

[205] At the hearing, the grievor affirmed that the employer's decision to terminate him had a direct financial impact on him. Among other things, he lost the benefits that he previously received. He also felt the negative impact of the termination on a psychological level.

[206] He stated that his current position is more demanding than the SP-03 position that he held at the Agency from February 2014 to September 2015. Had the employer offered him that SP-03 position from 2017 to 2021, he would have accepted it. He stated that his performance in that position was not acceptable in 2014 and 2015 because the employer did not adequately accommodate him.

A. Summary of the grievor's grievances

- In the grievance dated November 29, 2016, he alleged that the Agency failed to accommodate his disability based on a medical certificate that he received on October 25, 2016 (grievance A).
- In the grievance dated December 1, 2016, he alleged that the Agency failed to accommodate his disability in his 2016-2017 performance agreement (grievance B).
- In the grievance dated December 1, 2016, he alleged that the Agency failed to accommodate his disability in his 2016-2017 performance improvement plan (grievance C).
- In the grievance dated December 20, 2016, he alleged that the employer refused to reimburse the travel costs he incurred for a medical assessment in Gatineau (grievance D).
- In the grievance dated February 16, 2017, he alleged that the employer refused to reimburse expenses that he incurred on February 2, 2017 (grievance E).
- In the grievance dated March 1, 2017, he alleged that the employer refused to reimburse expenses that he incurred on February 28, 2017 (grievance F).
- In the grievance filed on March 1, 2017, he alleged that the Agency failed to accommodate his disability in his February 27, 2017, interim evaluation (grievance G).
- In the grievance filed on March 24, 2017, he alleged that the Agency failed to accommodate his disability (grievance H).
- In his grievance filed on March 24, 2017, he alleged that he was constructively dismissed. He withdrew it on January 28, 2022 (grievance I; withdrawn).
- In his grievance filed on September 24, 2021, he grieved his termination dated September 20, 2021 (grievance J).

B. Summary of the arguments

[207] The employer brought to my attention the key principles of discrimination and accommodation set out in the following decisions: *Canada (Attorney General) v. Duval*, 2019 FCA 290 at paras. 21, 22, 25, 41, and 42; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at paras. 22 and 38; *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at paras. 14 to 21; and *Nadeau v. Canada Revenue Agency*, 2017 FPSLREB 27 at paras. 43, 44, and 49 to 52.

[208] It also brought to my attention the key principles of collective agreement interpretation set out in the following decisions: *Arsenault v. Parks Canada Agency*, 2008 PSLRB 17 at paras. 22, 29, 38, and 40; *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at paras. 50 and 51; and *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at paras. 25 to 28.

[209] It also brought to my attention the key principles of terminations for reasons other than disciplinary set out in the following decisions: *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24 at paras. 91 and 93 to 95; *Lavoie v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 1 at paras. 147, 153, 156, 158 to 161, 170, 176, 177, 179, 184, and 187; and *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44 at paras. 75, 76, 82, 88, and 91.

[210] It also brought to my attention the key principles of performance evaluation and improvement plans set out in the following decisions: *Bahniuk v. Canada Revenue Agency*, 2005 PSLRB 177 at paras. 63 and 65; and *Charest v. Deputy Head (Department of Public Works and Government Services)*, 2017 FPSLREB 18 at para. 35.

[211] The employer argued that to make a *prima facie* case of discrimination, meaning at first view, the grievor had to show 1) that he has a characteristic that is a prohibited ground of discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) (a characteristic protected against discrimination), 2) that he suffered adverse treatment, and 3) that the protected characteristic was a factor in the adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61).

[212] From the start, the employer recognized its duty to accommodate in this case but argued that it could not accommodate the grievor without suffering undue hardship.

[213] It argued that when the Board finds a *prima facie* case of discrimination, the employer has the onus of establishing that its application of the standard was justified. In *McGill*, the Supreme Court of Canada reiterated the three-part test established in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at paras. 54 and 62 ("*Meiorin*"), as follows (at para. 13):

> *It is well established that the employer must justify the standard it seeks to apply by establishing:*
>
> *(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
>
> *(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, and*
>
> *(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*
>
> (Meiorin*, at para. 54)*

[214] The employer pointed out that grievance I was withdrawn and argued that all the grievances should be denied, for the following reasons:

Grievance A	Allegation that no accommodation was provided after Dr. Erb's first OFAF	The grievor was accommodated. He did not meet the second criterion necessary to establish a prima facie case of discrimination; namely, he did not demonstrate that he suffered adverse treatment.
Grievances B, C, and G	2016-2017 performance agreement, performance improvement plan, and interim evaluation of February 27, 2017	The Board does not have jurisdiction to hear these grievances involving performance evaluations and a performance improvement plan (see Charest). And the employer acted in good faith in how it addressed the grievor's unsatisfactory performance.

Grievances D, E, and F	Failure to reimburse certain incurred expenses	On one hand, these grievances are moot given the reimbursement of mileage, meals, and expenses associated with the grievor's medical assessments. In addition, the employer exercised its discretion to grant him 7.5 and 4.5 hours of leave with pay for medical appointments (code 5300) on February 2 and February 28, respectively. On the other hand, the grievor was not entitled to overtime because the collective agreement sets out in the definition of overtime that it is "… authorized work in excess of the employee's [grievor's] scheduled hours of work …". In this case, the grievor did not carry out work. In addition, clause 28.01 states, "Compensation under this Article shall not be paid for overtime worked by an employee at courses, training sessions, conferences, and seminars unless the employee is required to attend by the Employer." That list does not include medical leave. By inference, in addition to the hours that may be compensated when an employee travels to attend courses or training, only the hours spent performing work may be compensated under the definition of "overtime" in the collective agreement. In sum, the grievor did not carry out extra work; he was on leave. In the alternative, the grievor was granted discretionary leave (paid medical leave), which was a reasonable accommodation.
Grievance H	Allegation that no accommodation was provided after Dr. Leclerc's OFAF, which forced the	The employer established that its application of the standard was justified. It met the three criteria established in Meiorin (at paragraph 54) as follows: 1) it adopted the standard (being placed on sick leave,

	grievor to take leave without pay	pending the specialist's results) for a purpose rationally connected to performing the job (the Agency's duties), 2) it adopted the particular standard in an honest and good-faith belief that it was necessary to fulfilling that legitimate work-related purpose, and 3) the standard was reasonably necessary to accomplishing that legitimate work-related purpose. It demonstrated that it is impossible to accommodate employees sharing the grievor's characteristics without imposing undue hardship on the employer. The Agency was exposed to significant risks with respect to its ability and duty to fulfil its mandate. Before the grievor was placed on sick leave, Ms. Parris conducted a job analysis that confirmed that he did not have the ability to perform the duties of the different positions. For his part, the grievor did not do everything he could to reduce the impact of his disability on his work (see Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970). He was late providing recent medical information and communicating it to the employer.
Grievance J	Termination	The employer considered Dr. Joubert's OFAF of November 12, 2020, and his answers to its questions. It was aware that in his report, Dr. Joubert assessed the grievor as fit to work, with limitations and restrictions. Although he offered recommendations to help the parties find a solution for the grievor's return to work, Ms. Stewart explained why each suggestion was not feasible. For example, it was not possible to assign him one file at a time due to the files' downtime. Also, he had been supported before

		by a full-time mentor for a long time. Ms. Stewart gave a comprehensive account of the reasons for which the suggestions were not feasible. She again considered the positions in place at the East Central Ontario TSO, which coincide with the positions at the Agency's headquarters, and their appropriateness with respect to the grievor's limitations and restrictions. She did not find a fit. The grievor was terminated because he did not have the ability to perform work at the Agency and was unlikely to be able to work in the foreseeable future. The employer met the three criteria established in *Meiorin*. The standard, the termination, was adopted for purposes relating to carrying out the Agency's duties, the employer sincerely believed that it was necessary, and it was reasonably necessary to carry out the Agency's duties.

[215] For his part, the grievor argued that the employer continually failed its obligation to accommodate him. The medical information that he submitted during the period in which he filed his grievances indicated that he was fit to work with limitations or restrictions. The employer wrongly concluded that he was unfit to work. In fact, he worked outside the Agency for three years.

[216] The grievor brought to my attention clause 19.01 of the collective agreement, ss. 7 and 15 of the *CHRA*, and several parts of internal Agency documents, namely, section 6.1 of the *Directive on Early Intervention and Return to Work* (version 2.0), section 6.2 of that directive (but version 2.1), sections 5.2.1 and 5.3.4 of the *Procedures on the Duty to Accommodate* (version 2.0), section 6.1 of the *Directive on Performance Management and Recognition* (version 7.1), section 5.1.5 of the *Procedures on Performance Management and Recognition* (version 8.1), and the paragraph entitled

"[translation] Medical Disability" of the [translation] *Principles on Termination of Employment and Demotion for Non-Disciplinary Reasons*.

[217] He also brought to my attention the key principles of discrimination and accommodation set out in the following decisions: *Moore*, at para. 33; *Meiorin*, at paras. 54, 62, and 65; *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41 at paras. 132, 148, and 149; *Hydro-Québec*, at para. 14; *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101 at paras 89, 91 to 93, 96, 97, 99, and 100; and *Giroux v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 102 at paras. 138, 141, 145, and 153.

[218] In particular, he noted that paragraph 54 of *Meiorin* sets out the three-part test for determining whether a *prima facie* discriminatory standard is a bona fide occupational requirement.

[219] He also brought to my attention the key principles of collective agreement interpretation set out in the following decisions: *Landry v. Library of Parliament*, [1993] C.P.S.S.R.B. No. 90 (QL); and *Campione v. Canada Revenue Agency*, 2013 PSLRB 161 at para. 89. In addition, he referred to clauses 25.06(b), 28.01, 32.02, and 32.05 of the collective agreement.

[220] He asked to be reinstated at the Agency, confirmed that grievance I was withdrawn, and argued that all his grievances should be upheld, for the following reasons:

Grievance A	Allegation that no accommodation was provided after Dr. Erb's OFAF	The grievor met the 3 criteria necessary to establish a prima facie case of discrimination: 1) he had a disability and was declared fit to work with limitations and restrictions, 2) the employer failed to accommodate him on the grounds that it considered outdated the limitations and restrictions that Dr. Day established in 2013 even though they were repeated in 2016 in Dr. Erb's OFAF, and (3) he encountered difficulties in his job because he was not accommodated. The employer violated sections 5.2.1 and 5.3.4 of the *Procedures on*

		the Duty to Accommodate. And WordQ 3, which was offered to him instead of his requested Antidote, was unsuitable. In addition, he did not consider the area in which he worked quiet. The employer was not flexible with him as it did not accept that he exceeded the 180-day standard for completing a file. Its duty was to discuss with him, to find him an appropriate accommodation.
Grievances B, C, and G	2016-2017 performance agreement, performance improvement plan, and interim evaluation of February 27, 2017	The Board has jurisdiction to hear these grievances as the employer unlawfully discriminated in these performance evaluations and the performance improvement plan. Thus, it contravened clause 19.01 of the collective agreement. The grievor established a prima facie case of discrimination: 1) he had a disability and was declared fit to work with limitations and restrictions, 2) the employer did not offer him any accommodation, and 3) he encountered difficulties in his job because he was not accommodated. The first performance evaluation (grievance B) came after the employer's decision to ignore the limitations and restrictions identified in the 2013 OFAF, which Dr. Erb repeated in 2016. Similarly, the performance improvement plan (grievance C) came after the employer's decision to ignore the limitations and restrictions identified in the 2013 OFAF, which Dr. Erb repeated in 2016. The interim evaluation (grievance G) also came after the employer's decision to ignore the limitations

		and restrictions identified in the 2013 OFAF, which Dr. Erb repeated in 2016. The employer violated section 5.1.5 of the *Procedures on Performance Management and Recognition*. The employer's behaviour was offensive and a true insult to the grievor's dignity.
Grievances D, E, and F	Failure to reimburse certain expenses	The grievor was not paid for some of the hours he spent travelling to and from Gatineau for his assessment. He was entitled to overtime because the employer authorized him to undergo the medical assessment on February 2, and he was away from home for this purpose from 6:30 a.m. to 7:30 p.m. Of those 13 hours, 7.5 hours were paid to him (leave for medical appointment). The employer must compensate him at the overtime rate (time and a half) for the remaining 5 hours, since he took 30 minutes off for lunch. The employer also authorized him to undergo the medical assessment on February 28. His appointment was at 3:30 p.m. He was away from home for that purpose from 11:30 a.m. to 7:30 p.m. (he hoped to move his 3:30 p.m. appointment to 1:30 p.m., but that did not happen). He was paid for 4.5 of those 8 hours (leave for medical appointment). The employer must compensate him at the overtime rate (time and a half) for the 2.5 hours after 5:00 p.m., namely, 5:00 p.m. to 7:30 p.m., which he used to return to Kingston. Alternatively, the grievor requested that he be granted 5.5 hours of medical leave (rather than

		4.5 hours) because on that day, his workday could have ended at 6:00 p.m. If so, he would not have been required to take 3 hours of personal leave in the morning but only 2 hours. Specifically, the relevant collective agreement provisions are clauses 32.02, 32.05, 25.06(b), and 28.01. In particular, clause 25.06(b) of the collective agreement states that the "… normal work day shall be seven decimal five (7.5) consecutive hours, exclusive of a lunch period, between the hours of 7 a.m. and 6 p.m."
Grievance H	Allegation that no accommodation was provided after Dr. Leclerc's OFAF, which forced the grievor to take leave without pay	The employer did not establish that its application of the standard was justified. It did not fulfil the three criteria of Meiorin (at paragraph 54). Specifically, 1) it did not adopt the standard (being placed on sick leave pending the specialist's results) for a purpose rationally connected to performing the job (the Agency's duties), 2) it did not adopt the particular standard in an honest and good-faith belief that it was necessary to fulfilling that legitimate work-related purpose, and 3) the standard was not reasonably necessary to accomplishing that work-related purpose. First, the assessment found that he was fit to work with limitations and restrictions. He could have worked had he been properly accommodated and had he received Antidote instead of being sent home. Second, accommodating the grievor instead of sending him home would have been another way to achieve the legitimate work-related purpose (the Agency's duties).

		Third, it was not reasonable to send the grievor home. The Agency could have carried out its duties by accommodating him. The employer's job analysis was inadequate. It evaluated the positions based on their normal duties and not on duties adapted for the grievor. The employer was obligated to take the following approach before subjecting the grievor to forced leave without pay. Considering that he was fit to work with certain limitations and restrictions, it had to assess whether he could perform the following: a) the duties of his substantive position? If not, b) the modified duties of his substantive position? If not, c) the duties of a lower group-and-level position? If not, d) the modified duties of a lower group-and-level position? If not, e) the duties derived from different positions? It did not follow that approach. The employer could have dealt with him without incurring undue hardship. A high standard applies when an employer argues that accommodation would impose undue hardship due to excessive costs or health and safety issues. The employer adduced no such evidence. It also did not consider granting him paid leave. Subjecting him to forced unpaid leave was not a valid option until other options were considered. For his part, the grievor fulfilled his obligations, consulted Dr. Rouillard,

		the psychologist recommended by Dr. Leclerc, and responded to all the employer's information requests (see their communications between January 3, 2018, and July 24, 2020). In summary, he demonstrated to the Sun Life specialist that he was fit to work. He found employment outside the Agency, where he has since worked full-time, without accommodation.
Grievance J	Termination	In his November 12, 2020, report, Dr. Joubert assessed the grievor as fit to work with limitations and restrictions. He provided recommendations to help the parties find a solution for his return to work. In his testimony, the grievor explained that none of those recommendations was attempted. It was not enough for the employer to claim that his work would undermine its credibility. The employer did not establish that its application of the standard was justified. It did not fulfil the three Meiorin criteria (at paragraph 54): 1) it did not adopt the standard (the termination) for a purpose rationally connected to performing the job (the Agency's duties), 2) it did not adopt the particular standard in an honest and good-faith belief that it was necessary to fulfilling that legitimate work-related purpose, and 3) the standard was not reasonably necessary to accomplishing that work-related purpose. The employer did nothing to accommodate the grievor. The assessment found that he was fit to work with limitations and restrictions. It did not offer him Antidote or attempt anything

		before terminating his employment for disability. The 2017 job analysis was inadequate. The employer evaluated the positions based on their normal duties and not on duties that could be adapted for the grievor. And it should have expanded its search for a position suitable for him. The employer was obligated to take the following approach. Considering that he was fit to work with certain limitations and restrictions, it had to assess whether he could perform the following: a) the duties of his substantive position? If not, b) the modified duties of his substantive position? If not, c) the duties of a lower group-and-level position? If not, d) the modified duties of a lower group-and-level position? If not, e) the duties derived from different positions that he could perform? It did not follow that approach. The employer could have dealt with him without incurring undue hardship. A high standard applies when one argues that accommodation would impose undue hardship due to excessive costs or health and safety issues. No such evidence was adduced. It would have cost the employer nothing to assign duties suited to the grievor. In the end, although the grievor's performance in another position might have been unsatisfactory, the option was not pursued. Therefore, he will never know if he could have

		succeeded in a job suited to his limitations and restrictions.

III. Reasons

[221] The parties asked the Board that redress and mitigation measures not be addressed at the hearing. They requested an extension for that purpose, if necessary. I granted the request.

[222] The parties presented a number of decisions to support their positions. I read each one. However, I will refer only to those that are of particular importance to this analysis.

A. Issue 1: Did the employer unlawfully discriminate on the grounds alleged in grievance A?

[223] In grievance A, the grievor alleged that the employer unlawfully discriminated on the ground that it failed to honour the October 25, 2016, medical information. At the hearing, he argued that the employer's failure to accommodate him after he provided the medical information dated October 25, 2016, was discriminatory.

[224] Article 19 of the collective agreement states as follows:

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

[225] I note that sections 5.2.1 and 5.3.4 of the *Procedures on the Duty to Accommodate* read as follows:

> [Translation]
>
> ***5.2 Step 2: Gather and assess relevant information***
>
> *Once a need for accommodation has been identified, the manager will do the following:*
>
> ***5.2.1*** *Review with the employee or applicant the type of accommodation needed, recognizing that additional information may be required ….*
>
> …

> ***5.3 Step 3: Develop, propose, document, and implement accommodation options***
>
> …
>
> ***5.3.4*** *Provide interim accommodation until a more suitable, long-term solution is developed ….*
>
> [Emphasis in the original]

[226] Note that the grievor was already receiving interim accommodations until a more suitable, long-term solution could be found. As a reminder, accommodations were in place from November 19, 2013, but they were not successful. Among other things, in 2014 and 2015, he was assigned simplified duties in a different position at the SP-03 group and level to allow him to perform meaningful work, to no avail.

[227] Then, in December 2014, the employer received medical information that stated that the grievor was fit to work without limitations or restrictions. So, it consented that he resume his audit duties in his position at the SP-05 group and level. However, it found it beneficial to provide him with support from a team leader who mentored him full-time. The mentor was dedicated to helping, guiding, and directing him so that he could learn to work independently. However, the mentor's efforts were to no avail. And he was assigned a limited number of files and flexible deadlines to complete his audits, to no avail.

[228] The employer sought a more suitable long-term solution. When the grievor filed this grievance, the employer considered his newly submitted medical information unsatisfactory. Therefore, then, it felt that it could not implement the appropriate long-term solution. It did not know that solution and required the grievor's cooperation to help find it. The different interim accommodations continued to apply. According to the employer, those accommodations were meant not to solidify a status quo but to be sensible buffers adaptable to the changing situation. The employer was looking for a long-term solution.

[229] However, according to the grievor, the employer did not offer him an adequate level of accommodation.

[230] The Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA* (s. 226(2)(a) of the *FPSLRA*), of which s. 7 states that it is a

discriminatory practice to refuse to continue to employ or to differentiate adversely in relation to an employee on a prohibited ground of discrimination.

[231] An employee who complains that he or she has not been accommodated must first present sufficient evidence until proven otherwise that discrimination has occurred, namely, a *prima facie* case of discrimination. Thus, failing to accommodate an employee does not automatically amount to a finding of discrimination.

[232] To establish a *prima facie* case of discrimination, the grievor had to show that 1) he has a characteristic that is a prohibited ground of discrimination under the *CHRA* (a characteristic protected against discrimination), 2) he suffered adverse treatment, and 3) the protected characteristic was a factor in the adverse impact (see *Moore*).

[233] In this case, in his October 25, 2016, report, Dr. Erb checked the box "Fit to work with limitations/restrictions (capable of modified/alternative duties or work schedule)". Then, he wrote this: "See attached document for neuropsychologic evaluation in 2013. (Dr. Day)". He also added as follows: "I have nothing more to add. If further information required, please contact Dr. Day, or refer Mr. Mayrand for re-assessment".

[234] The grievor shared that information with the employer, which felt that the information did not allow it to develop a more suitable long-term solution. The management team, which was already accommodating the grievor but not seeing any improvement (fewer files, flexible time frames, ongoing assistance, etc.), considered the information insufficient to implement additional accommodations that would be effective in the long term.

[235] The management team found that the grievor's family doctor did not answer its questions and appeared not to have reassessed the grievor's specific condition in 2016 but instead to have simply indicated that limitations and restrictions were required, based on the specialist's 2013 assessment. At that time, Ms. Parris considered that the grievor likely did not communicate her questions about his ability to perform specific functions (such as exercising judgment or paying attention to detail). He said that he disagreed with the tone of the questions. Without waiting for the letter to be signed, he took it upon himself to seek Dr. Erb's medical opinion.

[236] On November 18, 2016, Ms. Parris took the time to explain to the grievor that she required clarification of his limitations and restrictions as Dr. Erb's letter simply referenced Dr. Day's report and did not specify how his limitations and restrictions affected or impacted his ability to perform his duties as an Agency auditor in the long term. In addition, she explained that Dr. Trickey's medical note dated November 8, 2016, did not identify any limitations or restrictions that would explain the need for Antidote. Therefore, the employer requested that he undergo a new medical assessment with a specialist.

[237] He disagreed and refused to see a specialist at that time. In the circumstances, the management team felt that it had no choice but to proceed with the performance improvement plan.

[238] I find that the grievor did not establish a *prima facie* case of discrimination. Although I find that he has a characteristic that is a prohibited ground of discrimination under the *CHRA*, in this case a disability, I find that he did not meet the second and third criteria necessary to establish a *prima facie* case of discrimination. In my view, he did not demonstrate that he suffered adverse treatment based on his disability.

[239] In his report, Dr. Erb checked the box "Fit to work with limitations/restrictions (capable of performing modified/alternative duties or work schedule)". Then, he wrote this: "See attached document for neuropsychologic evaluation in 2013. (Dr. Day)". He also added as follows: "I have nothing more to add. If further information required, please contact Dr. Day, or refer Mr. Mayrand for re-assessment".

[240] When the grievor consented to it, the management team made sure to send the letter with its questions directly to the specialist. It sought the specialist's advice as to whether the grievor had the ability to perform his audit or other Agency duties.

[241] None of the evidence presented established that he suffered any adverse treatment related to the employer's request for more information from the specialist.

[242] Therefore, I find that it was not demonstrated that the employer unlawfully discriminated for the reasons stated in grievance A.

B. Issue 2: Did the employer unlawfully discriminate on the grounds alleged in grievances B, C, and G?

[243] In grievance B, the grievor alleged that the Agency failed to accommodate his disability in his 2016-2017 performance agreement.

[244] In grievance C, he alleged that the Agency failed to accommodate his disability in his 2016-2017 performance improvement plan.

[245] In grievance G, he alleged that the Agency failed to accommodate his disability in his February 27, 2017, interim evaluation.

[246] The employer stated that the Board did not have jurisdiction to hear these grievances involving performance evaluations and a performance improvement plan (see *Charest*). It added that it acted in good faith when it addressed the grievor's unsatisfactory performance.

[247] The grievor stated that the Board had jurisdiction to hear these grievances because the employer unlawfully discriminated in the performance evaluations and the performance improvement plan. Thus, it contravened clause 19.01 of the collective agreement.

[248] He stated that 1) he had a disability and was declared fit to work with limitations and restrictions, 2) he was subjected to adverse treatment because the employer ignored the limitations and restrictions that Dr. Day established in 2013 and that Dr. Erb repeated in 2016, and 3) he encountered difficulties in his job and was subjected to the negative evaluations and the performance improvement plan because his medical condition was not accommodated.

[249] In his view, the employer violated section 5.1.5 of the *Procedures on Performance Management and Recognition*, which reads as follows:

> [Translation]
>
> ***5.1.5 Discussion about employee needs***
>
> *Employees are responsible for identifying their needs and challenges.*
>
> *Managers must help employees meet their performance expectations by*

> *• conducting two-way conversations with them to allow them to clarify their needs;*
> *• ensuring that appropriate resources are provided to*
>
> *· meet the requirements of the position;*
> *· demonstrate their full potential; and*
> *· be engaged in their work.*
>
> …

[250] In his view, the employer's behaviour was offensive and a true insult to his dignity.

[251] I understand that he believes that the employer should have suspended its performance evaluations until more appropriate long-term accommodations were developed.

[252] It is not clear that the Board has jurisdiction to hear his grievances B, C, and G under s. 209(1)(b) of the *FPSLRA*. It would if the performance evaluations and the plan were found disciplinary (see *Charest*).

[253] As noted in *Bahniuk*, the scope of the Board's jurisdiction is limited on these issues as it is limited to the collective agreement and does not extend to assessing the performance evaluation itself.

[254] Specifically, in *Bahniuk*, the Board found that its jurisdiction is limited to determining whether the employer acted in bad faith when it denied the grievor performance management leave. In this context, bad faith would mean that the employer did not base its assessment of the grievor's performance on any facts. The Board also noted that whether the grievor deserved the rating he received was not within its jurisdiction.

[255] Therefore, it is unclear whether the Board has jurisdiction to hear these grievances. In any case, even if I had jurisdiction, I would find that the grievor did not establish that his performance evaluations and performance improvement plan were discriminatory or that they revealed bad faith.

[256] With respect to the three *Moore* criteria, the second and third have not been met in this case, but the first has been met.

[257] As for the first criterion, the grievor demonstrated that he has a disability. However, he did not demonstrate that he suffered adverse treatment because the employer continued to assess his performance, and it put the improvement plan in place for him until more suitable long-term accommodations were developed.

[258] Remember that at that time, the employer felt that it could not implement the appropriate long-term solution. Although interim accommodations continued to apply, the employer sought a viable solution and required the grievor's cooperation to help it find one.

[259] When the grievor consented to it, the management team sought the specialist's advice as to whether he had the ability to perform his audit other Agency duties.

[260] Therefore, none of the evidence demonstrated that he suffered adverse treatment because the employer continued to assess his performance, and it put an improvement plan in place until more suitable long-term accommodations were developed.

[261] In conclusion, if I had jurisdiction to hear these grievances, I would find that the grievor failed to show that the employer engaged in unlawful discrimination or bad faith for the reasons stated in grievances B, C, and G.

C. Issue 3: Did the employer violate the collective agreement's provisions on the grounds alleged in grievances D, E, and F?

[262] These grievances relate to the failure to reimburse certain expenses that the grievor incurred.

[263] Clauses 25.06(b), 28.01, 32.02, and 32.05 of the collective agreement read as follows:

> ***25.06*** *Except as provided for in clauses 25.09, 25.10, and 25.11:*
>
> …
>
> *(b) the normal work day shall be seven decimal five (7.5) consecutive hours, exclusive of a lunch period, between the hours of 7 a.m. and 6 p.m.*
>
> …
>
> ***28.01*** *Compensation under this Article shall not be paid for overtime worked by an employee at courses, training sessions,*

> *conferences, and seminars unless the employee is required to attend by the Employer.*
>
> …
>
> ***32.02*** *Compensation under this Article shall not be paid for travel time to courses, training sessions, conferences and seminars, unless the employee is required to attend by the Employer.*
>
> …
>
> ***32.05*** *For the purposes of clauses 32.04 and 32.06, the travelling time for which an employee shall be compensated is as follows:*
>
> *(a) for travel by public transportation, the time between the scheduled time of departure and the time of arrival at a destination, including the normal travel time to the point of departure, as determined by the Employer;*
>
> *(b) for travel by private means of transportation, the normal time as determined by the Employer, to proceed from the employee's place of residence or work place, as applicable, direct to the employee's destination and, upon the employee's return, direct back to the employee's residence or work place;*
>
> *(c) in the event that an alternative time of departure and/or means of travel is requested by the employee, the Employer may authorize such alternative arrangements, in which case compensation for travelling time shall not exceed that which would have been payable under the Employer's original determination.*

[264] The employer stated that these grievances are moot given the reimbursement of mileage, meals, and expenses associated with the grievor's medical assessments. In addition, the employer exercised its discretion to grant him 7.5 and 4.5 hours of leave with pay for medical appointments (code 5300) on February 2 and 28, respectively.

[265] Furthermore, it argued that he was not entitled to overtime.

[266] First, I acknowledge that in January 2017, the management team confirmed to the grievor that his expenses for travelling to Gatineau on February 2 would be reimbursed and that his required work time to attend the medical assessment would be recorded as leave for a medical appointment of up to 7.5 hours. Thus, he would not have had to use his sick leave bank. He was granted 7.5 hours of paid medical leave (code 5300) for February 2 and later, 4.5 hours of it for his February 28 appointment.

[267] Sill in dispute are the 5 hours he spent travelling on February 2 and the 2.5 hours doing it on February 28.

[268] I agree with the employer that he was not entitled to overtime because "overtime" is defined as "… in the case of a full-time employee, authorized work in excess of the employee's scheduled hours of work …". In this case, he was not carrying out work for the employer. He consulted the specialist of his choice in Gatineau, which was about a two-hour drive from Kingston.

[269] Although the employer required him to consult a specialist, the grievor had the option of consulting one in his region. He chose to consult one in another region because he wanted to communicate with that person in French, which I understand. However, the collective agreement does not address this specific situation.

[270] Rather, clause 28.01 of the collective agreement states, "Compensation under this Article shall not be paid for overtime worked by an employee at courses, training sessions, conferences, and seminars unless the employee is required to attend by the Employer." The list does not include medical leave. By inference, time spent on any activity other than going to or from courses, training sessions, conferences, or seminars at the employer's request is not paid under this provision.

[271] Therefore, I cannot grant the grievor's request that the employer compensate him at the overtime rate (time and a half) for the 5 and 2.5 hours he spent travelling on February 2 and 28, respectively.

[272] Alternatively, the grievor requested that he be granted 5.5 hours of medical leave (rather than 4.5) on the grounds that on February 28, his workday could have ended at 6:00 p.m. Were that so, he would not have had to take 3 hours of personal leave in the morning but rather only 2 hours. In particular, clause 25.06(b) of the collective agreement states that the "… normal work day shall be seven decimal five (7.5) consecutive hours, exclusive of a lunch period, between the hours of 7 a.m. and 6 p.m."

[273] I find that Mr. Beamer had just cause to exercise his discretion not to grant the grievor's request. The grievor asked for his workday that day to begin at 10:00 a.m. and to end at 6:00 p.m. Mr. Beamer responded that the grievor's normal working hours were from 9:00 a.m. to 5:00 p.m., so he did not feel comfortable allowing a schedule change for a specific purpose that was not intended to allow him to perform work within the meaning of the agreement.

[274] Clause 25.06(b) states that the normal workday is 7.5 consecutive hours, exclusive of a lunch period, between 7 a.m. and 6 p.m. Since the evidence shows that the grievor's normal workday was between 9:00 a.m. and 5:00 p.m., I find that Mr. Beamer had just cause not to grant the grievor's request to change his work hours for the sole purpose of extending his medical appointment leave.

[275] Therefore, I find that it was not demonstrated that the employer violated the collective agreement provisions for the reasons given in grievances D, E, and F.

D. Issue 4: Did the employer unlawfully discriminate on the grounds alleged in grievance H?

[276] Grievance H includes allegations that no accommodation was provided after Dr. Leclerc's OFAF and that the grievor was subjected to unpaid sick leave.

[277] The grievor stated the employer did not meet the three *Meiorin* criteria (at paragraph 54).

[278] He also argued that the employer's job analysis was inadequate because it evaluated the positions based on their normal duties and not on duties that would be suitable for him.

[279] He stated that the employer was obligated to take the following approach before subjecting him to unpaid sick leave. Considering that he was fit to work with certain limitations and restrictions, it had to assess whether he could perform the following:

1) the duties of his substantive position? If not,
2) the modified duties of his substantive position? If not,
3) the duties of a lower group-and-level position? If not,
4) the modified duties of a lower group-and-level position? If not,
5) the duties derived from different positions?

[280] First, I find that a *prima facie* case of discrimination within the meaning of s. 7 of the *CHRA* was established. The employer placed the grievor on sick leave because, in its opinion, he did not have the ability to work at the Agency. He did not have the ability to work there because he had a disability. It knew about his disability, and he was placed on sick leave because of it. Therefore, the evidence shows that his disability directly contributed to placing him on sick leave. This is a *prima facie* case of discrimination under s. 7.

[281] Therefore, the issue is the employer's justification of the discriminatory practice. It may present a defence based on s. 15(1)(c) of the *CHRA*, which states that its conduct will not be considered discriminatory. It will have to establish that its refusal with respect to any employment was based on bona fide occupational requirements.

[282] The occupational requirements are bona fide if it is demonstrated that accommodating an employee's needs would impose undue hardship on the employer in terms of costs, health, and safety (see s. 15(2) of the *CHRA*).

[283] For the reasons that follow, I find that the employer proved that its discriminatory conduct arose from a bona fide occupational requirement.

[284] Paragraphs 98 to 100 of *Santawirya v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 58, are instructive in that respect. A judicial review application was made with the Federal Court of Appeal (Court file A-248-18) and was granted, but it does not challenge these paragraphs. The application sought redress for the grievor. Paragraphs 98 to 100 read as follows:

> ***98*** *In both* Meiorin *and* British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"), the Supreme Court insisted that adverse effect discrimination can arise where an apparently neutral rule, applied to everyone equally, causes adverse effects on some groups of people with a characteristic that is a prohibited ground of discrimination. The solution is to apply the rule in a more individualized fashion.*
>
> ***99*** *In the case of Ms. Meiorin, the rule was a test standard that forest firefighters had to meet. The evidence showed that women, because of their lung capacity, would have great difficulty meeting the standard. The Court determined that this high standard was not necessary for Ms. Meiorin to carry out her forest firefighter duties.*
>
> ***100*** *In the case of Mr. Grismer, he was denied a driver's licence because of a severe vision defect. The rule appeared rational; however, it was not necessary for Mr. Grismer. Over the years, he had adopted driving strategies that ensured he was a safe driver, despite his vision problem.*

[285] In *Santawirya*, the Board found that there was no evidence that accommodating the grievor would have caused the employer undue hardship.

[286] In this case, I find that the evidence demonstrated that accommodating the grievor to keep him on the job would have caused the employer undue hardship.

[287] The employer demonstrated that its application of the standard was justified. The standard in this case can be described as the requirement to subject an employee to sick leave if the employee's medical condition cannot be accommodated without causing undue hardship.

[288] In my view, it met the three criteria established in *Meiorin* (at paragraph 54) as follows: 1) it adopted the standard (the requirement to place an employee on sick leave as it was unable to accommodate his medical condition without causing undue hardship) for a purpose rationally connected to performing the job (the Agency's duties), 2) it adopted the particular standard in an honest and good-faith belief that it was necessary to fulfilling that legitimate work-related purpose, and 3) the standard was reasonably necessary to accomplish that legitimate work-related purpose.

[289] The evidence shows that in 2013 and afterwards, the management team received a series of fitness-to-work assessments to confirm the grievor's ability to perform the duties of his position due to his performance issues. Several assessments identified medical limitations and restrictions.

[290] However, the employer received medical information in December 2014 stating that the grievor was fit to work without limitations or restrictions. Despite that, the management team continued to observe serious deficiencies in his performance.

[291] For several months before he went on medical leave, the team observed deficiencies in his performance in terms of his ability to execute the duties of his position. Among other things, he struggled considerably to apply his analytical skills to his daily workload, which led to incorrect and unreliable final products.

[292] Specifically, the management team observed that he was often unable to understand and accurately process verbal communications, even when written instructions followed them and were furnished to him. Sometimes, those difficulties led to an incorrect use of judgment. The team also found that he was unable to follow or apply standard Agency policies and procedures in the course of his duties.

[293] The team observed that he had difficulty maintaining consistency in his work papers and in his files overall. In addition, it found that he did not have the necessary concentration to complete the steps required to finish a work document. At times, he did not record important details in his work documents.

[294] At the management team's request, the grievor underwent a medical assessment on February 2, 2017, with the specialist, Dr. Leclerc, for updated information on his limitations and restrictions. The OFAF that Dr. Leclerc completed and signed on March 2, 2017, confirmed that the grievor had limitations and restrictions.

[295] Dr. Leclerc identified the following temporary limitations and restrictions:

- limitations preventing the grievor from meeting deadlines, meaning he needed extra time to meet required deadlines;
- limitations in his ability to interpret verbal and written instructions and to communicate effectively verbally and in writing, which affect judgment, conflict resolution, and response to feedback;
- limitations in his ability to adapt, attention to detail, organizational and time management skills, and communication skills;
- limitations in effective written communication and attention to detail; the quality of his work could be improved by installing proofreading software (e.g., Antidote);
- limitations in teamwork and judgment;
- limitations in language pragmatics; clear and concise instructions, ideally in writing, might help to some extent but will not fully offset these limitations;
- limitations in his ability to interpret a message, which may affect his ability to properly process and consider the information to be processed;
- limitations affecting his behaviour and actions;
- limitations in that he is unable to perform tasks that require skills in interpretation (verbal or written), communication (verbal or written), drafting summaries or reports, judging abstract materials, meeting sometimes tight deadlines, and attention to detail; and
- limitations affecting his ability to maintain continuity in his files.

[296] The completed OFAF and letter noted Dr. Leclerc's recommendation for another medical assessment in a specific field of expertise that was not his. The documents indicated that the grievor was referred to the appropriate specialist who would determine whether the temporary limitations identified were permanent. Dr. Leclerc also indicated that although some services (care or treatment) could be provided, their nature and duration would be determined by the appropriate professional.

[297] By that time, it was clear to the employer that the grievor did not have the ability to perform his audit duties. The management team wanted to provide him with

an appropriate accommodation, taking into account his limitations and restrictions. To that end, Ms. Parris analyzed positions other than his to see if he could be offered one that could be considered a temporary and reasonable accommodation.

[298] After that analysis of positions, the management team could not find any position in the East Central Ontario TSO that met the grievor's limitations and restrictions. At the hearing, Ms. Parris explained that each duty of each position required judgment and attention to detail.

[299] On March 24, 2017, the management team informed the grievor that based on its findings and the nature and severity of his limitations and restrictions, he was to remain out of the workplace until he underwent a medical assessment by the specialist whom Dr. Leclerc had recommended. Once it was completed, the employer could review additional information from the specialist.

[300] Therefore, the evidence demonstrated that the employer assessed whether the grievor could perform the duties of his substantive position. He could not. It assessed whether he could perform the modified duties of his substantive position. He could not. It assessed whether he could perform the duties of a position at a lower group and level. He could not. It assessed whether he could perform the modified duties of a position at a lower group and level. He could not. Therefore, it found it necessary to place him on sick leave pending the results of the next assessment.

[301] Recall that in 2014 and 2015, the employer agreed to accommodate the grievor by offering him reduced duties under the general duties clerk position. Unfortunately, the management team found serious deficiencies in his work and in his ability to perform those duties. The witnesses confirmed that the duties of the Agency's SP-02 and SP-03 positions overlap. The grievor also confirmed that while he worked for Mr. Deszpoth, he performed the duties of the general duties clerk position at the SP-02 level, although he was in a position at the SP-03 group and level.

[302] Thus, the evidence shows that the employer placed him on sick leave without pay as a last resort. In my view, the employer demonstrated that it had no other choice. Given the nature of his limitations and restrictions, it was impossible to leave him in his position or to offer him another position or other duties. The evidence demonstrated that the duties of each Agency position require judgment and attention

to detail. In addition, all the accommodations offered earlier (fewer files, flexible deadlines, continuous assistance, etc.) were in vain.

[303] It remains to be seen whether the employer demonstrated that the steps taken to respond to the grievor's needs imposed undue hardship on it in terms of costs, health, and safety.

[304] In that respect, all the employer's witnesses explained that keeping the grievor in his job, even with an accommodation, significantly undermined the credibility and viability of the Agency's services.

[305] The evidence demonstrated that one of the Agency's commitments to taxpayers is to guarantee the confidentiality of their information that it possesses. Some of the errors that the grievor made because of inattention or cognitive problems turned out to be from cross-contamination, which occurs when one taxpayer's data mistakenly ends up in another taxpayer's file. Ms. Stewart explained that the Agency had to protect itself from the negative effects and repercussions of such errors.

[306] The evidence demonstrated that the Agency was at significant risk with respect to its ability and duty to fulfil its mandate. It cannot take the risk of significantly damaging its credibility and the effectiveness of its operations. The costs in this case were significant in terms of time, operational efficiency, and loss of credibility.

[307] Therefore, I find that the employer demonstrated that the steps taken to respond to the grievor's needs imposed undue hardship on it in terms of costs.

[308] Consequently, I find that it was not demonstrated that the employer unlawfully discriminated for the reasons stated in grievance H.

E. Issue 5: Did the employer unlawfully discriminate on the grounds alleged in grievance J?

[309] In grievance J, the grievor alleged that his termination was discriminatory.

[310] The employer stated that he was terminated because he was no longer fit to perform work at the Agency and that he was unlikely to be fit to work there in the foreseeable future.

[311] With respect to the termination, the Board derives its authority from ss. 209(1)(d) and (3) of the *FPSLRA*, which provide as follows:

> ***209 (1)*** *An employee … may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> ***(a)*** *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> ***(b)*** *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> …
>
> ***(d)*** *in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*
>
> …
>
> ***(3)*** *The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).*
>
> …

[312] The Agency is a separate agency under s. 11(1) and Schedule V to the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*).

[313] The Agency was designated on May 28, 2015 (SOR/2015-118), under s. 209(3) of the *FPSLRA*, before the grievor was terminated on September 21, 2021, and before he filed his grievance on November 5, 2021.

[314] According to ss. 12(2) and (3) and 12.1 of the *FAA*, the Agency may effect a termination only for cause, and they provide as follows:

> ***12 (2)*** *Subject to any terms and conditions that the Governor in Council may direct, every deputy head of a separate agency, and every deputy head designated under paragraph 11(2)(b), may, with respect to the portion of the federal public administration for which he or she is deputy head,*
>
> …
>
> ***(d)*** *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct.*

> ***(3)*** *Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c), (d) or (e) or (2)(c) or (d) may only be for cause.*
>
> ***12.1*** *Section 11.1 and subsection 12(2) apply subject to the provisions of any Act of Parliament, or any regulation, order or other instrument made under the authority of an Act of Parliament, respecting the powers or functions of a separate agency.*

[315] Therefore, I note that the standard of cause applies in matters subject to ss. 12(2) and (3) of the *FAA* and that the Agency's enabling statute does not alter that requirement. Section 51(1)(g) of the *Canada Revenue Agency Act* (S.C. 1999, c. 17; *CRAA*) provides that the Agency may terminate the employment of an employee and reads as follows:

> ***51 (1)*** *The Agency may, in the exercise of its responsibilities in relation to human resources management,*
>
> …
>
> ***(g)*** *provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part ….*

[316] The grievor was terminated for medical incapacity under s. 51(1)(g) of the *CRAA*. The issue is whether the termination was justified. It could be unjustified if a prohibited ground of discrimination factored into the decision.

[317] First, I find that a *prima facie* case of discrimination has been established within the meaning of s. 7 of the *CHRA*. The employer terminated the grievor because it considered that he was no longer fit to work at the Agency. He was not fit to work there because he had a disability. It knew about his disability, and he was terminated because of it. Therefore, the evidence demonstrated that his disability directly contributed to his termination. This is a *prima facie* case of discrimination under s. 7.

[318] So, the issue is the employer's justification for the discriminatory practice. It must establish that its refusal with respect to any employment is based on a bona fide occupational requirement. As noted, an occupational requirement is bona fide if it is

established that steps taken to respond to an employee's needs would impose undue hardship on the employer in terms of costs, health, and safety.

[319] For the reasons that follow, I find that the employer proved that its discriminatory conduct arose from a bona fide occupational requirement. The evidence demonstrated that reinstating and accommodating the grievor would have caused the employer undue hardship.

[320] The employer demonstrated that its application of the standard was justified. The standard in this case can be described as the need to terminate an employee if the employee's medical condition cannot be accommodated without causing undue hardship.

[321] In my view, the employer met the three criteria established in *Meiorin* (at paragraph 54) as follows: 1) it adopted the standard (the requirement to terminate an employee as it was unable to accommodate the employee's medical condition without causing undue hardship) for a purpose rationally connected to performing the job (the Agency's duties), 2) it adopted the particular standard in an honest and good-faith belief that it was necessary to fulfil that legitimate work-related purpose, and 3) the standard was reasonably necessary to accomplishing that legitimate work-related purpose.

[322] I note that the paragraph entitled "[translation] Medical Disability" in the *Principles for Termination of Employment or Demotion for Non-Disciplinary Reasons* includes the following:

> [Translation]
>
> …
>
> *• in the case of an employee who was examined by qualified doctors and found to be "fit to work with certain restrictions", efforts were made to accommodate the employee's medical condition without imposing undue hardship on the employer in terms of health, safety, and costs. The efforts may include a demotion to a position that meets the employee's identified limitations and restrictions ….*
>
> …

[323] The factual background sets out the reasons that led the employer to decide that it had to terminate the grievor because it could not accommodate his medical condition without causing undue hardship.

[324] The evidence demonstrated that from November 19, 2013, to March 24, 2017, the employer accommodated the grievor. In 2013, it adopted the accommodation plan that among other things, established that the employer would not impose time constraints on him to complete his audit files. Despite the accommodations in place in his position at the SP-05 group and level, the management team found that he still made several errors in his files.

[325] Thus, effective February 3, 2014, the grievor was assigned administrative duties at the SP-03 level. However, throughout 2014, the management team continued to observe serious deficiencies in his performance.

[326] Then in December 2014, the employer received medical information stating that he was fit to work without limitations or restrictions. Yet, the management team continued to observe serious deficiencies in his performance.

[327] Until March 24, 2017, the team observed deficiencies in the grievor's performance that related to his ability to perform the duties of his position. An auditor at his level has a workload of 12 to 15 files and completes an average file in 50 to 60 hours. His assigned workload was reduced to 5 files because he was taking more than 5 times the average time to complete his files. However, he was unable to complete those files, for many reasons. The Performance log shows his performance difficulties between March 3, 2016, and March 24, 2017.

[328] Here is an example of a challenge he experienced. When Ms. Parris reviewed and corrected his work, he would often make changes to the files, although they had already been approved, which led to errors in them. Similarly, she found that one taxpayer's data was mistakenly placed in another taxpayer's file. In each case, she had to take steps to remedy the confidentiality breaches.

[329] On March 24, 2017, the management team informed him that based on its findings and the nature and severity of his limitations and restrictions, the grievor was

to remain out of the workplace until he underwent a medical assessment by the specialist that Dr. Leclerc recommended.

[330] Later, he agreed to meet with Dr. Joubert.

[331] The employer considered Dr. Joubert's OFAF of November 12, 2020, and his answers to its questions. In his assessment, he concluded that the grievor had multiple functional limitations affecting the different duties of his position. He considered that the grievor was still unable to perform in his position at a satisfactory level. His opinion was that the limitations would not improve in the foreseeable future. He also noted the grievor's lack of willingness to address the situation.

[332] The assessment also confirmed that the grievor did not receive treatment following his assessment dated March 2, 2017.

[333] The evidence demonstrated that the management team reviewed Dr. Joubert's report in detail. It found that returning to work was not possible for the grievor in the foreseeable future. Ms. Stewart explained why each of Dr. Joubert's recommendations to facilitate the grievor's return to work was ultimately not possible. She presented clear, logical, and valid reasons for each of her conclusions. The reasons for the termination were also specified in the September 21, 2021, letter.

[334] In addition, the evidence demonstrated that Ms. Stewart carefully reviewed the job analysis that Ms. Parris completed in 2017. She also tried to find duties in those positions that the grievor could perform. However, she found nothing. Each duty required judgment and attention. Therefore, it was not possible to combine duties to create a position tailored to him.

[335] The evidence demonstrated that the employer's decision to terminate him was a last resort. In my view, it demonstrated that it had no other choice.

[336] It remains to be seen whether the employer demonstrated that the measures taken to respond to the grievor's needs imposed undue hardship on it in terms of costs, health, and safety.

[337] The evidence demonstrated that the employer made efforts to accommodate the grievor's medical condition from 2013 to 2017. It did everything in its power to fulfil

its duty and to contribute to a favourable outcome. However, the challenges that arose from the grievor's attention, analysis, judgment, and learning difficulties affected not only his writing but also how he performed his taxpayer data audits and other Agency duties. He made significant errors.

[338] The Agency was at significant risk with respect to its ability and duty to fulfil its mandate. It had to protect itself from the negative effects and repercussions of the grievor's errors on its credibility and the effectiveness of its operations. The costs in this case are significant in terms of time, operational efficiency, and loss of credibility.

[339] Therefore, I find that the employer demonstrated that the measures taken to respond to the grievor's needs imposed undue hardship on it in terms of costs.

[340] When an employee is unfit to work for the reasonably foreseeable future because of illness or disability, and no reasonable accommodation can be provided, the test for undue hardship has been met, and no unlawful discrimination can be said to have occurred (see *Hydro-Québec*, at para. 18).

[341] Thus, I find that the employer presented a reason that justified the grievor's termination. Therefore, it was not demonstrated that the employer unlawfully discriminated for the reasons stated in grievance J.

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

(The Order appears on the next page)

IV. Order

[343] The grievances are dismissed.

April 4, 2022.

FPSLREB Translation

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board