Date: 20230413

Files: 566-02-4291 to 4294
566-02-6300 and 6301
566-02-10192 and 10938

Citation: 2023 FPSLREB 36

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

TERRY DEAN CASPER

Grievor

and

TREASURY BOARD
(Department of Citizenship and Immigration)

Employer

Indexed as
Casper v. Treasury Board (Department of Citizenship and Immigration)

In the matter of individual grievances referred to adjudication

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Morgan Rowe, counsel

For the Employer: Marie-France Boyer, counsel

Heard via videoconference,
November 23 to 27, 2020,
and April 12 to 16 and 26 to 29 and June 21 to 24, 2021.

REASONS FOR DECISION

I. Overview and summary

[1] Terry Casper ("the grievor") was a service delivery specialist (SDS) with Citizenship and Immigration Canada (CIC or "the employer") at its Case Processing Centre (CPC) in Vegreville, Alberta.

[2] There are two separate and distinct parts to his case. Part I involves grievances filed following three separate instances of discipline imposed by the employer. There are six grievances in total under Part I because each grievance against a disciplinary measure is accompanied by a discrimination grievance filed under the collective agreement.

[3] The grievor properly gave notice to the Canadian Human Rights Commission of his intention to seek damages under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). As will be seen, significant remedies under the *CHRA* are to be applied.

[4] The first disciplinary measure was imposed on August 17, 2009, following the grievor's creation of "countdown posters" marking the days to departure of co-workers with whom he was on unfriendly terms. Discipline was unwarranted. The posters were well hidden in his cubicle, and as unflattering as they might have been, they were only ever intended for his personal gratification. He never displayed the posters or showed them to anyone. The five days of unpaid suspension are to be repaid, with interest.

[5] The discrimination aspect of the first disciplinary incident was not proven because at the relevant time, there was an insufficient link between the grievor's medical condition and the adverse effect of the disciplinary measures that the employer imposed. As more information came to light, this link was brought into sharp relief, and it was an important factor that should have been considered when two later disciplinary measures were imposed.

[6] After the first disciplinary sanction was imposed on August 17, 2009, the grievor complained to the employer that his medical condition had not been taken into account as a mitigating factor. Although the employer knew of it, the information about it was never properly handled or otherwise made available to the decision maker on the disciplinary issue. After the grievor put the employer on notice about his medical condition, it was obligated to take the appropriate steps to learn more and to

deal with the information appropriately, which it did not do. The employer did not exercise due diligence and did not investigate it any further.

[7] The employer did not take the grievor's medical condition into account when it imposed discipline on him on January 25, 2010, after his unpleasant interaction with a co-worker. Since no discipline was warranted in August of 2009, this should have counted as a first instance of discipline in what should otherwise have been a discipline-free work record. The appropriate sanction, taking into account the grievor's medical condition as a mitigating factor, should have been a letter of reprimand. Thus, the seven days of unpaid suspension that were imposed for this incident must be repaid, with interest.

[8] The discrimination component of the January 25, 2010, discipline was proven.. The employer, which knew of his medical condition, imposed disciplinary measures on him for behaviour that was at least partly attributable to his serious medical condition. These disciplinary measures had an adverse impact on the grievor and were attributable to his medical condition. A remedy of $1000 per day for the unwarranted suspension is payable under s. 53(2)(e) of the *CHRA*, for a total of $7000.

[9] The employer's lack of action or due diligence with respect to the grievor's medical condition gave rise to additional special damages under s. 53(3) of the *CHRA* in the amount of $1000 per day (for each day of the unwarranted suspension). Thus, an additional $7000 in damages is payable to him for the January 25, 2010, discipline.

[10] The final disciplinary sanction was imposed on December 20, 2010, after the grievor used strong language at a group meeting about a proposed Christmas luncheon. The disciplinary sanction of 10 days of unpaid suspension was grossly excessive and did not take his medical condition into account as a mitigating factor. The appropriate suspension should have been a 1-day suspension without pay; therefore, the difference, 9 days' pay, is payable to him, with interest.

[11] The discrimination component of the December 20, 2010, discipline was proven. By then, the employer was very much aware of the grievor's medical condition and its potential to manifest in untoward behaviour in the workplace. It had written a letter to Health Canada six months earlier, on June 30, 2010, requesting a medical assessment of him, in which it acknowledged prior incidents of discipline involving behaviour that the employer suggested were manifestations of his medical condition.

[12] With respect to s. 53(2)(e) of the *CHRA*, the grievor suffered a degree of pain and suffering that was drastic indeed. He contemplated suicide. It is difficult to contemplate a greater degree of anguish. I award the maximum under s. 53(2)(e), the amount of $20 000.

[13] With respect to special damages, the employer's behaviour was egregious and has had a permanent and devastating impact on the grievor. By December 20, 2010, it was more aware than ever of his medical condition and its potential to manifest itself in unpleasant workplace conduct. The effect of imposing a grossly disproportionate sanction on December 20, 2010, resulted in his departure from the public service (first on an extended period of sick leave and later on a leave of absence for personal reasons). Therefore, the employer is liable for the maximum amount of special damages payable under s. 53(3) of the *CHRA* in this instance. An additional $20 000 is awarded to the grievor as a result.

[14] Part II of this decision concerns the grievor's efforts to return to the workplace.

[15] After his period of sick leave in 2012, he went on personal-needs leave without pay (LWOP) to explore private-sector employment opportunities. In 2013, he sought to return to the public service. The employer placed him into a priority referral process and offered him a deployment. None of the referrals was successful, and the grievor did not accept the deployment. He did not return to work in the public sector. The two remaining grievances, each of which pertains to the unsuccessful efforts to return him to work in the public sector, are denied because the employer's efforts to accommodate him and return him to the workplace were reasonable.

[16] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40; *EAP2*) also came into force (SI/2014-84). Pursuant to s. 396 of the *EAP2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) as that *Act* read immediately before that day.

[17] 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 PSLREB and the titles of the *PSLREBA* and the *PSLRA* 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* (*FPSLRA*).

[18] The grievances were referred to adjudication, and the matter was heard in its entirety, with continuations, over a period of many months in 2017 in Edmonton, Alberta. Tragically, the adjudicator who heard this matter passed away after he closed the hearing but before issuing a decision. The matter was brought before me to be relitigated in its entirety.

[19] I heard witnesses from Vancouver, British Columbia; Edmonton; and Ottawa, Ontario, as well as submissions from counsel, by way of the Zoom videoconference platform. The hearing took place from November 23 to 27, 2020, and from April 12 to 16 and again in April, from the 26th to the 29th, and June 21 to 24, 2021.

II. Part I: The disciplinary grievances

[20] These are the Board's file numbers for the disciplinary grievances:

- 566-02-4291 (5-day suspension) and 4292 (no-discrimination clause);
- 566-02-4293 (7-day suspension) and 4294 (no-discrimination clause); and
- 566-02-6300 (no-discrimination clause) and 6301 (10-day suspension).

A. Summary of the evidence

[21] The grievor had been in the public service for approximately six to seven years when, in 2007, he suffered serious depression. He testified to work-related issues that exacerbated his already depressive state at that time. He felt undervalued and unsuccessful at work, with little to no hope of advancement. He was diagnosed with major depressive disorder (MDD) and was placed on a medical leave of absence for a nine-month period in 2007.

[22] The grievor received long-term disability benefits while on the leave of absence. The employer was aware of this situation; Sue Holden of its Compensation and

Benefits branch was copied on correspondence from the insurer dated December 13, 2007, and helped coordinate payment of the grievor's benefits.

[23] In his depression, the grievor became suicidal. In October of 2007, he was admitted to St. Mary's Hospital in Camrose, Alberta, which specializes in treating mental-health issues. The director of the Vegreville CPC office at the time, Shirley Holmstrom, was made aware of his medical condition and the circumstances surrounding his hospitalization in Camrose.

[24] When the grievor was declared fit to return to work, a graduated return-to-work (GRTW) program was discussed with Ms. Holmstrom. On December 25, 2007, Jodi Casper, the grievor's spouse, wrote the following to Ms. Holmstrom:

> …
>
> *While Terry would like very much to return to full-time employment in the Federal Public Service, given the present circumstances at CPC, current state of upheaval, overall environment and timing it may prove to be more of a hindrance than benefit. Terry believes returning to an environment that minimizes the likelihood of recurrence of his concerns would provide stability to his mental health and well being. In order to ensure a successful return to active employment I am wondering if it would be possible to consider a gradual return to* [*sic*] different *working location?*
>
> *Susan Sereda, the rehabilitation worker has asked that I verify your availability for a meeting on Monday, January 21st at approximately 1:00 p.m ….*
>
> …

[25] All the witnesses at the hearing testified to Ms. Casper's participation in all aspects of the grievor's affairs throughout the periods encompassed by all his grievances. The Caspers both testified to the need for this degree of assistance, given the grievor's ongoing health issues. Ms. Casper continues to help him manage his affairs.

[26] Ms. Casper worked in the same office at the Vegreville CPC but in a different department and testified to her experience in labour relations matters, as well as her experience with other workplace-related issues. She was, and continues to be, very familiar with her husband's medical condition and his employment-related issues.

[27] On January 21, 2008, Ms. Holmstrom, Susan Sereda (a rehabilitation specialist), the grievor, and Ms. Casper met to discuss the grievor's return to work. He testified to making clear his desire for a GRTW at a location other than Vegreville.

[28] Ms. Casper took handwritten notes of the topics of discussion at the January 21, 2008, meeting, as follows:

> …
>
> *- Reason for Absence*
> *- Breakdown*
> *- Illness - Depression*
> *- Humialiat / Embarassed*
> *- Camrose in House*
> *- Medication - Prozac …*
> *- Difficulty Returning*
> *- Fear of Dealing with Mgmt*
> *- Feels issues caused by mgmt here*
> *- Withdrawal from Others*
> *- Regard Self Conf.*
> *- Back to where was.*
> *- Not sure of Abilities*
> *- Worried Others Think*
> *- Not Able to react at Time*
> *- Stable Environment*
> *- No Confidence /Self Worth*
>
> …
>
> [*Sic* throughout]

[29] Ms. Casper testified to some of the observations she heard Ms. Holmstrom make at the meeting. She made notes of Ms. Holmstrom's comments, as follows:

> …
>
> *… No explain necessary used to be a RN. and is Quite familiar with illness. What accom. feel necessary?*
>
> …
>
> *… Needs to consider 3/4 months considerable time. Needs to be addressed/ Identify tools / restrictions and Type of accom required.*
>
> …

> *… All deps under pressure may need to step back before going forward. As Terry doesn't want others to know may restrict Marketing options available elsewhere.*
>
> …
>
> [*Sic* throughout]

[30] Ms. Casper testified to her conviction that at the meeting, Ms. Holmstrom seemed to clearly understand the importance of not returning the grievor to the Vegreville CPC. Although not present at the January 21, 2008, meeting, Ms. Holden, from the employer's Compensation and Benefits branch, referred to a doctor's evaluation in her fax to Ms. Sereda on January 24, 2008. The cover page reads, "… I am faxing you information regarding the doctor's evaluation that was discussed between yourself and Shirley Holmstrom. I will mail you the original documents." Neither Ms. Holden, Ms. Holmstrom, nor Ms. Sereda testified, and the doctor's evaluation referred to in the cover letter was not introduced into evidence.

[31] On February 4, 2008, Dr. Donald Wilson wrote as follows to both Ms. Holmstrom and Ms. Sereda about the prospect of the grievor's return to work:

> …
>
> *This letter is to confirm the above noted patient's ability to return to work in conjunction with his current health condition. The likelihood of a successful return to work for Mr. Casper would be greatly enhanced by returning to a meaningful and positive working environment. The work should be welcoming and free from harassment and other pressures that might unduly delay his recovery. Providing a position at a level where meaningful work is possible with or without appropriate accommodations is likely to provide motivation and reassurance needed for Mr. Casper of* [*sic*] *a supportive environment. Currently I would recommend that his return to work be facilitated to an office other than the Case Processing Centre in Vegreville.*
>
> …

[32] No evidence was entered of any additional dialogue or correspondence with Dr. Wilson.

[33] On March 20, 2008, Ms. Holmstrom wrote an email to Ms. Casper. The subject was "assignment for Terry", and her email read as follows:

> *Jodi, I am pleased to advise that I have been able to make an arrangement with Mr. Randy Gurlock at CIC Edmonton to provide*

> *employment for Terry during his return to work regime. The assignment can begin as early as 31 March 2008 for a period of three months. At that time we expect that Terry will return to CPC Vegreville to resume his duties as Service Delivery Specialist.*
>
> …

[34] The grievor testified to a positive work experience in the Edmonton office, but he dreaded his return to Vegreville, because it was where all his previous problems had originated. He did not file a grievance against the decision to return him to work in Vegreville.

[35] In early July of 2008, the grievor reported to the Vegreville CPC as directed and resumed his substantive position. Conflict arose within weeks. One supervisor, Michelle Henderson, contemplated sending APRs (applications for permanent residency) for the grievor to work on. She wrote, "If for some reason you are unable to process them, please advise me in writing of the reason. If you require some refresher training, please let me know …".

[36] The grievor took offence to this and wrote as follows to Ms. Holmstrom the following day:

> *Shirley; I am writing this email to you as my acting supervisor has advised me that she and yourself discussed my work ability and you see no reason why I should not be able to process APR's. First, I am shocked and humiliated that you would have such a discussion about myself without me being present. I thought that you fully understood my condition and reasons for my "lenghly" absence from this office.*
>
> *As I have only been back in this office for less than a month, I think it would be within your knowledge, understanding and reasoning as to why and how my ability to do this job would likely be affected. I do not think being allowed to adjust at my own pace or to being provided retraining is unreasonable given the circumstances of which you are fully aware.*
>
> *This unnecessary added pressure is causing me a good deal of emotional and physical stress, of which I can not handle right now. I would appreciate if you would advise my acting team leader to find someone else to assist in Jeff's absence and to refrain from pushing me to do more than I am capable of at this time.*
>
> …
>
> [*Sic* throughout]

[37] The grievor testified to receiving no request from anyone in management for additional medical information as a result of this interaction with Ms. Holmstrom.

[38] An additional conflict arose in September 2008, this time about the grievor's cigar smoking. Other employees complained about the smell lingering on his clothes when he returned from smoke breaks taken outside. He testified to feeling "picked on" by colleagues and to feeling that he was under a microscope at work.

[39] Once again, the grievor felt that he was being passed over for acting opportunities. On the outside of his cubicle, he posted an acting appointment and a notice of consideration for promotion. He testified to how Sue Neufeld, a team leader on a team other than his, came to his cubicle, and in front of two co-workers, shook the posters at him and challenged him on his decision to put them up. She then handed him a copy of page 3 of the CIC's *Code of Conduct* and walked away. He was invited to a meeting to discuss the incident.

[40] The grievor testified to Ms. Holmstrom placing the blame squarely upon his shoulders for the conflict with Ms. Neufeld. In an email dated November 26, 2008, Ms. Holmstrom wrote, "As there is no direct supervisory relationship, the daily contact should be minimal; however I will take this opportunity to advise that you should make every effort to continue minimize [*sic*] any further conduct."

[41] The grievor wrote to Ms. Holmstrom, complaining about Ms. Neufeld's behaviour and the effect it was having on him, as follows:

> …
>
> *Returning to work following a prolonged absence for illness leaves me particularly vulnerable and this verbal and emotional abuse undermines my self-confidence, morale and affects my productivity and ability to do my job. Because of the unpredictability and irrationally* [*sic*] *of this behaviour, I am using up emotional and mental resources trying to figure out what's going on and how to defend myself. I feel I have been targeted by Ms. Neufeld and others in management. I am shocked and have anxiety about future interactions with these individuals.*
>
> …

[42] Ultimately, on November 12, 2008, the grievor formally made a harassment complaint against Ms. Neufeld. Soon after that, on November 26, she made one against him. On May 21, 2009, his complaint was determined unfounded. Paul Armstrong,

Director General for the Centralized Processing Region, determined that Ms. Neufeld's complaint did not meet the definition of workplace harassment. Mr. Armstrong did not testify.

[43] The grievor testified to feeling that Ms. Holmstrom did not take Ms. Neufeld's behaviour toward him seriously and that the two were deliberately making life miserable for him. It had an adverse effect on his health and his productivity. Donna Harle, his supervisor, in an email to Joanne Dubuc, the manager of operations at the Vegreville CPC, on January 12, 2009, noted that the grievor had been sick the previous week and that his sick leave had a negative balance. She added, "As he will be maxed out I suppose some will have to be LWOP. He has a doctor's note which I will also be sending to you."

[44] Ms. Dubuc testified to receiving no medical information about the grievor from Ms. Harle or from anyone else. Ms. Harle did not testify at the hearing as unfortunately, she has passed away.

[45] In March of 2009, the issue of the grievor's cigar smoking was once again raised with management.

[46] On June 19, 2009, the grievor emailed Ms. Dubuc, stating, "You and your team leaders have a lot of brass." He was called in to explain himself and offered an explanation along the lines of "sergeant stripes in the military". Ms. Dubuc testified to her interpretation of his comment as "you have a lot of nerve" or something to that effect. She found his comment disrespectful but did not impose discipline.

[47] An email that the grievor obtained via the access-to-information (ATIP) process revealed that in June of 2009, Ms. Neufeld advised the grievor's team leader Ms. Dubuc that she (Ms. Neufeld) planned to pursue a peace bond in the coming weeks against the grievor. He was unaware of Ms. Neufeld's actions in this respect until well after the fact.

1. The first instance of discipline, August 17, 2009

[48] The grievor knew that both Ms. Neufeld and Ms. Holmstrom were due to leave the office, and he looked forward to their departures because of his continuing conflict with them. In what he admitted was a "lapse in judgement", he made posters counting down the days to their departures. At the bottom of one poster, beside the text "Ø

days left", were the words, "Yeah Gone Shirley H." At the bottom of the other was written, "Gone Yahooooo [*sic*]".

[49] The grievor testified to keeping the posters hidden from sight in his cubicle and would only pull them out to mark the passing of each day. They were for his private amusement, he said, and he did not display them or tell anyone about them. When the posters were discovered, the grievor had been marking a countdown on one of them for approximately eight months and had been marking the other for only a few weeks.

[50] Ms. Dubuc testified to being made aware of the posters and to finding them in plain sight in the grievor's cubicle. Not one of the witnesses was able to say how the posters came to be positioned in plain sight.

[51] At a fact-finding meeting on August 5, 2009, initially, the grievor lied about the purpose of the posters and to what or to whom they referred. Eventually, he acknowledged that he had created one for Ms. Neufeld and one for Ms. Holmstrom because they had caused him, in his words, "nothing but grief". Ms. Dubuc testified to having initially considered a seven-day suspension for this misconduct, but given the grievor's clean disciplinary record, she imposed a five-day suspension in a letter dated August 17, 2009.

[52] This disciplinary measure was grieved on September 1, 2009. The grievance contains a sentence, "I grieve that I have been treated unfairly and without consideration of my medical condition to which the employer had substantial previous knowledge."

[53] In her testimony, Ms. Dubuc repeated several times that she had no knowledge of the grievor's medical condition. She had never seen a medical note or a request for accommodation. In an email to the grievor dated September 10, 2009, Ms. Harle noted as follows:

…

> *In your grievance, which we received on September 3, 2009, you indicate that you have a medical condition which has not been accommodated by the employer. I have no record on file regarding this medical condition, nor do I have any record of accommodation required.*

> *In order to meet our obligations under the duty to accommodate policy, I require information from your physician regarding work place limitations so that I can take appropriate actions.*
>
> …

[54] The grievor testified to being surprised at Ms. Harle's observations because he knew that Ms. Holmstrom and Ms. Holden had received the letter from Dr. Wilson dated February 4, 2008. He asked Ms. Harle to consult CIC's Human Resources branch and to review his file to verify the information provided by Dr. Wilson. The grievor testified to Ms. Harle telling him that she did as he requested and that she found no such information on file.

[55] Consequently, on September 14, 2009, the grievor asked to review his personnel file. He testified to being shocked when he saw that nothing was on it. In an email to Pamela Bunclark, Human Resources Manager (Acting), on September 17, 2009, the grievor's bargaining agent representative, Gail Rowe, wrote that "… there was [*sic*] no notes or correspondence related to Terry's discipline of August 17, 2009. As well there were no notes with respect to return to work discussions following his absence with management."

[56] The grievor was concerned about the employer's lack of knowledge about Dr. Wilson's letter, and on September 24, 2009, he repeated Dr. Wilson's accommodation request at the second-level hearing of his September 3, 2009, grievance. He wrote as follows:

> ***I grieve that I have been treated unfairly and without consideration of my medical condition to which the employer had substantial previous knowledge.***
>
> …
>
> *- Terry was off work for Medical illness for a period of approximately 8 months.…*
>
> …
>
> *- After his 8 month absence, several discussions took place with a rehabilitation worker and Shirley* [Holmstrom] *and the union representative in* ***December of 2007****. From the on-set* [*sic*] *it was clear Shirley was reluctant to be as accommodating as was needed for Terry and that the negotiation would be difficult.…*
>
> …
>
> *- Although correspondence was provided to the department as a summary from the insurance company to Shirley, a separate letter*

> *was also provided from Terry's physician directly to her dated* ***February 4th, 2008*** *which indicating* [*sic*] *the following:*
>
> > *… I would recommend that his return to work be facilitated to an office other than the Case Processing Centre in Vegreville.…*
>
> *- … All of these factors considered in their entirety show a reckless and willful discrimination towards Terry, his medical condition, Treasury Board Policies on Prevention and Resolution of Harassment and Discipline.…*
>
> [Emphasis in the original]

[57] Ms. Dubuc testified to Ms. Harle's responsibility, as the grievor's manager, to follow up with him about medical information and accommodation issues. Ms. Dubuc, as the operations manager at the time, claimed that she did not have that responsibility, and she did not follow up on these issues. Ms. Harle, having unfortunately passed away, did not testify at the proceedings.

[58] Ms. Dubuc testified to having had no discussions with Ms. Holmstrom about the grievor's medical condition.

[59] Ms. Dubuc also testified to her concern over the grievor's use of sick leave. She was copied on the following email dated August 5, 2009, from Ms. Harle, who was responding to a request for information on his sick leave usage:

> *Terry phoned me earlier this afternoon. He said he has been to see the doctor, and that the doctor has given him a note stating that he is to be off on sick (stress) leave from now until August 14. He told me that he will be asking to change the holidays he had scheduled for next week (August 11, 12 and 13) to sick leave. He said he will be seeing the doctor again on August 17.*
>
> *I believe he was granted sick leave WITH pay last week.*
>
> *His sick leave currently stands at -150.125. Appears he will hit the maximum of -187.5 sometime on August 12.*
>
> *…*

[60] The grievor testified to being quite distressed by the absence of his medical information on the employer's records and by the continuing workplace conflict. He raised his concerns with Teresa Williams (who would eventually replace Ms. Holmstrom) at a meeting on October 6, 2009. He told her that he was "… on the verge of a relapse and will continue to suffer if the situation is not resolved".

[61] The grievor testified to receiving no request from anyone for any medical information following the meeting on October 6, 2009.

2. The second instance of discipline, January 25, 2010

[62] Sandra Humeniuk was a service delivery advisor (SDA) at the Vegreville CPC, and as of 2010 had been one for approximately four years. She testified to knowing the Caspers socially for a time and characterized them, at the outset of their relationship, as being more than just good acquaintances; they were friends. Their friendship did not last.

[63] Ms. Humeniuk's work obliged her to consult, from time to time, SDSs like the grievor for guidance and advice on files. She went to him on January 12, 2010, with an issue she was wrestling with on a file. She said that by then, he had become gruff and unapproachable, so initially, she looked for anyone else who might be available to help her. Seeing that there was no one else, she went to see the grievor.

[64] Ms. Humeniuk said that the grievor was rude and belittling in his dealings with her. He asked her, "Can't you read?" about one particular notation on the file. She said that his tone was harsh and mean. She was visibly upset when she testified on this subject.

[65] After the encounter, Ms. Humeniuk went to talk to a colleague about what had just happened and then sat at her desk and made notes about it. She gave the notes to her acting team leader the next day.

[66] An investigation was initiated into the events of January 12, 2010. Ms. Humeniuk's allegations were put to the grievor, who was invited to respond. He did, in a fact-finding meeting on January 14, 2010, and in a written statement dated January 19, 2010. He stated that he felt that he had done nothing wrong.

[67] Ms. Dubuc issued a disciplinary letter to the grievor dated January 25, 2010, in which she established the allegations and mentioned his prior five-day suspension for the countdown posters as an aggravating factor. She testified to his lack of remorse as being an additional factor, although it was not mentioned in the disciplinary letter. She imposed a seven-day suspension on the basis of progressive discipline. On the second page of the letter, she wrote this:

…

> *In addition to the disciplinary measure outlined above, I have concluded that you would benefit from attending an information/training session on respectful workplace behaviour. Once we have identified course availability, I expect that you will fully and actively participate.*

…

[68] Ms. Dubuc and the grievor testified to no such training ever being offered to him.

[69] The grievor filed a grievance against the second disciplinary action, which Ms. Dubuc received on February 8, 2010. In it, he complained that the employer contravened his collective agreement, as it pertained to the duty to accommodate, and that it treated him "… injudiciously in relation [*sic*] my medical condition …".

[70] Ms. Dubuc repeated that she was still unaware of any medical condition or any accommodation requirements. She stated once again that it would have been left for Ms. Harle, the grievor's team leader, to follow up on.

[71] As a result of the nature of the two disciplinary sanctions handed down that far, a Health Canada fitness-to-work evaluation (FTWE) was requested. A letter dated June 30, 2010, and signed by Ms. Williams (who by then had taken over from Ms. Holmstrom as the Vegreville CPC's director, referred to concerns that Mr. Casper raised on February 11, 2010, after he received his second disciplinary sanction. Ms. Williams quoted the grievor on his concerns. She wrote that he told her this:

…

> *"I am so stressed, worried and depressed, that people are talking about me and just finding reasons to upset me further. I am fearful of working in this environment or having every trivial move I make under a microscope …*
>
> *I don't know what can be done to repair the obvious damage to my working relationships and reputation in this office and I don't know what more I can do. I am leaving for the day as this entire situation is too difficult for me to handle with my condition."*

…

[72] In her letter to Health Canada, Ms. Williams went on to mention that the grievor had been spoken to on a number of occasions about the need for respectful behaviour in the workplace and added in a separate paragraph, "Given the above information,

please confirm whether Mr. Casper is fit to perform his duties, or whether Mr. Casper has any workplace limitations or restrictions."

[73] Ms. Williams included a timeline on human resources issues, indicating that the September 3, 2009, grievance against the first instance of discipline referred to a medical condition of which the employer was unaware.

[74] Neither Ms. Williams nor Ms. Dubuc inquired into the grievor's medical condition while awaiting the results of the Health Canada FTWE.

3. The third instance of discipline, December 20, 2010

[75] The grievor testified to a deteriorating work situation throughout calendar year 2010. He felt that he was being denied opportunities at work while the Health Canada FTWE was still pending and as yet unresolved.

[76] Holly Palley became the operations manager while Ms. Harle was still the grievor's team leader. Ms. Palley testified to having had discussions with Ms. Harle about the grievor but not about his health issues.

[77] A letter was prepared for Health Canada and was dated March 31, 2010, but it was not sent because the grievor wanted to include additional information. His amendments were included in the letter dated June 10, 2010. In the section entitled "Addendum 1: Human Resources Issues", the grievor documented the absence of medical information on the employer's records.

[78] Ms. Palley said that these were the grievor's only health issues that she was aware of. It was also the first time she became aware that he had grieved the first two instances of discipline. Ms. Palley testified to seeing no medical or accommodation information on file. She testified to a decision to await the results of the Health Canada FTWE to see if accommodation issues had to be addressed.

[79] On October 6, 2010, Dr. Errol Vernon of Health Canada wrote to the employer, stating, "At present, I am unable to complete the Fitness to Work Evaluation (FTWE) report, as I am still awaiting further medical documentation."

[80] On October 20, 2010, the grievor was presented with a list of expectations. Many of the shortcomings in the desired behaviours described by the employer were, according to grievor, directly attributable to his declining mental health and were

beyond his control. He testified to having a severe adverse reaction to receiving the list of expectations, and he became suicidal once again. He sought professional help but did so discreetly because he did not want anyone in Vegreville to know.

[81] On October 27, 2010, on the grievor's behalf, Ms. Casper sent Ms. Harle and others a document entitled "Depression in the Workplace - Causes of Low Mood & Depression" in an effort to explain the causes underlying the behaviours mentioned in the list of expectations.

[82] Ms. Humeniuk testified that she was the subject of a harassment complaint that the grievor made in November of 2010. She did not know what she might have done to lead to it and testified to the day on which she was made aware of it as being the worst day of her life. She also testified to never seeing it resolved. Eventually, in December of 2016, she was advised that the complaint had been "dropped" because the matter had taken too long to resolve.

[83] At a staff meeting on December 8, 2010, Ms. Palley, the operations manager, raised the issue of a Christmas luncheon for staff and advised that staff would be granted one hour to participate in the luncheon. She testified to notes she took immediately after the meeting in which she recorded the grievor's statements, which included the following:

…

> *"… This team lunch is a joke. The fact that we only get an hour is a slap in the face. I'm not coming to the lunch to protest this and you're going to find a whole lot of other people in the office doing the same thing. Other offices get way more time than we do here."*

…

[84] Ms. Harle, who was at the meeting, noted that the grievor also complained of "whiners and snivellers" on his team.

[85] These observations were brought to the grievor's attention in a fact-finding meeting on December 13, 2010. He did not deny making the comments, but he did acknowledge that his behaviour was inappropriate, and he apologized for his comments at the fact-finding meeting.

[86] In a letter of suspension dated December 20, 2010, Ms. Palley listed the following factors that she considered:

- the severity of the misconduct;
- the grievor's work history;
- his disciplinary record;
- his apology; and
- other (unspecified) factors.

[87] The grievor was suspended for 10 days. He filed his grievance the same day.

[88] The grievor continued to seek professional medical assistance and saw Dr. Nur Parker at the Cape Medi-Clinic in Vegreville on December 17, 2010. Dr. Parker issued the following letter, dated January 6, 2011:

> …
>
> *This letter is written in reply to the attached letter* [not entered into evidence] *and each question is answered sequentially below :*
>
> *1. Yes, he does have a medical condition impacting on his job.*
>
> *2. The medical condition is Major Depressive Disorder.*
>
> *3. No other medical diagnosis at present affecting his job.*
>
> *4. No, he is not fit to perform any duties with out restricition.*
>
> *5. Yes, he will be able to perform his duties with some work restrictions/limitations in place.*
>
> *6. and 7.*
>
> *Work restriction in the limitation of any stressors or any aggravating factors that may cause Terry undue anxiety or stress. Factors which may include aggressive co-workers should be avoided or trying to avoid a situation in which he is placed under stress. Accommodation regarding work hours should be addressed. I feel that due to the high depressive state of this patient, he should have at least a placement in a department or an area in which he is exposed to as little 'stress' and anxiety as possible.*
>
> …
>
> [*Sic* throughout]

[89] Dr. Parker also authorized the grievor's absence from work for medical reasons from December 21, 2010, to January 21, 2011.

[90] None of the employer's witnesses inquired of Dr. Parker. Ms. Dubuc and Ms. Palley both testified to a preference for awaiting the results of the Health Canada FTWE.

[91] Ms. Palley did not reconsider or revisit any aspect of the latest disciplinary measure on the basis of Dr. Parker's note dated December 17, 2010.

[92] Ultimately, the grievor never did return to work at the Vegreville CPC. Dr. Parker and later Drs. Satar and Rona Ribeiro each authorized a succession of one-month absences from January 2011 to March 1, 2012.

B. Arguments and decisions

[93] The parties submitted numerous cases in support of their respective positions. I carefully read and considered each of them. However, I will not refer to each and every one of them in this decision as there is considerable repetition, and some are more squarely on point with this case than others.

[94] The grievor conceded that each incident was disciplinary in nature and did not contest that some measure of disciplinary sanction was warranted, but in each of the three cases, the measures were excessive and disproportionate to the misconduct at issue. The employer argued that the disciplinary measures were reasonable in each case and that they should not be disturbed.

[95] *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98 (QL)("*Scott*"), was referred to in *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72, and in *Parent v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 125. In grievances about disciplinary measures, the adjudicator's task is not to assess the reasonableness of the employer's decision. Rather, the hearing must be held *de novo*. The adjudicator's task is to assess the *Scott* criteria, which are the following:

1) Was there a factual basis for imposing discipline?
2) If so, was the disciplinary measure imposed excessive?
3) If so, what should the appropriate measure consist of?

[96] Only if there was a factual basis for imposing discipline in the first place can any discussion of the appropriateness of the sanction take place. The second and third *Scott* criteria highlight the importance of properly assessing the aggravating and mitigating factors at play.

1. The first instance of discipline

a. The grievor's arguments with respect to the first instance of discipline

[97] The grievor admitted that it was not a good idea to have the countdown posters in the workplace, but he was adamant that he deliberately kept them private. The posters were not on display for anyone else to see. He has no idea who might have alerted Ms. Dubuc to their presence or who might have revealed them. The posters were sarcastic but not malicious, and his intention was never to harm anyone else.

[98] Ms. Dubuc testified that she did not feel that mitigating factors were at play other than a clean disciplinary record; as of then, the grievor's had been clean over a lengthy career of 19 years.

[99] The disciplinary record mentions "… a defiant, uncooperative and unremorseful attitude" despite the grievor admitting at the fact-finding meeting his purpose for creating the countdown posters. True, he did not admit it right away, argued the grievor, but to characterize his attitude as defiant, uncooperative, and unremorseful seemed overly harsh.

[100] The grievor pointed out several mitigating factors that were not considered, the most important of which was the discriminatory nature of the disciplinary measure. His medical condition was not taken into account at all. Since Ms. Holmstrom was present at the return-to-work meetings in January of 2008, and since she was the recipient of Dr. Wilson's letter of February 4, 2008, she had stewardship of important medical information that clearly had a bearing on the grievor's state of mind when his countdown posters were discovered. Ms. Holden, of the CIC's Compensation branch, was also aware of this medical information. Apparently, neither Ms. Holden nor Ms. Holmstrom made this important medical information part of the grievor's personnel file or shared it with anyone in a position to consider whether discipline was warranted. He argued that this lack of action by the employer can hardly be considered his fault.

[101] Another very strong mitigating factor that was completely ignored, argued the grievor, was the workplace environment. He did not choose random targets for his sarcasm; the posters counted the days to departure of two individuals with whom he was significantly at odds. He was involved in a bitter dispute with Ms. Neufeld, of

which management was keenly aware. Indeed, his position was that Ms. Holmstrom did nothing about this conflict; hence, his animosity.

[102] The grievor submitted cases in which suspensions were found to be appropriate sanctions for workplace misconduct. The suspensions imposed in *Touchette* and *Parent*, and the suspension imposed in *Trillium Health Partners v. Ontario Nurses' Association* (2017), 274 L.A.C.(4th) 143, were due to verbal outbursts in the workplace (in the latter, an offensive homophobic remark) that others clearly heard. In contrast, the grievor never intended his posters to have an audience. In comparison, his actions did not warrant a suspension; the appropriate sanction should have been a letter of reprimand.

b. The employer's arguments with respect to the first instance of discipline

[103] The employer argued that the grievor was well aware of what constituted appropriate as opposed to inappropriate workplace conduct, having received training on multiple occasions. He knew that what he had done was wrong because initially, he lied about the nature of the posters. He never apologized for putting them up.

[104] The employer noted that the grievor raised no mitigating factors, so none was mentioned on the letter of discipline. Ms. Dubuc said that she took his clean disciplinary record into account as a mitigating factor.

[105] The repetitive nature of marking, day by day, the countdown to the departures of Ms. Holmstrom and Ms. Neufeld is an aggravating factor that must be considered. The grievor's actions cannot be considered a solitary instance of a lack of judgement. He marked the posters day after day, over a period of months.

[106] In *Bahniuk v. Canada Revenue Agency*, 2012 PSLRB 107, a three-day suspension was imposed for disrespectful conduct, but in that case, the grievor apologized, which the grievor in this case did not do.

[107] The employer argued that it could not have been held responsible for information of which it was unaware, per *Boivin v. President of the Canada Border Services Agency*, 2017 PSLREB 8. Ms. Dubuc testified that she had no knowledge of the grievor's medical condition and that he brought no accommodation requests to her attention.

[108] The employer maintained that the quantum of sanction meted out under the circumstances was reasonable. The five-day suspension should not be disturbed, and this grievance should be denied.

c. Decision and reasons with respect to the first instance of discipline

[109] I accept the *Scott* criteria as the foundation for this analysis. The first step is to determine whether there was a factual basis for imposing discipline. The grievor acknowledged his misconduct but insisted that the quantum of the sanction was disproportionate. Although I appreciate his admission, I do not agree that his actions warranted a disciplinary response from the employer. The context for the creation of the posters, and that he kept them hidden from view, are all-important.

[110] There is no question that the grievor created the posters and that he marked them, day by day, but I must disagree with the employer's characterization that he "posted" or "displayed" them in his cubicle. The employer's submissions were consistent in that it simply assumed that the grievor posted or displayed the posters. There is no evidence whatsoever that he did.

[111] The grievor's evidence was unequivocal on his part; he created the posters for his private enjoyment. He was emphatic in his testimony that he did not display them. He kept them hidden. I believe him on this important point. I also believe Ms. Dubuc's testimony that upon being informed of the presence of the posters, she went to his cubicle and saw them. It does not automatically follow that the grievor put them out in plain view. Someone did, obviously, but there is no evidence suggesting it was the grievor.

[112] The absence of an overt display of contempt or disrespect distinguishes this case from every case submitted by both the grievor and the employer. Every one of the cases in which suspension occurred involved an open, sometimes public, display of contempt or disrespect, sometimes involving obscene words or gestures, or both. One case involved homophobic slurs. None of that vitriol was present in this case.

[113] It does not stand to reason that he would have displayed the posters. He was working on one of them for eight months; had he displayed them openly, he would have been called to task much earlier. I believe the grievor's testimony that he

deliberately kept them hidden for his private amusement and that he never even wanted anyone else to see them.

[114] The grievor was punished for his unkind thoughts. The only time those thoughts were turned into actions was when he took a few seconds each day to mark the days off on the posters. This was clearly not a work-related activity, but it does not involve the degree of moral turpitude that would warrant a disciplinary response.

[115] The first element of the *Scott* criteria is not met, so the analysis need not progress. Any sanction that was imposed was unwarranted.

[116] The first grievance, carrying Board file no. 566-02-4291, is allowed. By way of remedy, the amounts deducted from the grievor pursuant to his five-day suspension without pay must be reimbursed, less the applicable deductions.

[117] Since this grievance involves a suspension without pay, s. 226(2)(c) of the *FPSLRA* gives me the authority to award interest on the amounts owed to the grievor. Once the applicable deductions have been calculated on the five days' pay he is owed, cumulative interest at the Bank of Canada rate must apply. The interest is owed from the date on which discipline was imposed, namely, August 17, 2009, to the date on which the employer pays the award. Since the suspension took place in Vegreville, the applicable provincial legislation is the *Judgement Interest Act and Regulation*, Alberta Regulation 215/2011, which is current to September of 2022. According to that regulation, the amounts of interest that should accrue are detailed in the next paragraph.

[118] From August through the remainder of calendar year 2009, 2.75% per year. The interest rates for the following years are as follows:

2010: 0.825%
2011: 1.85%
2012: 1.2%
2013: 1.4%
2014: 1.10%
2015: 1.05%
2016: 0.55%
2017: 0.53%
2018: 0.87%
2019: 2.2%
2020: 1.5%
2021: 0.2%

2022: 0.2%

[119] Turning now to the discriminatory nature of the disciplinary action, I will consider whether the grievor made a *prima facie* case of discrimination by asking these three questions:

i) Did the grievor establish a disability?
ii) Did he experience an adverse impact due to the employer's actions?
iii) Is there a connection between his disability and the adverse impact?

[120] First, I find clear evidence that the grievor suffered from a disability and that the employer was aware of it. I find it surprising that Ms. Holmstrom was not called as a witness, ostensibly because she had nothing to do with the first instance of discipline and was not present for the second or third ones.

[121] I find that on the contrary, Ms. Holmstrom had a significant role to play. The credible testimonies of both the grievor and Ms. Casper, along with Ms. Casper's corroborative notes of the meeting on January 21, 2008, place both Ms. Holmstrom and Ms. Holden in a position of stewardship of important information pertaining to the grievor's serious medical condition.

[122] Ms. Holden knew that the grievor was receiving long-term disability benefits while he was hospitalized in the Camrose institution for a mental disorder. She was the point of contact for the employer in paying him those benefits.

[123] The circumstances of the grievor's institutionalization in the Camrose hospital and Dr. Wilson's letter make it clear that he suffered from a disability and that he required workplace accommodation. The only accommodation specified by Dr. Wilson was a return to work at a location other than Vegreville, which the employer ignored.

[124] Unchallenged testimony from the Caspers made it clear that both Ms. Holmstrom and Ms. Holden knew about the serious nature of the grievor's disability. Ms. Casper even made a note of Ms. Holmstrom's observation that as a former registered nurse, she was well acquainted with the medical condition he suffered from. No objection was raised at the hearing about Ms. Casper's notes to this effect. This is clearly an out-of-court statement being offered for the truth of its contents, but a statement against interest is a clear exception to the hearsay rule.

[125] Clearly, this statement was against the employer's interests. Ms. Holmstrom had a duty to safeguard the medical information she received about the grievor and to treat it accordingly. She did neither. Despite receiving a clear instruction from Dr. Wilson about not returning the grievor to the Vegreville CPC, she did exactly the opposite. Dr. Wilson's February 4, 2008, letter to Ms. Holmstrom was never placed on the grievor's personnel file. It appears that neither Ms. Holden nor Ms. Holmstrom shared any of the grievor's important medical information with Ms. Dubuc, Ms. Harle, Ms. Palley, or, it would seem, with anyone at all.

[126] Second, the grievor suffered an obvious adverse impact as a result of the employer's failure to take his medical condition into account. To begin with, he should never have been returned to the Vegreville CPC because his medical condition was exacerbated there, in part because of workplace tensions that were so severe, they made him suicidal and resulted in his hospitalization in Camrose. However, he did not grieve the decision to return him to Vegreville. His failure to grieve that decision, it will be seen, has important implications with respect to determining the applicable remedy.

[127] The grievor's medical condition was not taken into account when the decision was made as to whether to impose discipline, and given the nature of that condition, the decision to impose a significant suspension was unfortunate.

[128] Although Ms. Dubuc testified to having no knowledge that the grievor had a specific medical condition, she certainly had reason to suspect that all was not right with him. He was using up his sick leave. His negativity and his attitude became unbearable.

[129] Ms. Dubuc kept notes of her conversation with Ms. Harle on January 13, 2009, which predated the first instance of discipline by approximately eight months. She noted that "Donna stated Terry is not rude, but not friendly - doesn't speak to her, or make eye contact", that he "rarely contributes at team meetings, looks down", and that a new co-worker said that "he hardly goes to him cause [*sic*] he's so grouchy".

[130] The grievor testified at length to the emotional impact of the sanction. He was already finding it difficult to cope with the workplace conflict, and the five-day suspension made matters worse. He testified to his humiliation, hurt feelings, and loss of self-respect and self-esteem as a result of the sanction.

[131] Therefore, on the basis of the grievor's testimony, I find that clearly, he suffered an adverse impact, both financial and psychological.

[132] Where I find difficulty is at the third stage of the discrimination analysis. Was the adverse impact directly connected to his medical condition?

[133] A doctor's testimony directly linking the adverse impact to a diagnosed medical condition would have been ideal. In its absence, I am left to extrapolate. The grievor testified to his medical condition, but he is not a doctor. Since Ms. Holmstrom did not testify, I am left to guess at her degree of knowledge about how the grievor's medical condition had the potential to manifest itself in destructive workplace behaviour. Until he raised a red flag about his medical condition in his grievance of the disciplinary sanction, an objective determination of the link between his medical condition and the adverse impact of the disciplinary sanction (at that particular point) could not be made.

[134] Of course, all of this changed once the grievor's supervisors became aware of the need to investigate further into the grievor's medical situation.

[135] As a result, the grievance carrying Board file no. 566-02-4293, pertaining to discrimination, is denied. The grievor failed to establish a *prima facie* case of discrimination in this particular grievance.

2. Discipline imposed on January 25, 2010

a. The grievor's arguments with respect to the January 25, 2010, instance of discipline

[136] The grievor admitted that his interaction with Ms. Humeniuk was disrespectful and that it deserved some form of disciplinary response but feels that the seven-day suspension was disproportionately harsh.

[137] Despite the grievor and Ms. Humeniuk differing in opinion as to what was said, and in what tone, there is no clear information about how the employer reached its findings of fact or reconciled the conflicting evidence. The letter of discipline simply arrived at a conclusion and justified the sanction on the basis of progressive discipline.

[138] The case of *Touchette*, argued the grievor, emphasizes the importance of providing sufficient detail. It states as follows at paragraphs 70, 72, and 73:

> *[70] There is an unfortunate tendency, in professional discipline cases involving rude, colourful, or profane language, for decision makers to dance daintily around the actual words that were used. This is not helpful. The recipient of the disciplinary action must be brought face-to-face with the precise nature of his or her transgression. That is the only way of assessing whether the accompanying sanction was fair, just, suitable, or reasonable. In the present case, the letter is unclear about what the grievor is being sanctioned for.*
>
> …
>
> *[72] The determinations of the fact-finding process must be clearly spelled out to provide clear notice of the nature of the misconduct at issue.*
>
> *[73] Equally vague is the articulation of the aggravating and mitigating factors. The range of sanction open to Mr. Hewson was quite wide, from an oral reprimand to five days' suspension. Where he ultimately lands along this spectrum depends entirely upon the weight given to aggravating and mitigating factors, so this is a very important part of the analysis. It is also crucial to the second stage of the Scott analysis, because the aggravating and mitigating factors taken into account will determine whether or not the discipline imposed was excessive or not.*

[139] Ms. Dubuc testified that she did not take any mitigating factors into account. The letter mentions the prior five-day suspension for similar misconduct as an aggravating factor, but she testified to the presence of other aggravating factors, namely, a lack of remorse and a failure to apologize.

[140] The grievor argued that several mitigating factors should have been considered. First and foremost was the ongoing turbulence that the grievor experienced in the workplace, which was present ever since he set foot back in the Vegreville office. It was difficult for him to maintain a calm demeanour in the face of it, and his overreaction to Ms. Humeniuk's request for assistance was attributable to it.

[141] His actions were spontaneous. He was not violent; nor did he use profanity or objectionable language. He was abrupt and rude. There is no indication that he was untruthful about his actions; he simply recalled things differently than did Ms. Humeniuk. His actions did not warrant a seven-day suspension, he argued. At most, a one- to three-day suspension would have sufficed to address his behaviour.

[142] The backdrop to this instance of discipline was the grievor's ongoing medical issue. The use of sick leave and the workplace friction should have provided the

employer with ample grounds to make further inquiries into the state of his health, he argued, but no inquiries were made until the FTWE was requested in June of 2010.

[143] The discrimination-analysis framework applies to this second instance of discipline as well, argued the grievor. It is not enough for the employer to state that the supervisors were not aware of a medical condition that required accommodation. The question, according to him, is whether the employer knew or ought to have known that a disability could have impacted his behaviour.

[144] The existence of several "red flags" in the workplace, argued the grievor, make this case similar to *Mellon v. Human Resources Development Canada*, 2006 CHRT 3 at paras. 97 and 98, which state as follows:

> ***97*** *All of the events described above should have sent up a red flag. I conclude that, from all of these events, the Respondent knew, or ought to have known that the Complainant was experiencing anxiety from work-related stress. The fact that she did not tell them in so many words does not disentitle her from the protection of the* Act *(see:* Mager c. Louisiana-Pacific Canada Ltd.*, [1998] B.C.H.R.T.D. No. 36.) For its part, if the respondent felt that work induced stress is not a disability it should have sought a professional assessment of the Complainant.*
>
> ***98*** *It is not enough for the Respondent to say that they were not advised of or aware of the Complainant's condition. Certainly, from the evidence presented at the hearing, it is clear that they must have been aware that she was suffering from what might be described as a delicate emotional state. Knowing what it did, it was up to the employer to determine whether the complainant's health was affecting her performance. It had the responsibility to at least inquire as to whether the complainant's condition might impact upon its decision to terminate the Complainant.*

[145] The grievor argued that the friction with others in the workplace was a manifestation of MDD, a medical condition known to the employer since the return-to-work discussions in January of 2008 and Dr. Wilson's letter of February 4, 2008. Therefore, his disability was a clear factor in the disciplinary measure that was imposed, and it is not his fault that it appears that Ms. Holmstrom and Ms. Holden did not share his important medical information with anyone. The Alberta Human Rights Commission stated as follows in *Warren v. West Canadian Industries Group Limited*, 2007 CSHG para. 95,527 at paras. 174 to 176:

> ***174*** *The Panel finds that after submitting the medical note, there were behavioural issues and absences due to sickness that should have triggered some follow-up with both Mr. Warren and Dr. Badenhorst regarding his mental illness. However, no such action was taken.…*
>
> ***175*** *Ms. Lewis did not tell anyone that Mr. Warren had been diagnosed with a mental illness, including Ms. Mugford who testified that she "signed off" on Mr. Warren's termination.*
>
> ***176*** *It is the Panel's view that Mr. Warren's mental disability was a factor in his termination. The reasons given by West Canadian for his dismissal were poor attitude and an inability to get along with his co-workers. These reasons are consistent with the symptoms of Mr. Warren's mental illness.*

[146] In this same decision, the employer's failure to share information is expanded upon as follows at paragraphs 190 to 192:

> ***190*** *However, once he disclosed his mental illness by way of the medical note from Dr. Badenhorst, there was no acknowledgement of his illness by West Canadian or its representative, Ms. Lewis. In fact, there is no evidence that Ms. Lewis shared this information with anyone in the company, or in any way sought out any solutions.*
>
> ***191*** *The Panel finds that Mr. Warren's initiative to disclose his illness was a request for accommodation. Had the respondent seriously inquired as to how this could be accommodated, solutions may have been found.*
>
> ***192*** *Being mindful that the search for accommodation is a multi party inquiry, after disclosing his illness Mr. Warren does not have a duty to originate a solution. Following disclosure, the respondent made no serious efforts to accommodate Mr. Warren. Consequently, the Panel finds that the respondent did not accommodate Mr. Warren's disability to the point of undue hardship.*

[147] *Sears v. Honda of Canada Mfg., a division of Honda Canada Inc.*, 2014 HRTO 45 ("*Honda*"), argued the grievor, reinforces the employer's duty to inquire. That case states this at paragraphs 114 and 115:

> *[114] The evidence shows that the applicant did not formally request accommodation. However, the procedural duty to accommodate indicates that an employer cannot passively wait for an employee to request accommodation where it is aware of facts that indicate that the employee may be having difficulties because of disability; there is a duty to take the initiative to inquire in these circumstances.*

> *[115] A number of decisions of this Tribunal, as well as other tribunals applying human rights legislation, have considered when a respondent can be said to have enough knowledge of an applicant's disability to trigger responsibilities under human rights legislation. Most of these decisions have arisen in the context of identifying when the employer has a duty to accommodate. Most decisions indicate that the claimant will not be held to a high standard of clarity in communication. This approach is in keeping with the principles enunciated by the Supreme Court of Canada in respect of the need to interpret human rights legislation generously and purposively. Liability has been found when an employer had no knowledge of the disability.…*

[148] The *Honda* case goes further and stands for the proposition that the employer cannot claim a lack of knowledge of a disability based on managers' failure to pass on relevant information. It states this at paragraphs 130, 139, and 149:

> *[130] A number of individuals within the structure of the corporate respondent had full information about the applicant's disabilities. Ms. Maxim-Redfern testified that she had full access to the applicant's medical records, as did the company physician. Mr. Moulding of Human Resources knew about the applicant's visual disabilities, including colour blindness, from at least 2009. Mr. Moulding's testimony indicated that, while it was part of his job to deal with performance issues and possible discipline, he did not understand it the* [*sic*] *part of his duties to deal with accommodation.…*
>
> *…*
>
> *[139] … The system used by the corporate respondent to deal with employee health issues also features a number of information silos of which employees may be unaware. This complicates the onus on the employee, and compromises the potential for adequate response by the corporate respondent.…*
>
> *…*
>
> *[149] To initiate accommodation relating to disability, an employee must of course be prepared to disclose information about the relevant disability to someone in authority. An employee who has already disclosed his or her disabilities to the employer may not be aware that s/he must do so again. In this case, the applicant had reason to believe that his employer knew that he had disabilities that made his job more difficult, and he did believe this.…*

[149] In *Warren*, the Alberta Human Rights Commission cited this passage from *Gibbs v. Battlefords & District Cooperative Ltd.*, 1996 CarswellSask 602 at para. 31:

> *… Mental illness is one of the least understood and least accepted of all illnesses. It creates fear and stereotypical responses in people.*

> *Yet who are the mentally ill? Potentially they can be people who suffer from varying degrees of illness, from short term situations that temporarily incapacitate an individual to long term illnesses that require continuous support and attention. Psychiatric disabilities have many possible causes, sometimes physical, sometimes psychological and sometimes social. For a great many people, such illnesses are shameful and embarrassing and as a result they are very reticent to stand up for their rights or to protest when injustice has been done to them.…*

[150] The grievor argued that he should not be held responsible for the employer's failure to share both vital information about his medical condition and Dr. Wilson's accommodation recommendation.

[151] The grievor argued that the employer ought to have inquired further into his medical condition. In her notes of a meeting with Ms. Harle (the grievor's supervisor) on January 13, 2009, Ms. Dubuc noted as follows:

> …
>
> *Donna* [Harle] *stated Terry is not rude, but not friendly - doesn't speak to her or make eye contact.*
>
> *- Started around the time of his last grievance*
>
> *- rarely contributes at team meetings, looks down*
>
> *- new PM-03 on team … said he hardly goes to him cause he's so grouchy*
>
> [*Sic* throughout]

[152] Ms. Dubuc testified to the grievor's negative sick leave balance. What more indication of a possible medical condition, the grievor argued, did the employer need? Still, no inquiry was made. The employer preferred to simply await the outcome of Health Canada's FTWE.

[153] The grievor's testimony made it clear that he suffered an adverse impact as a result of the seven-day suspension and that it was directly related to his medical condition. He already felt undervalued at work, and the penalty exacerbated an already fragile mental condition. The seven-day suspension cast him into a deep depression. He testified to having discussed this with Ms. Harle, who referred him to the Employee Assistance Program (EAP). He testified to being on medication prescribed by his physician for his depression at that time.

b. The employer's arguments with respect to the January 25, 2010, instance of discipline

[154] The employer pointed to the grievor's job description. An important part of his job was to provide advice and assistance to SDAs such as Ms. Humeniuk. He had received training on appropriate and respectful workplace behaviour, so he knew better than to respond to Ms. Humeniuk's request for assistance in the manner he did.

[155] The grievor's comments were intentionally hurtful. He said, "Can't you read?" and "You should get some intelligence." When asked to comment on Ms. Humeniuk's statement, he stated that he felt that he had not been rude and suggested only in his testimony at the hearing that perhaps he could have framed his observations more politely.

[156] The employer maintained that the seven-day suspension was in keeping with the principle of positive and progressive discipline, given the grievor's recent five-day suspension for similar behaviour. *Tanciu v. Treasury Board (Veterans Canada)*, PSSRB File No. 166-02-27712 (19970805), [1997] C.P.S.S.R.B. No. 80 (QL), is an example of how progressive discipline is applied in an effort to correct workplace misconduct.

[157] The employer took note of the grievor's complaint in his grievance pertaining to the first instance of discipline that it had not considered his medical condition, which supposedly, it was aware of. The grievance was signed on September 1, 2009.

[158] Ms. Harle, the grievor's supervisor at the time, emailed him on September 10, 2009, stating as follows:

> …
>
> *In your grievance, which we received on September 3, 2009, you indicate that you have a medical condition which has not been accommodated by the employer. I have no record on file regarding this medical condition, nor do I have any record of accommodation required.*
>
> *In order to meet our obligations under the duty to accommodate policy, I require information from your physician regarding work place limitations so that I can take appropriate actions.*
>
> …

[159] The grievor did not supply the medical note as requested. Since the employer was not aware of any accommodation requirement, it argued that it cannot be held

responsible for failing to accommodate him. In *(Canada) Attorney General v. Gatien*, 2016 FCA 3, the Federal Court of Appeal stated the following at paragraphs 47 and 48:

> *[47] In this regard, contrary to what the Federal Court judge found, there was evidence before the Adjudicator from which he could have reasonably concluded that the employer was unaware of Ms. Gatien's mental health condition when it imposed discipline. The mere fact that she dissolved into tears or said she was stressed falls well short of proof of her suffering from a recognized psychiatric illness. Likewise, the brief note from her physician, which merely referred to recent stressors to support a short period of sick leave falls well short of communicating to the employer that Ms. Gatien was suffering from or was likely to suffer from post-traumatic stress disorder.*
>
> *[48] As the appellant rightly notes, the case law recognizes that one cannot equate stress with a disability:* Halfacree v. Canada (Attorney General)*, 2014 FC 360 at paragraph 37, aff'd 2015 FCA 98 at paragraph 15;* Riche v. Treasury Board (Department of National Defence)*, 2013 PSLRB 35 at paragraphs 130-131;* Crowley v. Liquor Control Board of Ontario*, 2011 HRTO 1429 at paragraphs 57-63. Thus, there was a rational basis for the Adjudicator to conclude that the employer did not have any medical information about Ms. Gatien's condition at the time it decided to impose discipline. The Federal Court therefore erred in finding this conclusion to be unreasonable.*

[160] The grievor had a duty to cooperate. The employer sought medical notes, but he failed to provide any. *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97, states this at paragraph 125:

> *[125] As stated in* Taticek *and again in* Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41, the SCC noted, in* Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 ("*Renaud*"), that employees seeking accommodation have a duty to cooperate with their employers by providing information as to the nature and extent of their alleged disabilities that will enable the employers to determine the necessary accommodations.…*

[161] The employer argued that if a *prima facie* case of discrimination is established, the duty to inquire further into the grievor's medical situation was not triggered. *Williams v. Elty Publications Ltd.*, [1992] B.C.C.H.R.D. No. 25 (QL) at para. 85, states the following:

> ***85** I can see no basis in the evidence to support the contention of counsel for the Complainant that the Respondent either knew or*

> *ought to have known of the Complainant's disability. While Wilson was aware that the Complainant was a recovered alcoholic, I accept Wilson's evidence that she was not aware of the Complainant's fears of reverting to alcoholism. Similarly, while Wilson was aware that the Complainant was upset due to the break-up* [*sic*] *of her relationship (a fairly common occurrence), there is no evidence to support a finding that Wilson (or Collison) knew or ought to have known that the Complainant's degree of upset had escalated to the point where she had a mental disability (if indeed it had). In reaching this conclusion I have given credence to Wilson's testimony that the Complainant was known to "fly off the handle" and to Collison's evidence that the Complainant was "irritable and didn't get along with other people."*

[162] The employer argued that in this case, although the grievor took a large number of sick days and was in conflict with others in the workplace, these facts did not oblige it to make additional inquiries into his medical issues. Its obligation was discharged when it asked him to provide a medical note and he did not. It was concerned about his behaviour because a fitness-to-work assessment was requested of Health Canada on June 30, 2010. In that request, the workplace incidents that led to disciplinary action were mentioned specifically.

c. Decision and reasons with respect to the January 25, 2010, instance of discipline

[163] The chief distinguishing feature between the exchange with Ms. Humeniuk and the creation of the countdown posters is that it was not a covert activity. The grievor had a face-to-face exchange with a colleague over a work-related issue and acknowledged using insulting language that resulted in hurt feelings on Ms. Humeniuk's part. Discipline is warranted under such circumstances.

[164] The grievor submitted that the employer made no effort to reconcile different versions of the events. I find that no reconciliation was necessary as there was no real difference between his story and Ms. Humeniuk's. I need not engage in an analysis of witness credibility as I find that both witnesses testified credibly as to the exchange that took place at the grievor's desk on January 12, 2010. He could not recall word-for-word the language that he used, but he did acknowledge that it was impolite and offered an apology for it. Ms. Humeniuk had the advantage of having immediately written down the grievor's comments in notes that she submitted to her supervisor the following day when she complained about his behaviour.

[165] There are compelling circumstantial guarantees of trustworthiness in the contemporaneous taking of notes. Ms. Humeniuk took notes of what the grievor said immediately after their interaction. She later typed them and submitted them to her supervisor, along with her complaint about the grievor's behaviour. She testified that the grievor said these things:

- "What intelligence? There is not [*sic*] intelligence in the government."
- "You should get some intelligence."
- He had never seen this "shit".
- "Well it says landing ready, can't you read?"
- As she walked away, he repeated, "Can't you read?"

[166] I find that the grievor did in fact say those things to Ms. Humeniuk when she asked him about practice and procedure in a landing-ready file (this is a term of art pertaining to the status of a file, and its precise definition would have no bearing on the merits of the grievance).

[167] The employer correctly pointed out that SDSs and SDAs must have file-related discussions. As per the CIC's *Code of Conduct*, these discussions "… must remain polite and courteous when dealing with colleagues to ensure that CIC is a respectful workplace."

[168] I find, as per the first stage of the *Scott* criteria, that the grievor's conduct warranted a disciplinary response. He might have intended to merely voice an opinion on the nature or quality of the operational intelligence gathering that had taken place on the matter Ms. Humeniuk sought guidance on, but he turned it into a personal attack when he said, "You should get some intelligence." This, along with "Can't you read?" were deliberately hurtful and constituted a personal attack on Ms. Humeniuk. The use of an expletive crosses the line into inappropriate and disrespectful conduct.

[169] Therefore, on the basis of the evidence, I find that discipline was warranted. The final stage in the *Scott* analysis framework is to determine the appropriate quantum of sanction.

[170] The employer's arguments on positive and progressive discipline hold no water. Since creating the countdown posters did not warrant a disciplinary response, this disrespectful interaction with Ms. Humeniuk must be considered the first instance of discipline in an otherwise discipline-free service record.

[171] The only relevant aggravating factor that the employer considered when it imposed the seven-day suspension without pay was the lack of an apology, and to some extent, I agree. The grievor knew that he had upset Ms. Humeniuk. He offered her no apology, and until he testified at the hearing, he showed little introspection. At the hearing, he acknowledged the impact upon Ms. Humeniuk and admitted that he could have handled matters differently. In his written response of January 19, 2010, he offered no apology and placed the blame on Ms. Humeniuk "… for having gone to a [*sic*] SDS when there was absolutely no reason to do so."

[172] I find the lack of an apology to be an aggravating factor.

[173] The employer completely ignored the mitigating factors. None was mentioned in the letter of suspension dated January 25, 2010, and none was acknowledged in the testimonies of the employer's witnesses. However, several must be considered.

[174] A clear mitigating factor is that this was a spontaneous outburst. There was nothing premeditated in the grievor's behaviour. He overreacted to what he thought was an unnecessary line of questioning from an SDA who, he felt, could have worked the problems out on her own. Since it amounted to a one-time lapse of good judgement, I consider this to be a mitigating factor.

[175] The employer was clearly aware of the stress the grievor was under in the workplace. There were complaints of harassment. Others complained about the smell of cigar smoke on his clothes, and he said that he felt that he was under a microscope. Context is important. The stressful workplace environment was not an excuse for his behaviour, but it is a compelling explanation for why it occurred. The stressful work environment must be taken into account as a mitigating factor. It was not.

[176] However, chief among the mitigating factors is the grievor's medical condition, of which the employer had been aware since Ms. Holmstrom and Ms. Holden participated in return-to-work discussions in January of 2008. They received Dr. Wilson's accommodation recommendation, and the reasons underlying it in his letter dated February 4, 2008, were clear. That his recommendation was never acted upon or brought to the attention of those in a supervisory capacity can hardly be the grievor's fault.

[177] In January and February of 2008, the employer was made aware that some of the manifestations of MDD would cause some difficulty with respect to maintaining harmonious working relationships, especially in an already stressful environment. Therefore, the grievor's medical condition was a significant mitigating factor that should have been taken into account when the sanction was imposed for the January 12, 2010, incident.

[178] Both Ms. Dubuc and Ms. Harle expressed concern about the grievor's use of sick leave. They knew that something was amiss. On September 9, 2009, he signalled a medical condition that should have been investigated further. The employer did not exercise due diligence. His medical condition was an important factor in the January 12, 2010, conflict with Ms. Humeniuk and should have been taken into account as a significant mitigating factor when determining the quantum of the sanction. This is especially true since by this time, the employer had been provided with ample evidence to indicate that his medical condition was most likely linked to the ongoing friction with his co-workers.

[179] The next stage of the *Scott* criteria involves measuring the quantum of discipline. If it was excessive, justification must be provided for a lesser sanction.

[180] I find that the seven-day suspension was grossly disproportionate to the misconduct at issue. The cases already referred to indicate windows of three to five days' suspension for misconduct characterized by a significant degree of profanity or other threats. In his interaction with Ms. Humeniuk, the grievor uttered a single profanity, the word "shit", but it was not directed at her. It was directed at the file she asked him a question about. I find nothing threatening in his behaviour.

[181] It must be repeated that I find that this was the grievor's first instance of discipline. From an analysis of the cases provided by counsel, all of which describe much worse behaviour, I find that a letter of reprimand is in order for this, his first instance of misconduct. By way of remedy, then, the repayment of all seven of the unpaid suspension days must be made, with interest (as per my previous analysis).

[182] Turning now to the discrimination issue, I find that the employer was aware of an increasing trend toward the use of sick leave. So concerned was it about the grievor's condition that (later on) in March of 2010, it began preparing a detailed letter to Health Canada requesting a FTWE. This letter was ultimately sent on June 30, 2010.

But none of the employer's witnesses testified to any inclination to revisit the January 25, 2010, disciplinary measure, despite compelling reasons to suspect that an underlying medical condition was giving rise to workplace issues.

[183] The grievor testified to Ms. Harle expressing to him her concern about his mental well-being, and she referred him to the EAP.

[184] In an email dated September 10, 2009, Ms. Harle referred to the grievor's first grievance, in which he indicated that he had a medical condition, and then stated that she could find no record on file about one or any record of any accommodation required. That fact, her observations about his negative sick leave balance, her recommendation to him that he seek EAP assistance, and her observations (which Ms. Dubuc recorded in handwritten notes) about his behaviour all provide a clear indication that she truly knew something was amiss.

[185] The red flag raised by the grievor about his missing medical information should have been cause to inquire further. Coupled with these other contemporaneous indicators of ill health, I find that the employer was remiss in its duty to inquire further into the grievor's medical condition. It was not sufficient to simply request a Health Canada FTWE and leave it at that, especially when the noted behaviours led to further disciplinary action.

[186] I find the *Honda* case particularly persuasive and squarely on point with the grievor's circumstances in the present case. The major distinction is that in *Honda*, the information was not shared because of systemic information-sharing practices within the organization. Since neither Ms. Holmstrom nor Ms. Holden testified, there is no clear evidence as to why the information obtained during the return-to-work discussions in January of 2008 and Dr. Wilson's letter of February 2008 were not made available to others.

[187] I find that the employer was, by this time, aware of a disability that was directly related to the workplace incident that gave rise to the January 25, 2010, instance of discipline. It suspected that health issues were a factor in the grievor's workplace misconduct and documented as much in a letter to Health Canada that was sent later on in 2010.

[188] The difference between this incident of discipline and the one imposed on August 17, 2009, is that by January 25, 2010, I find that there was a direct link between the grievor's medical condition and the imposition of an unduly harsh disciplinary sanction. By the time the seven-day suspension without pay was imposed, on January 25, 2010, the employer was keenly aware of the existence of a medical condition that was undoubtedly a factor in the friction between the grievor and others in the workplace.

[189] As a result, I find that the grievor made a *prima facie* case of discrimination. He suffers from a medical condition, of which the employer was aware. This is a prohibited ground. An objective consideration of all the facts and of the context leads to the conclusion that his outburst with Ms. Humeniuk was related to his medical condition.

[190] I accept the employer's contention that accommodation is a two-way street, which is supported by the case law it submitted. The grievor had to assume some responsibility for arriving at a satisfactory accommodation. I accept that after learning that neither Dr. Wilson's letter nor any of the information pertaining to his diagnosis and his return to work was present on his personnel file, the grievor did not supply the employer with a renewed diagnosis. He could have done so, as he was seeing a psychiatrist at the time, but he did not.

[191] However, the employer made no attempt to accommodate the grievor because it acknowledged no disability in the first place.

[192] I find that the employer's recklessness with respect to Dr. Wilson's letter dated February 4, 2008, and all the information pertaining to the grievor's return to work had a continuing adverse effect. Had this important medical information properly made its way into the hands of supervisors who could have acted on it, the grievor's medical condition would have been taken into account as a mitigating factor.

[193] As for remedy, ss. 53(2)(e) and (3) of the *CHRA* provide as follows:

53(2) *If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the*	***53(2)*** *À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne*

person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:	*trouvée coupable d'un acte discriminatoire :*
…	[…]
(e) *that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*	***e)*** *d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.*
…	[…]
(3) *In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.*	***(3)*** *Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.*

[194] The cases supplied by both counsel were not instructive in terms of identifying an appropriate remedy. Neither counsel argued remedy extensively, but some of the cases contained useful discussions of compensatory damages. For the sake of clarity, I will refer to damages under s. 53(2)(e) of the *CHRA* as "pain-and-suffering damages" and damages under s. 53(3) as "special damages".

[195] The grievor argued for a cumulative remedy in the form of a reinstatement to the public service. I cannot consider this because the remedy must be tied to the grievance. The decision to place him back in the Vegreville CPC, against Dr. Wilson's recommendation, was unfortunate and carried severe consequences for the grievor, but this decision was never the subject of a specific grievance. He grieved only the three instances of discipline, and he did so separately. Therefore, each consideration of

remedy can address only the specific instance of discipline for which remedy was requested and for which remedy is payable.

[196] With respect to this particular instance of discipline, I find the grievor's testimony and that of his spouse are compelling accounts of the pain and suffering he experienced as a direct result of the employer's discriminatory practice. *Tanzos v. AZ Bus Tours Inc.*, [2007] C.H.R.D. No. 33 (QL) at paras. 68 and 69, states this:

> ***68*** *The complainant is also claiming compensation for pain and suffering under paragraph 53(2)*(e). *Again, I must say that the evidence submitted in support of this claim is somewhat weak and is certainly not enough to justify an amount in the higher scale provided under the* [*CHRA*]. *While subsection 53(2) of the* [*CHRA*] *gives discretion to the Tribunal with regard to granting various remedies when a complaint proves to be founded, such discretion must be exercised judiciously in light of the evidence before the Tribunal. In this case, the complaint is allowed and nothing in the complainant's testimony indicates any reason to refuse awarding her compensation for pain and suffering. (See* Dumont v. Transport Jeannot Gagnon*, 2002 FCT 1280).*
>
> ***69*** *I agree that the respondent's decision did cause the complainant pain and suffering, if only in terms of anxiety. I therefore award $3,000.00 as compensation for pain and suffering.*

[197] The *Tanzos* decision contains no quantification of the nature of the pain and suffering endured, but the amount of $3000 was awarded in that case. In the present case, the grievor and his spouse both testified to the negative psychological impact of the seven-day suspension without pay, which I have found severely disproportionate to the misconduct at issue. It is important to recall that Ms. Holmstrom and Ms. Holden were both aware that the grievor was returning to work following hospitalization for a major depressive disorder so severe he contemplated suicide, caused in part by him feeling undervalued in the workplace. I find that the pain and suffering that the seven-day suspension caused him was substantial and that a substantial award is appropriate. Therefore, I order the payment of pain-and-suffering damages in the amount of $7000 under s. 53(2)(e) of the *CHRA*, which equates to $1000 for each of the seven days he was unnecessarily suspended.

[198] At no time did any of the employer's witnesses consider the impact of the workplace conflict on the grievor, given his medical condition. Although it is true that none of the witnesses who actually testified knew of his medical condition, it is also

true that this unfortunate state of affairs can hardly be considered his fault. The employer's failure to properly record the medical information, including Dr. Wilson's letter, was wilful and reckless conduct, which dictates a remedy of special damages under s. 53(3) of the *CHRA*.

[199] Neither counsel presented *Hare v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2019 FPSLREB 59 (*Hare*), but I find it instructive on the issue of special damages under s. 53(3) of the *CHRA*.

[200] In *Hare*, the employer was found to have been aware of a medical condition but did not accommodate it. This was found to be wilful and reckless in nature, and the maximum of $20 000 was awarded under s. 53(3). In the present case, the employer was aware of a medical condition and did not make that information available to management personnel, who most certainly needed to know about it. It was crucial to take the grievor's medical condition into account when evaluating a disciplinary response to workplace behaviour clearly linked to his mental state.

[201] This was wilful and reckless behaviour on the part of the employer that had a powerfully negative impact upon the grievor, and therefore, I award the sum of $1000 per day for each of the seven days of his unwarranted suspension for a total of $7000 in special damages under s. 53(3) of the *CHRA*.

[202] Since this grievance involves a suspension without pay, s. 226(2)(c) of the *FPSLRA* gives me the authority to award interest on the amounts owed to the grievor. Once the applicable deductions have been calculated on the seven days' pay he is owed, cumulative interest at the Bank of Canada rate must apply. The interest is owed from the date on which discipline was imposed, namely, January 25, 2010, to the date on which the employer pays the award. Since the suspension took place in Vegreville, the applicable provincial legislation is the *Judgement Interest Act and Regulation*, Alberta Regulation 215/2011, which is current to September of 2022. According to that regulation, the amounts of interest that would accrue are detailed in the next paragraph.

[203] From August through the remainder of calendar year 2009, 2.75% per year. The interest rates for the following years are as follows:

2010: 0.825%

2011: 1.85%
2012: 1.2%
2013: 1.4%
2014: 1.10%
2015: 1.05%
2016: 0.55%
2017: 0.53%
2018: 0.87%
2019: 2.2%
2020: 1.5%
2021: 0.2%
2022: 0.2%

[204] I am precluded from ordering the payment of interest on damages awarded under the *CHRA*.

[205] The grievances carrying Board file nos. 566-02-4293 and 4294 both pertain to the same set of events surrounding the imposition of the second disciplinary measure. They are both allowed.

3. The final instance of discipline, dated December 20, 2010

a. The grievor's arguments with respect to the December 20, 2010, instance of discipline

[206] The grievor acknowledged that his comments of December 8, 2010, were out of line and apologized for them in the meeting on December 13, 2010, with both Ms. Palley and Ms. Harle in attendance. He agreed that discipline was warranted but argued that a 10-day suspension without pay was grossly disproportionate.

[207] The grievor's apology and expressions of remorse were the only mitigating factors taken into account in the letter of suspension dated December 20, 2010. The aggravating factors mentioned in the letter, and testified to by the employer's witnesses, were the severity of the misconduct and the presence of prior discipline.

[208] The grievor raised an issue with respect to considering the severity of the misconduct as an aggravating factor. An aggravating factor is, by definition, something that accompanies the misconduct that attracts a harsher penalty, not the misconduct itself.

[209] The 10-day suspension, in the light of the cases already submitted, was grossly disproportionate to the misconduct at issue, argued the grievor. Following the analysis

in the *Scott* case, a suspension in the amount of 1 to 3 days' duration would be more appropriate.

[210] As before, many important mitigating factors were not taken into account in assessing the quantum of sanction. The grievor's comments were spontaneous and indicative of a very brief lapse of judgement due to an emotional reaction. They were not directed at any particular individual. They arose in a period in which the grievor was experiencing a great deal of stress at work, of which the employer was also well aware but did not take into account.

[211] Once again, argued the grievor, the chief mitigating factor that the employer omitted in its analysis was his medical condition, of which it had been aware since January and February of 2008. This information was simply not shared or placed on his personnel file, which would have made it accessible to managers.

b. The employer's arguments with respect to the December 20, 2010, instance of discipline

[212] The employer once again referred to the importance of working with others and how integral it was to the grievor's job description.

[213] As with the other incidents of disrespectful behaviour, the employer cited *Bahniuk*, at paras. 261 to 263, as follows:

> *[261] The employer's* Code of Ethics and Conduct *clearly stipulates that all CRA employees must adhere to the core values of respect and professionalism, and that managers are expected to exemplify those values. The grievor's training history … indicates that he was aware of the* Code of Ethics and Conduct. *The* Manager's Charter *requires that managers demonstrate the core values of CRA through words and actions.*
>
> *[262] Based on the evidence, I find that the grievor engaged in unprofessional and disrespectful conduct toward Ms. Bauer on May 2, 2008, in contravention of the employer's policies. He admitted as much by apologizing to Ms. Bauer for his behaviour. The grievor's uncontrolled behaviour as described by Ms. Bauer was reprehensible and has no place in a work environment, all the more so when engaged in by a manager.*
>
> *[263] With respect to the appropriateness of the discipline imposed, the grievor's disciplinary record at that point consisted of a written reprimand and a 1-day suspension for similar incidents. Ms. Bauer referred to the employer's grid for examples of misconduct and the suggested disciplinary measures at Appendix C of the* Discipline Policy. *She selected "use of abusive language", a Group 1*

> *misconduct, as the appropriate category for the grievor's misconduct. The introductory page to that appendix clearly indicates that the information is not exhaustive, but is presented as a guideline. In view of the fact that the grievor had a disciplinary record, the discipline suggested by the policy was a suspension ranging from 3 to 5 days. Ms. Bauer testified that she would have imposed the maximum suspension of 5 days, but in view of the grievor's apology, which she considered a mitigating circumstance, she opted for the minimum suspension of 3 days. Ms. Bauer stated in cross-examination that discipline was necessary in spite of the grievor's apology, as she felt that managers must serve as role models for employees and that it was important that this be impressed on the grievor.*

[214] With two previous incidents of workplace misconduct already in place, argued the employer, the principle of positive and progressive discipline applied. Increasingly harsh sanctions should act as a deterrent to future misconduct.

[215] The quantum of this sanction, as with the other two, should not be disturbed, argued the employer. It cited *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119 at para. 13, as follows:

> *13 I am convinced on the basis of the evidence before me that the respondent has made a* prima facie *case that discipline was warranted in these circumstances. The discipline imposed was consistent with the* Global Agreement *between the parties, and I see no reason to interfere. The adjudicator in the* Hogarth *decision, at page 6, identified as follows when an adjudicator should interfere when considering discipline:*
>
> > I agree … that an adjudicator should only reduce a disciplinary penalty imposed by management if it is clearly unreasonable or wrong. In my view, an adjudicator should not intervene in this way just because he feels that a slightly less severe penalty might have been sufficient. It is obvious that the determination of an appropriate disciplinary measure is an art, not a science…

[216] With respect to the discrimination argument, the employer repeated its submissions to the effect that the duty to accommodate is a two-way street. Having advised the grievor that no medical information was on his personnel file, it asked him to provide it, and he did not. It took a reasonable step in requesting the Health Canada FTWE on June 30, 2010.

[217] The employer repeated its argument concerning the duty to cooperate with the accommodation process as articulated in *Central Okanagan School District No. 23 v.*

Renaud, [1992] 2 SCR 970 ("*Central Okanagan*"). To paraphrase, the search for accommodation is a multi-party inquiry, and the employee seeking accommodation must do his or her part as well.

[218] The employer noted that Ms. Dubuc specifically requested a medical report in her email to the grievor dated September 10, 2009, when she noted this:

> …
>
> *In your grievance, which we received on September 3, 2009, you indicate that you have a medical condition which has not been accommodated by the employer. I have no record on file regarding this medical condition, nor do I have any record of accommodation required.*
>
> *In order to meet our obligations under the duty to accommodate policy, I require information from your physician regarding work place limitations so that I can take appropriate actions.*
>
> …

[219] The grievor did not supply the medical information requested. The employer cannot be called upon to accommodate a disability of which it is not aware.

c. Decision and reasons with respect to the December 20, 2010, instance of discipline

[220] I do not find that the *Cooper* decision applies to the present case. To begin with, *Cooper* was a unique and singular case in that the adjudicator did not hear from the grievor because the grievor did not appear at the hearing. In such circumstances, with the grievor tendering no evidence, the adjudicator may have no option but to base the decision on the reasonableness of the employer's assessment of the appropriate sanction. That is hardly the case here.

[221] A contested hearing is a trial *de novo*. The threshold step, according to *Scott*, is to determine whether the grievor's statements at the team meeting on December 8, 2010, warranted discipline. By his admission, he said words to this effect:

- "We've got a bunch of whiners and snivellers on this team", and
- "The team holiday lunches are a joke and that only getting one hour is a slap in the face."

[222] Ms. Harle, the grievor's supervisor, took notes of the meeting on December 13, 2010, held to discuss the events of December 8, 2010. Her notes contain the following paragraph:

…

> *Holly* [Palley] *said he continued by stating "I'm sick and tired of the crap that goes on here. There's lots of people out on the floor and there's people on this team who get away with (pardon my language) all kinds of shit and nothing is said to them. We've got a bunch of whiners and snivellers on this team". Holly asked if he said that. Terry said he didn't recall about the first part but he remembers saying about whiners and snivellers.*
>
> …
>
> [*Sic* throughout]

[223] As mentioned earlier, Ms. Harle did not testify at this hearing because unfortunately, she has passed away. Her notes are part of the record. No hearsay objection was raised. The notes are clearly hearsay evidence; they are out-of-court statements intended to be introduced for the truth of their contents.

[224] Hearsay evidence can be admitted if necessary, provided it is relevant and of probative value. The notes are both relevant and probative, and they are certainly necessary, owing to the unfortunate demise of the note-taker. Therefore, I find as a matter of fact that on December 8, 2010, the grievor uttered the sentences attributed to him in the preceding paragraphs.

[225] I cannot find the expression of distaste over a one-hour gift of time for a holiday luncheon sufficiently disgraceful to warrant a disciplinary sanction. The grievor thought that one hour was a bit parsimonious. He may have been right, but in speaking his mind, he simply expressed an opinion about a work-related subject. Calling it a "joke" was a bit blunt, but on its own, this comment was not deserving of disciplinary action.

[226] However, calling one's teammates whiners and snivellers at a team meeting is sufficiently inflammatory and disrespectful to warrant a disciplinary response. Name-calling is deliberately hurtful and has no place in a respectful workplace environment. Similarly, the use of profanity is unacceptable. Discipline was warranted here.

[227] The next step in the *Scott* analysis is to determine the quantum of the sanction.

[228] The cases that the parties submitted have already been considered and analyzed and need not be revisited. I will restate only that every case provided outlined

misbehaviour that was far worse than that exhibited by the grievor on December 8, 2010. None of those cases called for a suspension of greater than five days.

[229] The range of sanctions for relatively minor misconduct, according to the cases submitted, is from a letter of reprimand to a suspension of one or two days, depending upon the weight of the aggravating and mitigating factors.

[230] The grievor was already on notice for his choice of language in the workplace, having received discipline for his January 12, 2010, outburst with Ms. Humeniuk. Therefore, I accept as an aggravating factor the existence of a prior disciplinary sanction (for roughly similar behaviour) earlier that same year. I find that this is the only aggravating factor. The gravity of the misconduct, as the grievor quite correctly pointed out, is not an aggravating factor.

[231] There are significant mitigating factors. At the fact-finding meeting December 13, 2010, the grievor apologized for his behaviour at the December 8, 2010, meeting. They were spontaneous utterings not directed at any particular person. The outburst occurred in a workplace that had become increasingly stressful for him.

[232] However, most important is that these utterances were the manifestation of a medical condition of which the employer was by then keenly aware, per my earlier analysis. The grievor told the employer to look for a letter from Dr. Wilson dated February 4, 2008. After checking, no such letter was found. Nonetheless, the employer had sufficient concerns about the grievor's mental well-being to request the Health Canada FTWE. Concerns had been raised about him "maxing out" his sick leave. Complaints had been made with management about his odd behaviour. The employer had ample reason to link the utterances to his mental health, about which it had serious concerns. This should have been taken into account as a mitigating factor, and it was not.

[233] Since a letter of reprimand was the appropriate sanction for the January 25, 2010, disciplinary action, I find it reasonable to consider a period of suspension as being appropriate for this instance. Given the weight of the mitigating factors, a one-day suspension without pay is the appropriate sanction. I repeat that the cases that both parties supplied describe misconduct much worse than that displayed by the grievor on December 8, 2010.

[234] With respect to the discrimination issue, my analysis remains the same as for the previous two instances of discipline. The grievor cannot be held responsible for the failures of Ms. Holmstrom and Ms. Holden to make important medical information available to those who needed it to make crucial work-related decisions about him.

[235] Ms. Harle and Ms. Dubuc both expressed concern about the grievor's use of sick leave. Ms. Williams documented her clear suspicion that the grievor's mental health was a factor in the workplace misconduct in her letter to Health Canada on June 30, 2010. Despite the presence of many red flags, the employer made no allowances for the grievor's medical condition when it imposed a disproportionately harsh sanction of 10 days' suspension without pay.

[236] The grievor testified to the devastating effect that this final sanction had on him. He went immediately to his doctor, and for reasons related to his mental health, was placed on an extended period of sick leave. Ultimately, he never returned to his workplace. As adverse effects go, this is about as harsh as it gets.

[237] The grievor made out a *prima facie* case of discrimination. He was sanctioned harshly for misconduct clearly related to his declining mental state, which was not taken into account as a mitigating factor.

[238] I find that the employer discriminated against the grievor on December 20, 2010, on the basis of a disability of which it was aware. Its discriminatory actions had an adverse effect on him, and his disability was clearly a factor.

[239] By way of remedy, per my earlier reasoning, I order the repayment of the lost days of pay in excess of the one-day suspension without pay. A 10-day suspension was imposed, but he only deserved 1 day. The net amount is 9 days of pay. As before, the calculation is to include all applicable deductions, and I will leave this to the parties to calculate. As before, interest is to be awarded as per the schedule referred to earlier.

[240] With respect to a remedy under s. 52(2)(e) of the *CHRA*, an important consideration is that this final instance of unduly harsh discipline resulted in the grievor's departure from the workplace.

[241] Seeking reinstatement, the grievor cited *Fair v. Hamilton-Wentworth District School Board*, 2013 HRTO 440 (Grievor's Book of Documents, Tab 20B). It dealt with a

reinstatement of employment under similar circumstances and stated as follows at paragraph 13:

> *[13] The applicant is seeking reinstatement. The remedial objective of human rights legislation is to make the applicant "whole." In this case reinstatement is an appropriate tool to place the applicant back in the position she would have been in had the discrimination not occurred. Had the respondent properly accommodated her, the applicant would have been returned to full-time employment ….*

[242] In the next paragraph, the Human Rights Tribunal of Ontario (HRTO) adopted the Supreme Court of Canada's remedial principles stated in *McKinney v. University of Guelph*, [1990] 3 SCR 229 at para. 341, as follows:

> *[14] … it should be noted that the rights of the appellants which have been infringed pertain to their dignity and sense of self-worth and self-esteem as valued members of the community, values which are at the very centre of the* Charter. *It would be insufficient, in my view, to make any order which does not seek to redress the harm which flows from the violations of this interest. Reinstatement is clearly the most effective way of righting the wrong that has been caused…*

[243] The grievor also referred to *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3, the applicability of which is summarized as follows at paragraph 1:

> *[1] This is a case about an employee who tried to return to work from sick leave and whom the employer did not accommodate. The story ended sadly almost four years later when the employee chose medical retirement rather than continuing to wait for accommodation.…*

[244] In *Nicol*, the employer was found to have discriminated against the grievor on prohibited grounds and was directed to compensate him accordingly. Paragraph 169 states as follows:

> *[169] The employer is directed to pay the grievor, within 90 days of the date of this decision compensation for all lost pay, vacation entitlements, benefits and pension contributions from June 1, 2008, to the effective date of his medical retirement. The parties should jointly work out the amount owed to the grievor and must do so within 90 calendar days. When making the calculations, the following factors must also be applied:*

> *1. The calculations are about compensation, not the human resources pay system category or terminology the employer must use to process the compensation.*
>
> *2. From June 1, 2008, to September 15, 2008, the payment must be calculated at the CR-05 level with adjustments for the grievor's years of service and normal progression through the pay band.*
>
> *3. From September 15, 2008, to the date of the grievor's medical retirement, the payment must be calculated at the PM-01 level as compensation for the loss arising from the refusal to reclassify him on discriminatory grounds.*
>
> *4. Any negotiated increases in the pay and benefits from June 1, 2008, must be included.*
>
> *5. Pension contributions applicable from June 1, 2008, should be applied to the grievor's pension account, and his retirement pension should be recalculated accordingly.*
>
> *6. Any tax consequences to the grievor should be calculated in such a way as to minimize the tax impact on him.*

[245] The grievor submitted that the approach taken in *Nicol*, as it applies to his situation, should be followed. He assiduously kept records of employment and wages earned and mitigated his losses. He and the employer should be able to easily calculate the appropriate compensation for lost wages. The grievor asked that I remain seized of the matter if the appropriate amount cannot be agreed upon.

[246] The grievor also sought the reinstatement of the several rights and benefits, including pension, which would accrue as a result of the reinstatement of his employment.

[247] I agree with the grievor in that he should never have been returned to the Vegreville CPC. The decision to place him there was the source of much of his misery, but he did not grieve it, so I cannot address it when considering the remedy. I cannot justify his reinstatement to the public service. I may only tie an appropriate remedy to a specific grievance. The best I can do under all the circumstances is properly assess the pain and suffering he experienced and award damages accordingly.

[248] The cumulative effect of these disproportionately harsh disciplinary sanctions, in a relatively short period and in a dysfunctional workplace, falling as they did upon a grievor already suffering from a disability, was devastating. Following the receipt of the disciplinary letter dated December 20, 2010, he went straight to his doctor, who

ordered an extended period of sick leave. Ultimately, he ultimately never returned. This should never have happened, and it could have been prevented had his medical condition been properly taken into account all along the way. It was not, owing to the reckless behaviour exhibited by the employer.

[249] I find a degree of pain and suffering that is truly singular in nature. The grievor's wife tearfully corroborated the grievor's testimony about having secluded himself in the basement, contemplating suicide, in the days following the receipt of the disciplinary letter dated December 20, 2010. Following a lengthy period of sick leave, he decided to take a leave of absence from the public service rather than return to a toxic workplace. It is difficult to imagine a greater degree of pain and suffering, and I award the maximum amount permissible under s. 52(2)(e), namely, $20 000.

[250] These sentiments remain at the forefront when considering special compensation under s. 53(3) of the *CHRA*. The employer's wilful and reckless behaviour with respect to the medical information that never found its way into the hands of those who truly needed to consider it when making important work-related decisions has been discussed at length.

[251] Likewise, the employer's growing conviction that it was dealing with someone suffering form a serious mental condition has been discussed at length. It never undertook any meaningful accommodation analysis other than requesting the Health Canada FTWE. The net effect of this wilful and reckless behaviour was that the grievor left the workplace, never to return. This, as I have observed, is about as serious as it gets. By way of special damages, I award the maximum amount available under the *CHRA*, namely, $20 000.

[252] As I have previously observed, I do not have the authority to order the payment of interest on awards under the *CHRA*.

[253] The grievances carrying Board file nos. 566-02-6300 and 6301 both pertain to the same set of events surrounding the imposition of the December 20, 2010, disciplinary measure. They are both allowed.

[254] Part I of this decision is concluded. Part II deals with the grievor's attempts to return to the public service and the employer's attempts to facilitate his return.

III. Request for a sealing order

[255] The grievor requested a sealing order with respect to specific exhibits entered at the hearing that contain sensitive and detailed medical information about him. The employer consented to the request and concurred that it would be prudent, under the circumstances. The exhibits in question appear in the grievor's book of documents and are as follows:

Tab 3:	"Claim for Long Term Disability Benefit"
Tab 4:	"Claim for Long Term disability Benefit"
Tab 5:	"History Sheet" and "Mental Status Examination" notes, St. Mary's Hospital, Camrose, Alberta
Tab 12:	rehabilitation consultant's report
Tab 89:	Alberta Health Services report
Tab 105:	"Vegreville Mental Health Assessment", Alberta Health Services
Tab 108:	medical letter from Dr. Satar
Tab 168:	Dr. Ribeiro's notes
Tab 180:	Dr. Ribeiro's accommodation notes

[256] The Board's policy and its practices with respect to sealing orders in the context of the open court principle are published and well known. In accordance with this important constitutional principle, the Board's hearings are conducted in public, save for exceptional circumstances. Its mandate and the nature of its proceedings compel the Board to maintain an open justice policy fostering transparency, accountability, and fairness.

[257] The Supreme Court of Canada has ruled that the party seeking a sealing order bears the onus of justifying its issuance based on sufficient evidence. What has become known as the "*Dagenais/Mentuck*" test arose from *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76. The test has these two parts:

> 1. Is the order necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk?
> 2. Do the salutary effects of the order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings?

[258] The Supreme Court of Canada had occasion to consider these principles more recently in the case of *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 33, as follows:

> *[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under* Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.*

[259] The nine exhibits in question were crucial items of evidence at the hearing. All of them contain explicit personal or medical information pertaining to the grievor's medical condition. In the circumstances he set out, which were unchallenged by the employer, in the language of the Supreme Court of Canada in *Sherman*, at para. 35, I find that the information in these nine exhibits "… is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity."

[260] I will not order all the exhibits in this case sealed, only those nine that the grievor identified. This minimizes the compromise to the open court principle. I am satisfied that such an order, pertaining as it does to only nine of the exhibits, does not impede the fairness of the process; nor is the public interest compromised in any meaningful way. The exhibits listed earlier are ordered sealed.

IV. Part II: Summary of the evidence for the grievances in files 566-02-10192 and 10938

[261] From January of 2011 onwards, Ms. Casper became an important point of contact (and at times the sole point of contact) between the grievor and the employer.

[262] On his doctor's recommendation, the grievor took a leave of absence from work (personal needs leave) from January 11, 2012, to April 9, 2013. While on it, he worked in the private sector at several construction and manual labour jobs. The lack of job security in the private sector was the principal factor in his decision to return to the

public service, and he once again entered into a dialogue with his employer about how to go about doing that.

[263] On May 14, 2013, the employer proposed placing the grievor on LWOP until April of 2014 so that it could backfill his substantive position. His leave-of-absence priority status was to expire on September 30, 2014. By the operation of s. 42 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss.12, 13; *PSEA*), if he did not return to the workplace within one year of the expiry of his priority status, on September 30, 2015, he would cease to be an employee.

[264] The grievor was placed on leave-of-absence priority status with the Public Service Commission (PSC). By the operation of the priority status staffing mechanism, he was sent a series of referrals to positions at his grade and level. His applications were frequently rejected because he failed to meet the positions' qualifications. He was unsuccessful in his applications for the positions for which he was qualified because he failed exams and interviews.

[265] On August 16, 2013, the grievor filed a grievance about the duty to accommodate. He claimed that the priority status referral process was an ineffective means of returning him to the workplace. This grievance carries Board file no. 566-02-10192.

[266] The employer considered no other staffing mechanism than the priority referral process save for once, on March 26, 2014, when the grievor was offered a lateral deployment to an identical indeterminate position, which required relocating to Ottawa. Initially, he accepted it, but upon reflection, turned it down due to uncertainties surrounding his wife's employment prospects and the need to remain in western Canada to care for aging parents.

[267] Dissatisfied with the continued shortcomings of the priority referral process, the grievor filed another grievance about the duty to accommodate on November 4, 2014. This grievance carries Board file no. 566-02-10938.

[268] The grievor sought work elsewhere and entered a training program with the Canadian National Railway ("CN Rail") in December of 2014. His training necessitated a temporary move out of the province and periods of training in remote locations with no Internet access. While he was away, his spouse, on his behalf, continued to apply to

referrals and to engage prospective employers in dialogue surrounding job interviews and exams. He was frequently unable to attend either exams or interviews as a result of the intensity of his CN Rail training sessions. In April of 2015, dialogue with the employer on a return to work ceased entirely, although referrals continued to arrive. The grievor (or his wife, on his behalf) applied for a few of these referrals despite not meeting the necessary qualifications on any of them.

[269] None of the grievor's applications was successful. On September 30, 2015, by the operation of s. 42 of the *PSEA*, he ceased to be an employee.

[270] The grievor testified to an increasing degree of difficulty receiving consistent professional medical attention from Dr. Parker, so in November of 2011, he began seeing Dr. Ribeiro.

[271] The grievor sought that Dr. Ribeiro, a family physician with considerable experience in mental-health-related illnesses, be qualified as an expert witness.

[272] The employer raised an objection, offering the following cases in support:

- *Boiko v. National Research Council of Canada*, 2018 FPSLREB 11 at paras. 736 to 739;
- *Guraluk v. Treasury Board (Department of Human Resources and Skills Development)*, 2018 FPSLREB 42 at para. 29;
- *R. v. Hamilton*, 2011 ONCA 399 at para. 259;
- *R. v. K.(A)* (1999), 45 O.R. (3d) 641 (Ont. C.A.) at para. 72;
- *R. v. Livingston*, 2017 ONCJ 645 at para. 65;
- *R. v. Mohan*, [1994] 2 SCR 9;
- *R. v. Muller*, 2013 BCCA 528 at paras. 34 to 37; and
- *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

[273] The grievor submitted, in addition to *Mohan* and *White Burgess Langille Inman*, the following additional cases to support his contention that Dr. Ribeiro should be qualified as an expert witness on the narrow grounds of her expertise diagnosing and treating his mental-health issues:

- *Westerhof v. Gee Estate*, 2015 ONCA 206;
- *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2014 ABQB 256;
- *Laing v. Sekundiak*, 2015 MBCA 72;
- *Kaul v. The Queen*, 2017 TCC 55; and
- *Canada Post Corp. v. C.U.P.W. (External)* (1992), 29 L.A.C (4th) 143.

[274] The employer argued that Dr. Ribeiro is not a mental-health specialist and that she lacked the necessary qualifications to be qualified as an expert witness. Also, her testimony was not necessary to decide the issues that had to be decided at the hearing as she would not provide information that was outside the trier of fact's experience or knowledge. In addition, the employer argued that as the grievor's treating physician, Dr. Ribeiro lacked the impartiality necessary for an expert witness, and that she would merely advocate on his behalf.

[275] The grievor drew attention to the aspect of Dr. Ribeiro's testimony in which she stated that as the treating physician, she has a duty to advocate in the best interests of a patient's health, which would not affect her impartiality. Treating physicians are the most frequently recognized participant experts, as opposed to litigation experts, in legal proceedings. The participation expert is directly involved with the facts of the case and is not brought forward for the sole purpose of litigation. He or she can serve solely as a fact witness, but in many cases, it is preferable to qualify them as experts. These grievances pertain to an alleged disability, which is a legal determination. The trier of fact must determine whether the grievor suffered from a disability, what the symptoms of the disability looked like, and how they manifested themselves. These considerations, argued the grievor, were clearly relevant to the issue of accommodation, and Dr. Ribeiro, as an expert witness, could help by providing an opinion on them.

A. Decision on qualifying Dr. Ribeiro as an expert witness

[276] With respect to the issue of independence, I accept a physician's duty to advocate in the best interests of his or her patient's health. Dr. Ribeiro has been qualified as an expert in other legal proceedings, and her testimony on the issue of her qualification as an expert provided ample proof of her awareness of her role in the present proceedings. Paragraph 46 of *White Burgess Langille Inman* holds that the expert witness "… must, therefore, be aware of this primary duty to the court and be able and willing to carry it out." I was satisfied that Dr. Ribeiro would render honest and impartial opinions, regardless of their potential impact upon the grievor's financial or legal interests.

[277] Dr. Ribeiro's résumé was entered into evidence, and she testified to the different aspects of her practice pertaining to mental-health issues. I find that she is fully

qualified as a family physician, but I also find that she has sufficient experience with mental-health issues to qualify her as an expert on the grievor's mental health.

[278] I find that no one was better placed than Dr. Ribeiro to testify to the state of the grievor's mental health throughout the relevant periods encompassed by the grievances pertaining to the employer's duty to accommodate during the return-to-work process. I note that Dr. Ribeiro was not the grievor's treating physician during the period pertaining to the disciplinary grievances.

[279] With respect to the issue of necessity, I accept the employer's arguments that Dr. Ribeiro's letters are clearly understandable to the layperson, but I also accept that some elements of Dr. Ribeiro's interpretation of the facts might be beyond the layperson's comprehension. It was impossible to predict, in advance, which elements would require expert interpretation to assist the trier of fact. I thought it prudent, under those circumstances, to qualify Dr. Ribeiro as an expert witness and to permit her to provide opinions based on the facts she observed with respect to the grievor's mental health.

B. The calendar year 2011

[280] Dr. Ribeiro testified to the grievor's poor state of mental health when she first saw him in October of 2011. She diagnosed him with MDD, which she noted was consistent with other, earlier diagnoses that other mental-health professionals provided who had seen the grievor. Dr. Ribeiro noted that one doctor in particular included a diagnosis of "… Adjustment Disorder with mixed anxiety and depressed mood". This was the only diagnosis other than MDD, and Dr. Ribeiro disagreed with it, primarily because adjustment disorder is defined narrowly and must resolve within six months of removing the stressor. That was not the grievor's situation because he remained in a depressed state more than six months after he removed himself from his stressful work situation.

[281] The grievor was on paid sick leave from January 21 until March 21, 2011, at which time he was on sick leave without pay and receiving long-term disability benefits.

[282] In June of 2011, the grievor withdrew from the Health Canada FTWE process, testifying that he felt that it had no value because, in his words, he "was not going to be going back to work anytime soon."

[283] On November 24, 2011, Dr. Ribeiro wrote the employer the following recommendation for the grievor:

> …
>
> *… that* [the grievor] *be off* [work] *for a minimum period of at least 1 year to attend to his mental health well-being, rehabilitation and recovery. This time is needed to assess the effect of various environments on his functional capacity, mental health and well-being.*
>
> *Once* [his] *health has stabilized and returned to a capacity where he is likely to succeed in full time employment, I will advise you accordingly.*
>
> …

[284] Throughout the 2011 calendar year, after consulting his doctors, the grievor began to feel that he needed a change of pace from the public service, and he sought employment in the private sector. As a result, he could no longer receive his long-term disability benefits. He began to work in the private sector in January 2012.

C. The calendar year 2012

[285] A table was entered into evidence showing the different jobs that the grievor held outside the public service. He testified to a considerable level of frustration with them, many of which were in the construction industry and the oilfields that involved heavy manual labour, which took a toll on him physically. His main concern with them all was the lack of job security. He found himself constantly being laid off and having to seek other employment.

[286] The grievor wanted to keep his options open with respect to returning to the public service, so he went on extended LWOP from January 11, 2012, to April 9, 2013. This leave without pay was categorized as personal needs leave.

D. The calendar year 2013

[287] After consulting his spouse and doctors, the grievor decided to return to the public service. Dr. Ribeiro wrote a letter to the employer dated February 4, 2013, in

which she stressed the need for the grievor to return to a work location other than the Vegreville CPC.

[288] In a letter dated February 16, 2013, Ms. Casper wrote on the grievor's behalf to Josée Lapointe, Director, Workplace Effectiveness. She referred to Dr. Ribeiro's letter and accommodation recommendation.

[289] Ariane Hovington, a CIC labour relations manager, was involved with the grievor's return-to-work process. In an email dated May 24, 2013, she acknowledged the accommodation requirement but stated that no positions were available.

[290] Ms. Hovington advised Ms. Casper that Mr. Casper "… must participate in the accommodation process", and to that end was required to complete the appropriate documentation.

[291] The documentation that Ms. Hovington referred to included leave application forms. In emails dated May 23, 2013, to Joanne Daniel, the grievor's bargaining agent representative, Ms. Hovington advised "… we want to extend his LWOP and backfill his position." She stated that she would advise when his position was backfilled and he was placed on priority status.

[292] Ms. Casper, on the grievor's behalf, requested more information on the implications of backfilling the position and placing him on a priority referral list.

[293] The grievor and Ms. Casper both testified to a reluctance to engage in the priority referral process, and both openly questioned why a return to his substantive position (at an office other than the Vegreville CPC) was not an option.

[294] Ms. Hovington testified that the reason it was not an option was that no such positions were available. This witness testified to the closures of 19 CIC offices across the country and to the eliminations of many positions. SDS positions, which the grievor sought, now existed only in Sydney, Nova Scotia, Vegreville (which was off limits to him due to the accommodation requirement), and Ottawa and Mississauga, Ontario. The other two types of PM-03 positions (settlement officer and citizenship and immigration officer) existed outside Vegreville but had completely different work descriptions from the SDS position.

[295] The grievor took his concerns to his bargaining agent. On April 5, 2013, Claire Lalonde, on his behalf, wrote to the employer, stating, "… can you confirm that you informed Terry's local management that he will continue to be on leave without pay until such time as you find him a placement for his return to work."

[296] On May 23 and June 13, 2013, Ms. Daniel requested further information on the priority referral process and proposed settling outstanding grievances.

[297] Edward Stack of the Public Service Commission testified to the nature of the Priority Information Management System (PIMS). If an employee has been on leave for a long enough period, and his or her position is backfilled, then he or she is entitled to referrals for employment opportunities on a priority basis.

[298] Mr. Stack characterized the priority referral process as a tool to allow public service employees to maintain continuity of service over prolonged periods of absence from the workplace. The employer must backfill the position occupied by the person on leave to maintain productivity in the workplace, and once this is done, the person on leave receives priority entitlement to facilitate a return to the workplace.

[299] Although the grievor identified as a person with a disability, the disability entitlement is a very narrow category and was not applicable to him. Rather, he was categorized as a returnee from a leave of absence, which was scheduled to end on September 30, 2014. Priority entitlement runs for one year.

[300] Mr. Stack referred to ss. 41 and 42 of the *PSEA* in his testimony, which read as follows:

41 (1) *When an employee on leave of absence is replaced, pursuant to the appointment or deployment of another person for an indeterminate period to the employee's position, priority for appointment shall be given over all other persons to*	***41 (1)*** *Dans le cas où un fonctionnaire est en congé et est remplacé par voie de nomination ou de mutation d'une autre personne à son poste pour une période indéterminée, ont droit à une priorité de nomination absolue :*
(a) *the employee on leave of absence, for the duration of the leave of absence and a further period of one year ….*	***a)*** *le fonctionnaire qui est en congé, pendant son congé et l'année qui suit;*
…	[…]

> ***42*** *A person who is entitled under subsection 41(1) to be appointed to a position and who is not so appointed in the applicable period provided for in that subsection ceases to be an employee at the end of that period.*
>
> ***42*** *La personne visée au paragraphe 41(1) qui n'est pas nommée à un poste dans le délai applicable aux termes de ce paragraphe perd sa qualité de fonctionnaire à l'expiration de ce délai.*

[301] Mr. Stack testified to the grievor being listed at four groups and levels, including his position (PM-03) and three others, AS-03, WP-02, and FB-02. Once the information is entered, the person with priority entitlement can change things, such as to add or delete groups and levels or to add (or modify) a résumé. Sometimes, a person will decide to accept a term position rather than an indeterminate position or accept one at a lower level, and these changes in preferences will attract a greater number of referrals. He noted that the grievor did not opt for a term position.

[302] Even though the grievor was not subject to a workforce adjustment process, he was offered priority referrals under it as well, to maximize the number of referrals sent his way.

[303] Mr. Stack observed that in terms of the priority referral process, it appears that the grievor's situation received the full extent of the opportunities available under it. He testified that literally, nothing more could have been offered to the grievor under the circumstances.

[304] On June 25, 2013, Ms. Casper wrote the following on the grievor's behalf:

> *… I wanted to take an opportunity once again to communicate with you directly as four months have passed since providing the employer with notification of Terry's ability to return to work.…*
>
> *…*
>
> *… If the department is not prepared to agree to any settlement proposals, we fully expect that normal and usual accommodation would be provided ….*
>
> *…*
>
> *… In consideration this has dragged on for a period of 4 months without any responses to his accommodation or RTW* [return to work] *we are once again asking for both your intervention and assistance.*
>
> *…*

[305] Dr. Ribeiro wrote the employer on June 18, 2013, as follows:

…

> *It is my understanding that you are unable to provide any position that would allow Mr. Casper to return to meaningful work or allow him to reintegrate in to* [*sic*] *the workplace for an unknown duration of time. I also understand that you would like to proceed with harassment complaints both for and against Mr. Casper.*
>
> *Given the already substantial negative impact of past work related events on Mr. Casper's Physiological health, I am sure you can appreciate the extreme difficulty and negative repercussions to Mr. Casper in managing two major life changing events such as being denied the ability to return to meaningful work and simultaneously having to deal with issues of harassment.*
>
> *Considering the contribution of past workplace issues to Mr. Casper's health revisiting or reliving past workplace trauma is not recommended at this time. It would be most beneficial for Mr. Casper's wellbeing to be facilitated in his immediate return to meaningful work at an alternate location as previously requested.*

…

[306] Mr. Armstrong, Director General for the Centralized Processing Region, in an email dated July 11, 2013, stated that management had no interest in a settlement and repeated the options that were open to the grievor, as follows:

…

> *Since Mr. Casper's current approved leave has ended July 5, 2013, it is important for him to inform management as to his preferred option for moving forward (i.e. CIC continues to refer him solely to internal positions or the department backfills his position resulting in a priority entitlement). Notwithstanding his decision, he will be required to submit another leave form to extend his period of leave without pay beyond July 5, 2013. I would ask that Mr. Casper complete the attached form and return to me no later than July 17, 2013.*

…

[307] On July 12, 2013, Ms. Casper sought clarification on the grievor's behalf, as follows:

…

> *1.) Could you please advise what steps have been taken in accordance with the new Duty to Accommodate Guidelines issued by the DG of HR in April 2013.*

> *2.) Please provide a* [*sic*] *the positions, locations and contact person for the positions to which Mr. Casper has been referred and what the status of those referrals are.*
>
> *3.) If the proposal is accepted, could you please provide the section of the PSEA* [*sic*] *would be used for his leave priority entitlement.*
>
> *4.) If Mr. Casper chooses not to become a priority what other options are available to the department in terms of accommodation.*
>
> …

[308] Correspondence from Mr. Armstrong dated September 11, 2013, summarized the accommodation steps taken, noting that the grievor's résumé had been circulated throughout the CIC's Ontario and Western regions and the National Capital Region for consideration. Mr. Armstrong did not testify because unfortunately, he has passed away.

[309] Volumes upon volumes of documentation were received into evidence about each and every referral made under the priority referral process. An exhaustive examination of each and every one is unnecessary. Rather, some generalizations can be made.

[310] Initially, the grievor indicated a willingness to relocate outside western Canada, including to Ottawa and Mississauga, and he received referrals to those locations and applied to them but was found not to qualify.

[311] Ms. Hovington testified to 36 different position referrals from the CIC between August of 2013 and January of 2014. Mr. Stack testified to a total of 76 referrals from the PSC.

[312] Ms. Casper analyzed these referrals and pointed out that for some, the appointment date was before the referral process was put in place. Also, for some of them, the language or the education requirement meant that the grievor was not qualified.

[313] The grievor testified to his frustration at not meeting the qualification requirements for almost all the referrals because he had been away from the workplace for so long, which meant that he did not meet the "recent work experience" qualification.

[314] In an email dated January 13, 2014, and in her testimony, Ms. Hovington stated that "… Management agreed to consider [the grievor's] experience preceding his leave and discounting his period of disability" for a collective staffing process to which he had applied. She conceded that although this was Mr. Armstrong's approach, each director general was responsible for his or her own region, and there was no guarantee that others would approach the situation the same way Mr. Armstrong did.

[315] Ms. Hovington also testified to some of the "bugs" in the referral process; it was not perfect. For example, some referrals were never sent to the grievor. He was also referred to positions as part of a process usually reserved for individuals affected by workforce adjustment. This particular referral process was put in place uniquely for the grievor.

[316] Sharon Barbour, a bargaining agent representative, testified on the grievor's behalf to her efforts to assist him. She acknowledged that his situation was complicated by the fact that the majority of CIC positions are in Ottawa and that positions in Quebec and the CIC's Atlantic region were out of the running because he is not bilingual.

[317] Ms. Barbour testified that she was aware of other accommodation options that in her opinion, could have been considered. On March 5, 2014, she sent an email on the grievor's behalf that reads in part as follows:

…

> *It is my understanding that this priority status is the only planned accommodation for Mr. Casper at this time. Mr. Casper will continue to cooperate and participate in all efforts the employer makes to secure him an appropriate position, but he has been prepared to return to work for approximately one year and the efforts the department has made on his behalf have not been successful to date.*
>
> *It seems obvious that the current plan to accommodate Mr. Casper is not sufficient. We are requesting that Mr. Casper be returned to work in his original position at an alternate location immediately.*
>
> *Does the CIC employ return to work coordinators who could provide assistance in his endeavours to get back to work? If not, perhaps you can suggest someone we could work with from the CIC Employment Equity, Diversity and Official Languages Unit?*

…

[318] Three weeks later, on March 26, 2014, Mr. Armstrong offered the grievor a deployment, as follows:

> …
>
> *The position is a Service Delivery Specialist at the PM-03 group and level in the Operational Support Centre … located in downtown Ottawa ….*
>
> …
>
> *Please note also that if your spouse were to request Leave Without Pay for Relocation of Spouse in order to relocate with you, this would be granted for a period of up to one year … and she would be eligible for priority status as a relocation of spouse priority.*
>
> …

[319] The grievor and Ms. Casper both testified to initial optimism at the deployment offer. It meant that he could return to his previous position at a location other than Vegreville without having to undergo interviews or exams.

[320] The grievor and Ms. Casper each testified to their misgivings about the priority referral process. According to them, it certainly did not seem to be working out all that well for the grievor, and Ms. Casper was leery of finding herself in the same predicament.

[321] The grievor testified to spending approximately one month carefully considering the deployment. He, his spouse, and Ms. Barbour engaged in additional dialogue with Mr. Armstrong about what the deployment would entail. Ultimately, the grievor decided not to accept it. Ms. Barbour sent this email on his behalf dated April 28, 2014:

> *Thank you for your email. After serious consideration, Mr. Casper has determined that he cannot accept this offer of employment.*
>
> *In the long period of time that has passed since he first indicated he was available to work in Ottawa, his situation has changed. The prolonged period of unpaid leave has been financially draining, and Mr. Casper and his wife are not in a position to relocate across the country at this time. They would lose their family support systems and Mrs. Casper would lose her income for an indefinite period. Staying in the western region is the best solution.*
>
> *We would appreciate if you could remove Ottawa from the list of potential work locations. Edmonton, Calgary, Regina and Saskatoon are still within reason for their family.*
>
> …

[322] The employer called Colleen Bohan as a witness to testify to her efforts to help the grievor secure a position. She testified to her seven years of experience in labour relations as of the time she became involved with his situation. She was aware of the accommodation requirement that he not be considered for Vegreville CPC positions.

[323] Ms. Bohan testified to one referral in particular, which the grievor received on May 21, 2014, for an indeterminate position at the PM-03 group and level as a settlement officer in Edmonton. He requested an extension to the five-day time limit within which he could respond to a referral. Ms. Bohan arranged for two more days.

[324] The grievor was required to submit the names of two references. He stated that he had only one, and Ms. Bohan testified to accepting the one name. On July 25, 2014, he was asked to attend an interview. He testified that owing to his disability, he experienced anxiety with the interview questions. He saw his physician, Dr. Ribeiro, who wrote a letter dated July 29, 2014, stating, in part, as follows:

> …
>
> *Given that Mr. Casper has not had the opportunity to return to his regular work duties for a significant amount of time, he has not been able to practice detailed systematic reasoning required by his former position. It would therefore be appropriate to provide questions and/or information in advance of his expected responses. Additional time for decision making, analysis and completion of time sensitive information should also be provided.*
>
> …

[325] Ms. Bohan testified to receiving an email from the PSC dated August 1, 2014, about the referral. It stated in part, "Just wanted an update for this request. Priority persons were referred to you on May 21. Feedback is normally required in 60 days. In your case 72 days has [*sic*] passed."

[326] Ms. Bohan testified to her response, provided on August 6, 2014, which reads, in part, as follows:

> …
>
> *We are still working through the assessment with Mr. Casper. There have been several requests from him that have delayed the process including asking for more time to update resume, delay in providing references, provided only one reference instead of two as required, not available the first date we scheduled interview and*

> *now he has provided a doctors note requesting accommodations in the interview.…*
>
> …

[327] Ms. Bohan testified to intervening on the grievor's behalf and to not cancelling the priority clearance request. The delays inconvenienced the CIC. In particular, she testified to an email she received from Sadie McLure summarizing the situation, as follows:

> …
>
> *It is critical that we continue moving forward with this case as it is crippling our operations given his PSC referral is holding up the hiring of approximately 16 positions in Alberta. I don't feel that we are getting the same amount of effort on the employee's side that we are putting in. This individual was referred to us by the PSC on May 21, 2014 and we have been actively trying to complete his assessment since then.*
>
> …

[328] The grievor, through his bargaining agent, invited the employer to involve the Personnel Psychology Centre (PPC) to help with the accommodation. Ms. Bohan agreed and testified to receiving a questionnaire from the PPC about the interview format. She completed the questionnaire and forwarded it along with the statement of merit criteria and the rating guide to the PSC on September 2, 2014.

[329] Ms. Bohan testified that this resulted in a request for additional information from the grievor's physician. In an email to the grievor dated September 18, 2014, Ms. Bohan attached the form entitled, "Information collected from a health professional for accommodation purposes". She requested a deadline of September 23, 2014.

[330] On November 14, 2014, Helen Grantis, for the PPC, replied to Ms. Bohan with a summary of the recommendations on how to fairly assess the grievor in an interview. Ms. Grantis's letter stated, in part, as follows:

> …
>
> *As you are aware, my job is to advise you on how to assess Mr. Casper fairly. My first task was to review more closely the nature and extent of his functional limitations. I considered his personal questionnaire as well as a doctor's letter and questionnaire. I also spoke to the candidate.*

> *The second task was to review the interview questions and assessment criteria and determine if there were any barriers to fair assessment. I also looked at the staffing context- ie priority referral).*
>
> *As a result of this evaluation, I have determined that you will be unable to assess Mr. Casper fairly using behavioural based questions which require him to recall past work behaviour. It is clear that if he is required to do that it will be difficult for him to demonstrate his competency fairly due to the relationship between his past work experiences and his ongoing disability. The doctor states: "recollection of past work or personal work related experiences should be avoided"*
>
> *Because Mr. Casper is a statutory priority and is the only one being assessed, you have flexibility of how you can assess him. While he has to demonstrate that he meets essential qualifications, the manager has the delegated discretion to assess him however he feels appropriate.*
>
> *Because your interview contains one behavioural based question, it will have to be modified. This means that you will need to modify question 1. The others questions can remain as is, as long as he does not have to provide work examples. You could modify Q 1 to be a situational question, for example. Along with modifying one of the items, I will also recommend more time to review he questions. I will provide you with a report outlining the recommendations next week.*
>
> …
>
> [*Sic* throughout]

[331] Ms. Bohan testified to the employer's decisions to accept all the PPC's recommendations and to try to schedule an interview for the positions as soon as possible. In the meantime, another CIC PM-03 position was referred, this one in Saskatoon, Saskatchewan. In an email to the grievor dated February 20, 2015, Ms. Bohan wrote, in part, as follows:

> …
>
> *Further to the request from Jodi Casper I am writing to confirm the format for the next steps of the assessment of Mr. Casper for PM-03 positions with CIC in Edmonton, Calgary and Saskatoon.*
>
> *Terry will have a written exam to be completed at home which will consist of three questions designed to assess the following merit criteria: Decisiveness, Focus on Quality and Details, Judgement/Analytical Thinking and Written Communication Skills. He will be accommodated during the written portion as per the recommendations provided by the Personnel Psychology Centre:*

> *"He should be given double the time than* [*sic*] *was provided to other candidates. Scheduling should be considered accordingly in order to accommodate for the extended time." We will send the exam questions by email one day and Terry will have 24 hours to complete and return the exam. At this time we have not been able to determine a date Terry is available for this written exam.*
>
> *An interview date also needs to be determined. The interview will be in person or by video conference. It will consist of three situational type questions. These questions are designed to assess the following merit criteria: Adaptability and Flexibility, Effective Interactive Communication, Interpersonal Understanding and Values and Ethics. Terry will be accommodated as per the recommendations provided by the Personnel Psychology Centre:*
>
> *"EXTRA TIME:*
> *Mr. Casper should be provided with 48 hours to review the interview questions.*
> *The interview may take longer to administer. Mr. Casper should be given more time to respond if necessary. The board should ask clarifying questions if necessary.*
> *OTHER: Steps should be taken to reduce stress for this candidate: During the interview, he can be given a short break if needed. There may be a best time of day to administer the interview."*
>
> *Please note that I have updated the PSC Priority Advisor that Terry is not available for assessment until after mid March as per the emails from Jodi Casper on February 6th and 10th. She confirmed that he has not updated the PSC regarding his current unavailability.…*
>
> …

[332] In an email dated February 10, 2015, Ms. Casper wrote, in part, as follows:

> *Hi Colleen, this will confirm that we have received the accommodation information you provided. Due to lengthy* [*sic*] *time that has passed, in order to have a possibility of some form of secure employment, he is undertaking a training program. This program is in* [*sic*] *remote location and he does not have access to a computer. What I know for sure right now is that he will not be available until mid March.*
>
> …

[333] In their testimonies, both Ms. Casper and the grievor expanded on this information. They both felt that the priority referral process was simply not working out for them, and they were disappointed with the lack of other considerations or possibilities involving a return to the workplace for the grievor. As a result, he sought secure and stable employment elsewhere, and to that end, he applied for and was accepted into a training program with CN Rail.

[334] The grievor testified to a preliminary eight-week training program in Winnipeg, Manitoba, to become a railway conductor. It was rigorous and involved a full eight hours per day either in the classroom or in hands-on training on the track. He succeeded at this stage, which qualified him to embark upon a four-to-six-month qualification process. He left for Saskatchewan the first week of March 2015, to begin it. During that time, he had minimal communication with his wife. He had no computer and was often in remote parts of the country where Internet connections were either non-existent or sketchy at best.

[335] The grievor did not participate in the interview process for PM-03 positions in Calgary and Edmonton, Alberta, and in Saskatoon.

[336] Ms. Bohan testified to following up a number of times between February and April of 2015, but she was never able to have the grievor fix an interview date. He testified that he was unable to because of the demands of his CN Rail training schedule.

[337] The final email exchanges between the grievor and Ms. Bohan took place on April 28 and 30, 2015, and read, in part, as follows:

…

> *Since we are near the end of April please advise if Mr. Casper is now available for referral as a priority. As I mentioned below I have changed his status in the Priority Information Management System to unavailable. We need to know the date he becomes available so he can again be referred to positions that he may interested* [*sic*] *in.*
>
> *Note the end date of Mr Casper's priority entitlement period is September 30, 2015.*

…

[338] On the grievor's behalf, Ms. Casper continued to respond to referrals and to apply for positions while he was in training with CN Rail. Not one of the applications was successful.

[339] On September 8, 2015, the grievor received the following letter from the employer, which reads, in part, as follows:

…

> *This is further to my letter dated September 25, 2014 in which you were notified that your leave of absence priority status would end on September 30, 2015, and you were informed of the provisions of paragraph 42 of the Public Service Employment Act (PSEA), which states:*
>
> > ***42.*** *A person who is entitled under subsection 41(1) to be appointed to a position and who is not so appointed in the applicable period provided for in that subsection ceases to be an employee at the end of that period.*
>
> *Your leave of absence priority will expire at the end of this month and, as such, you will cease to be an employee of the Public Service on September 30, 2015 if you have not been appointed indeterminately prior to this date. An employee who ceases to be an employee on the expiration of the leave of absence priority period may need to resign at least one day in advance in order to protect severance benefits. This should be discussed with your compensation advisor prior to the priority end date (September 30, 2015).…*
>
> *…*
>
> [Emphasis in the original]

[340] On the date specified in the letter, the grievor was no longer a member of the public service.

V. Summary of the arguments for the grievances in files 566-02-10192 and 10938

A. For the employer

[341] The employer submitted that it made every reasonable effort to find the grievor a position, taking into account the accommodation specified by Dr. Ribeiro, namely, to place him at a location other than Vegreville.

[342] The employer offered the grievor an indeterminate deployment to his substantive position in Ottawa on March 26, 2014. After initially agreeing to it, the grievor ultimately refused it, for personal reasons.

[343] Mr. Stack testified to a total of 76 referrals from the PSC, and Ms. Hovington testified to 36 from the CIC.

[344] In *Gourley v. Hamilton Health Sciences*, 2010 HRTO 2168, a total of 40 job postings were referred to. It states as follows at paragraph 51:

> *[51] … The fact that consideration of over forty wide ranging job postings in 2006-2007 did not lead to a suitable alternate position*

> *speaks to the difficulties in accommodating the applicant's physical and psychological restrictions. I note that my conclusion that the substantive branch of the duty to accommodate was satisfied in this case is not rooted simply in the quantity of job postings that were reviewed, but the fact that the respondent considered and assessed a wide range of available positions. I accept the respondent's explanation that the search was complicated by the fact that the applicant did not have technical skills, training, experience, and/or education which were easily transferable to alternate positions in the health care setting. As a result, in these circumstances, I find that the respondent did not violate the substantive aspect of the duty to accommodate under the* Code*.*

[345] In the context of these latter two grievances, referring again to *Central Okanagan*, the employer repeated its assertion that accommodation is a multi-party process. Ms. Bohan testified to the employer fielding numerous specific requests about exams and interviews, and for every one, a solution was offered to address the grievor's concerns. Ultimately, he withdrew from the process in April of 2015 and did not communicate further with Ms. Bohan, who testified that the positions referred to him in May of 2014 had not been assessed by the end of April 2015 and ultimately never were, because the grievor ceased communicating with her. This, testified Ms. Bohan, was the longest she had ever seen an assessment process take because they are usually completed within 60 days. In her testimony, Ms. Bohan described the grievor as having displayed the "worst level of cooperation [she has] ever experienced".

[346] The employer acknowledged that there were some initial "glitches" with the priority referral process, but once it was up and running, positions at the grievor's group and level outside Vegreville were referred to him regularly. The employer submitted *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12, for the proposition that accommodation may take time. It need not be instantaneous. That case states as follows at paragraph 71:

> *[71] … There is no duty of instant or perfect accommodation, only reasonable accommodation (see* McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para 22;* Tweten v. RTL Robinson Enterprises Ltd.*, 2005 CHRT 8;* Graham v. Canada Post Corporation*, 2007 CHRT 40, at para 91 to 94; and* Hutchinson v. Canada (Minister of the Environment Canada)*, 2003 FCA 133, at para 77).*

[347] The employer submitted that the grievor took issue with what he perceived were fundamental flaws and complications in the procedures surrounding implementing and operating the priority entitlement process. The Federal Court of Appeal, in *Canada (Attorney General) v. Duval*, 2019 FCA 290 at para. 25, held as follows:

> *[25] … In* Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131, [2015] 3 F.C.R. 103 (F.C.A.), this Court held that there is no separate procedural right to accommodation that imposes any particular procedure that an employer must follow in seeking to accommodate an employee. Rather, in each case, it will be a question of fact as to whether the employer has established that it accommodated a complainant to the point of undue hardship.*

[348] The employer chose the priority referral process because of its proven track record of successfully reintegrating employees into the workplace. The priority referral process, argued the employer, was a reasonable approach to accommodation, given the grievor's plan to return to work following a leave of absence for personal reasons.

[349] The employer added that any time the grievor identified a new need for accommodation in the application process or at the exam or interview stage, it acted reasonably and obliged. For example, he was permitted to submit fewer than two references, he was exempted from the "recent and significant experience" essential qualification, and the exam and interview processes were both modified to suit his requirements. The employer submitted that it cannot be blamed for the grievor's lack of success in his job applications.

[350] The employer submitted that it brought Ms. Bohan on board specifically to assist with the accommodation process but that she was frustrated by the grievor's lack of cooperation. She was clear in her testimony that in her opinion, he did not facilitate the search for an appropriate accommodation.

[351] The employer drew attention to aspects of the testimonies of the grievor, Ms. Casper, and Ms. Barbour, which intimated that additional accommodation options could have been considered. There is no evidence, submitted the employer, of the grievor bringing forward any additional options for its consideration. Its witnesses referred to federal cutbacks, which resulted in some of the CPCs across Canada being restructured and impacted the number of referrals that could be made. The Regina CPC, for example, had been closed.

[352] The employer pointed to one example in particular, which demonstrated the grievor's failure to meet his obligation to facilitate the accommodation process. Ms. Hovington sent him a referral at 9:27 a.m. on September 18, 2013, about an indeterminate PM-03 position in Mississauga that was numbered 2013-IMC-IA-CPR-17502. Ms. Casper testified to receiving it and to submitting the grievor's résumé in response at 9:35 a.m., just eight minutes later.

[353] Ms. Casper testified to being aware of the need to tailor the cover letter and the résumé appropriately for each application. The employer submitted that that would have been impossible to do in eight minutes; therefore, it is not surprising that on October 7, 2013, the grievor was advised of his elimination from the process, as follows:

> …
>
> *After a careful assessment of the information you have provided for the PM-03 position, the persons responsible for assessment have concluded that you failed to demonstrate the following essential qualifications:*
>
> ***E2 – Recent experience in leading/coordinating a project(s) or working group or team***
>
> ***E3 – Recent experience in providing advice and guidance on procedure, policies, regulations and legislation to others in a work related setting***
>
> …
>
> [Emphasis in the original]

[354] The employer submitted that the grievor did not make any efforts to return to the public service outside the process that it put in place. No evidence was provided of any other applications being made. Mr. Stack testified that persons with priority entitlements must be actively involved in the process, which includes looking for other positions themselves.

[355] The grievor acknowledged that he did not apply for each and every referral that was sent his way. Ms. Casper acknowledged that she did not apply for some on his behalf because she knew just by looking at them that he would not qualify for them. This, submitted the employer, limited his chances of qualifying for a position and reflects his failure to meet his obligation to fully engage the accommodation process.

[356] The employer submitted that Dr. Ribeiro's communications were clear and that it accepted the need to accommodate the grievor's disability. The accommodation requirement was simple; placement anywhere but Vegreville, and the employer made every effort to make it happen. A deployment to Ottawa to an SDS position was offered, but he refused it.

[357] The employer submitted that the grievor could not dictate the terms of his accommodation, per paragraph 142 of *Ahmad v. Canada Revenue Agency*, 2013 PSLRB 60. *Central Okanagan* holds that employees are not entitled to a perfect or preferred accommodation and are required to accept a reasonable accommodation that suits their needs. *Leclair*, at para. 134, states:

> *[134] Many employees, like the grievor, think that finding an accommodation is carte blanche to be given the position of their choice because of the employer's duty to accommodate them to the point of undue hardship. This is a misconception; employees are not entitled to their preferred accommodations. They are entitled to reasonable accommodations that meet their identified needs. The employer in this case made the effort to find a reasonable accommodation based on the medical information it had been provided. The grievor was not willing to consider the options being put forward, and he delayed the process.*

[358] The employer submitted that the grievor's refusal of the Ottawa deployment for family related reasons was similar to the circumstances set out in *Tchorzewski v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 86, which states this at paragraphs 216 and 217:

> *[216] The duty to accommodate an employee's disability is defined in terms of the medically certified limitations on the employee's ability to perform a job. As far as the employer knew, the only restriction it needed to take into account was that the grievor should not work at the RPC.…*
>
> *[217] With respect to her unwillingness to consider a position outside Saskatoon, I have concluded that the grievor placed this restriction on herself and that the employer was not bound by this preference.…*

[359] The employer cited the following cases in support of its contention that the person seeking accommodation must consider options that may not be entirely to his or her liking but suit his or her needs and that the person cannot restrict the job

search in such a fashion that makes it virtually impossible for the employer to accommodate:

- *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4; and
- *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44.

[360] Thus, argued the employer, the obligation to accommodate was fully discharged, and the grievances in files 566-02-10192 and 10938 should be denied on that basis.

[361] The employer went on to argue that should the Board not deny these two latter grievances on the basis of the grievor's failure to establish a *prima facie* case of discrimination or to cooperate in the accommodation process, his requested accommodation constituted an undue hardship.

[362] The grievor insisted on being placed in his substantive position at a new location. Given the economic climate at the time, per Ms. Hovington's testimony, doing so was extremely difficult, submitted the employer. Essentially, he requested that a new SDS position be created at a location of his choosing, which constituted undue hardship.

[363] The employer cited a number of cases in support of the proposition that there is no obligation to do the following:

- create a new position (*Holmes v. Canada (Attorney General)*, 1997 CanLII 5101 (FC) at para. 16);
- train the employee for new duties (*Kingston (City) v. Canadian Union of Public Employees, Local 109*, [2016] O.L.A.A. No. 439 (QL)) at para. 87;
- place an employee in a position for which he or she is not qualified (*Kingston*, at para. 91); or
- place the employee in a higher-level position (*Magee v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 1 at para. 93).

[364] The employer argued that it took reasonable steps to help the grievor reintegrate into the workplace following his leave of absence. By the operation of s. 42 of the *PSEA*, if a person on a leave-of-absence priority is not appointed to a position within the applicable period, the individual ceases to be an employee at the end of the priority period. This is an automatic process and is not discretionary. Constant reminders were provided about the implications of not being appointed by September 30, 2015.

[365] The employer referred to s. 211 of the *FPSLRA*, which states that the Board does not have jurisdiction over s. 42 of the *PSEA*.

[366] For the above reasons, argued the employer, the grievances in files 566-02-10192 and 10938 should be denied.

B. For the grievor

[367] The grievor repeated his Part I argument that he should never have found himself outside the workforce and seeking a return to the public service in the first place. He felt that he should not have had to reapply to his old position. His absence from the public-sector workplace acted as a serious disadvantage to him, for example, when he was obliged to demonstrate in his applications "recent and significant experience" and when he was asked to provide references.

[368] Dr. Ribeiro authorized a return to work on February 4, 2013, referring to her earlier letter of November 24, 2011. The letters are about the grievor's mental health and well-being. His disability, he argued, was made clear and was acknowledged by the employer. In an email dated May 24, 2013, Ms. Hovington provided this summary of the employer's approach to accommodation:

> …
>
> ***Accommodation:***
>
> - *The CIC priority management unit is receiving all request from CIC managers to staff any position. When they will receive request to staff a PM-03 position or equivalent within Western Region and Ontario Region (including NCR), they will send me the information.*
> - *I will refer these positions to Mr and Ms Casper (as per your instruction) with a copy of the statement of merit criteria and Mr Casper will have to provide me with a copy of an updated resume and cover letter if he wants to be considered for the position.*
> - *Mr Casper will have to respond in a 72 hours delay in order to be considered for the position. If so, I will forward his resume and letter to management.*
>
> ***LWOP and Priority status***
>
> - *We are proposing to grant Mr. Casper a LWOP for other reason from April 10, 2013 to April 11, 2014 in order to backfill his position. The employee will have to submit a leave form for this LWOP for other reason from April 10, 2013 to April 11, 2014*

> *with the code 999. Please use the attachment to do so and send it back to me. His current LWOP was extended to July 5, 2013.*
>
> • *The employee will be inform when his position will be backfill and his entitlement as a priority.*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[369] Thus, argued the grievor, the employer clearly recognized his disability and accepted its duty to accommodate.

[370] The grievor argued that he experienced an adverse impact that was connected to his disability on the following basis:

> • The only reason he could not return to his substantive position immediately in February of 2013 was a medical restriction, due to his disability, which prevented him from returning to work in Vegreville and from having direct contact with his previous managers.
> • The result of this inability to return to his substantive position was that he remained on leave without pay for three years and that ultimately, he lost his employment status on September 30, 2015.

[371] This, argued the grievor, was sufficient to establish an adverse impact with a clear nexus to his disability. This established a *prima facie* case of discrimination and engaged the employer's duty to accommodate to the point of undue hardship.

[372] To establish undue hardship, the employer must show that accommodating the employee's needs would impose undue hardship on it in terms of health and safety and cost. The grievor referred to cases argued in Part I and drew particular attention to a Canadian Labour Arbitration decision cited as *Ahkwesahsne Police Assn. v. Mohawk Council of Akwesasne*, [2003] C.L.A.D. No. 642 (QL), which states this at paragraph 33:

> *[33] It seems clear that the more recent cases considering work reorganization as a response to the challenge of accommodation demonstrate a development and perhaps an expansion of the way in which arbitrators are interpreting and applying human rights law, which has of course mirrored the expansion of legislative protections and the interpretation of those standards by courts, human rights commissions and tribunals. Thus, the cases on the scope of the employer's obligation to accommodate an employee permanently in alternative work now seem to acknowledge that the duty may require significant workplace reorganization. The only clear limit to such efforts is that the employee must be able to*

> *perform a useful and productive job for the employer (Hamilton Civic Hospitals and CUPE, Local 794 (1994), 44 L.A.C (4th) 31).*

[373] The grievor paraphrased the Supreme Court of Canada in *Central Okanagan* when he stated that the concept of undue hardship contemplates that the employer will properly experience some hardship when it accommodates an employee with a disability.

[374] The grievor presented the following eight points to support his contention that the employer failed its duty to accommodate.

1. Point 1: The employer demonstrated a flawed understanding of the accommodation process

[375] The grievor argued that the employer did not follow its guidelines, particularly in terms of obtaining advice and input from the offices in its organization that are designed specifically to help parties with accommodation cases.

[376] The employer jumped immediately to the priority referral system without considering whether it would actually fulfil its duty to accommodate.

[377] Ms. Hovington in her May 24, 2013, email, and Mr. Armstrong in his July 23, 2013, email, both failed to recognize that the employer can be required to create a position as long as the position provides meaningful work. It can be required to modify the workplace, to the point of undue hardship.

[378] The grievor argued that both Ms. Hovington and Mr. Armstrong failed to understand the employer's obligation to look outside a department, if necessary. Little indicates that that was done. *Kelly v. Treasury Board (Department of Transport)*, 2010 PSLRB 80 at para. 106, states this:

> *[106] … More effort could have been made by the employer to market the grievor before having him utilize his leave. Regardless of whether or not something might have resulted from such action, the employer nonetheless had a duty to market the grievor and its failure to advertise this offer of salary to potential employers means that it failed to accommodate the grievor.…*

[379] The grievor drew a parallel to *Nicol*, at para. 102, which states this:

> *[102] … If the decision to accommodate was made, there would be conversations, reviews of job descriptions, encouragement to have*

> *doctors review job descriptions, sharing of reports of any functional assessments, and ongoing dialogue until the employee supported the resolution.*

[380] The grievor argued that his situation was worse than what was described in both *Kelly* and *Nicol* because once the priority referral process was in place, the employer took no responsibility for ensuring that it actually functioned properly.

2. Point 2: The unreasonable delay, and no interim accommodation

[381] As noted in *Nicol*, at para. 145, the failure to implement an accommodation within a reasonable period can constitute a breach of the duty to accommodate. By the time the first grievance was filed, on August 14, 2013, no referrals had yet been made.

[382] When it became apparent that the process might take some time, interim measures could have been taken but were not. Some options might have included continuing the grievor's salary or finding him temporary positions such as assignments or secondments as in *Kelly*.

3. Point 3: The process was unnecessarily complicated

[383] The grievor argued that it was clear that everyone was overwhelmed by the overly complicated referral process. The employer provided no serious, substantive assistance navigating it. The PSC's involvement did not remove the employer's obligation in this respect.

[384] In *Hotte v. Treasury Board (Royal Canadian Mounted Police)*, 2016 PSLREB 122, the employer registering the employee in PIMS to help her find work elsewhere in the public service was not, on its own, enough to establish accommodation to the point of undue hardship.

[385] Paragraph 96 of *Hotte*, argued the grievor, is particularly relevant. It reads as follows:

> *[96] … I feel that if the employer had sincerely wanted to accommodate the grievor, it would have made a much greater effort to find a solution adapted to her case. Among other things, it certainly could have provided assistance preparing her résumé, training, coaching or mentoring, and support services to help her better understand how PIMS worked and the positions posted there.*

4. Point 4: Refusal to revisit the priority referral approach

[386] Despite the grievor's articulation on many occasions that the priority referral process was simply not successful in returning him to work, the employer made no effort to revisit this strategy.

[387] The substantive nature of the duty to accommodate means that the employer cannot keep repeating the same process over and over when it is obviously not working and when other options should be tried.

[388] By February 13, 2014, it was apparent to both the grievor and the employer that he was being screened out of the positions to which he was being referred. It should have raised some red flags with the employer.

5. Point 5: Failure to implement standard accommodation options

[389] The grievor argued that many standard options were not explored, including these:

- an interim measure, such as leave with pay or temporary secondments or assignments;
- refresher training;
- financial assistance to seek retraining outside the workplace;
- an active effort to market him to other departments;
- bundling duties into a job that he could perform;
- mentoring and coaching him;
- helping with his résumé and the application process;
- relaxing or modifying qualification standards for positions; and
- considering positions at other pay levels.

[390] In an email dated July 31, 2013, the employer acknowledged that the obligation to accommodate "… may include retraining the employee up to the point of undue hardship." This was not considered for the grievor.

[391] When other options were explored, they were done haphazardly and ineffectually, argued the grievor. After he had been continually screened out because of the "recent experience" essential requirement, the employer modified it inconsistently and unclearly by applying it to only one process and leaving it for other managers to interpret on a case-by-case basis.

[392] Another option that was not properly explored was telework. The grievor argued that Ms. Hovington was not involved in exploring that possibility and that Mr. Armstrong simply reported that it was not possible.

6. Point 6: Failure to use deployment or assignment options after the offer in Ottawa

[393] The grievor submitted that he declined the Ottawa deployment for legitimate reasons, noting that the family support available to him in western Canada would no longer have been available to him had he moved to Ottawa. He also noted that his spouse, who would most certainly have accompanied him on the deployment, would have found herself at the mercy of the priority referral process, which was a failure, as far as he was concerned.

[394] The grievor argued that he could simply have been deployed to one of the many western Canada positions that became available over the period during which he was subject to the priority referral process. He submitted that it seemed as though the employer simply abandoned that particular option once the Ottawa deployment was refused.

[395] The grievor submitted *Fair v. Hamilton-Wentworth District School Board*, 2012 HRTO 350 (Grievor's Book of Authorities, Tab 20A), which states this at paragraph 5:

> *[5] The substantive principle at issue in this case relates to an employee who, because of disability, can no longer perform the essential duties of the job she has* [*sic*] *been performing until the onset of the disability. Reasonable accommodation of such an employee may, in some circumstances, be accomplished by a transfer to another position with the employer.…*

[396] This seems to have been an easy solution, but it was never considered.

[397] The grievor submitted that paragraphs 44 to 46 of *Fair* demonstrate that the circumstances in that case were similar to his. In *Fair*, the employer had a vacant position open, and rather than use it to accommodate the disabled employee, it obliged her to compete for it. The decision states as follows at paragraph 46:

> *[46] The respondent had the discretion not to post the position and it was open to it to use the position as a form of accommodation. It chose not to do so. I find that it would not have caused the respondent undue hardship to have placed the applicant in that position without a competition.*

[398] Another similar case, argued the grievor, is *Metsala v. Falconbridge Limited, Kidd Creek Division*, [2001] O.H.R.B.I.D. No. 5 (QL), which the HRTO's precursor decided. An employee returning to work from a disability was not properly accommodated. At paragraph 47, it states, "On the totality of the evidence, it is undisputed that Falconbridge took the position that the Complainant would have to wait for a vacant position for which she was qualified to arise. That is not accommodation."

[399] The grievor reiterated that the employer led no evidence to indicate that it would have suffered undue hardship had it deployed him to any of the dozens of vacancies that existed in the CIC, let alone across the federal public sector.

7. Point 7: The grievor should never have been placed in the priority referral process

[400] The grievor argued that requiring him to continually renew his LWOP was unfair. The only benefit from doing so accrued to the employer, allowing it to backfill his position.

[401] The grievor maintained that he had a legal right to return to his substantive position unless the employer could establish that doing so constituted an undue hardship.

[402] The grievor submitted that the employer unilaterally altered his employment status such that it put him on a path to the cessation of his employment.

8. Point 8: The PSC's process does not relieve the employer of its duty to accommodate.

[403] Although the grievor acknowledged that the PSC's process was a tool for finding an accommodation, the evidence indicates that from 2014 on into 2015, the employer essentially disappeared from the picture and left the grievor to deal with the PSC on his own.

[404] In the final analysis, argued the grievor, the employer led no evidence to demonstrate why it could not have exercised its discretion to extend, rather than cut off, his LWOP in 2014. As the Board's predecessor decided in *Nicol*, at para. 140, "Waiting does not constitute undue hardship".

[405] The grievor argued that the preceding eight points demonstrate the employer's failure of its duty to accommodate and that the grievances in files 566-02-10192 and 10938 should be allowed.

[406] Responding to the employer's argument that the grievor failed to cooperate in the accommodation process, it is important to keep in mind that the first grievance was filed in August of 2013, which was long before any alleged failure to cooperate.

[407] The grievor submitted *JL v. Empower Simcoe*, 2021 HRTO 222, on the issue of an alleged failure to cooperate. The applicant, a child with disability-related needs, lived in a group home operated by the respondent. The child alleged discrimination on the basis of disability when the respondent imposed visitation restrictions during the COVID-19 pandemic, the effect of which prevented his parents from visiting him.

[408] Paragraphs 131 to 135, submitted the grievor, are directly on point with his circumstances and read as follows:

> *[131] The respondent says the applicant's parents failed to cooperate in the accommodation process and instead, insisted upon their preferred accommodation of in-person visits with no physical distancing. I disagree. The applicant's parents asked to see their son without physical distancing and explained why. They told the respondent that they thought he would not understand why they had to be physically apart and that this would cause him distress and harm. They explained to the respondent that they believed physical touch was important for the applicant to have meaningful communication. The respondent was well aware of the applicant's communication limitations and his inclination to communicate, at least in part, through physical touch. The applicant had been in its care for seven years.*
>
> *[132] The applicant requested accommodation from the respondent – that his parents be allowed to visit without social distancing with the other COVID precautions in place. The ball was in the respondent's court to consider the applicant's accommodation request and seek its own public health advice on that specific request. It did not do so. Instead, it remained steadfast in its approach. Because the respondent did not investigate the applicant's accommodation request, there is no objective public health evidence that it would have caused undue hardship to grant the request in terms of jeopardizing the health and safety of the residents and staff in the applicant's home. The respondent did not call such evidence at the hearing.*
>
> *[133] The respondent asserts the applicant's parents refused reasonable alternatives for them to visit with their son. These alternatives included remote visits through the use of technology.*

> *There are several difficulties with this argument. While the evidence establishes the applicant was exposed to technology, it does not establish that he was proficient to the extent that he could communicate meaningfully with his parents through the use of technology. Technology is not a reasonable form of accommodation for a child who is non-verbal and communicates at least in part, through physical touch.*
>
> *[134] this argument also ignores the central issue in this case. The issue is whether it would have caused the respondent undue hardship to provide the accommodation requested. That question must be answered. It is not an answer to say the applicant should have accepted what was offered, regardless of whether it was appropriate, and his failure to do so is a failure to cooperate in the accommodation process resulting in the dismissal of his claim.*
>
> *[135] I would pause here to say one thing. The duty to accommodate is a duty on the respondent because it is in the best position to determine how the applicant can be accommodated without undue hardship. The applicant must cooperate in the accommodation process by providing sufficient information to allow the respondent to understand the nature of the disability and the accommodation sought. This is often referred to as the "duty to cooperate". The duty to cooperate does not mean the applicant is responsible for finding the solution. That responsibility remains with the respondent. So, although the accommodation process is a multi-party inquiry, the parties are not equally responsible for the process. The respondent shoulders more responsibility for the accommodation process because it controls it. This is evident from the fact that if a respondent denies an accommodation request outright, there is very little an applicant can do about it. See* Central Okanagan School District No. 23 *v.* Renaud*, 1992 CanLII 81 (SCC);* Espinoza *v.* the Napanee Beaver Limited*, 2021 HRTO 68 at para. 102.*

[409] The grievor also submitted *Zorzi v. AimH - Prince George Association for Community Living and others*, 2020 BCHRT 198, for the proposition that an employer does not have to simply accept an employee's accommodation request; it must establish instead that the measure it offered was reasonable and that the employee's refusal of it was unreasonable to establish a breach of the duty to accommodate.

[410] The analogy to the present case, submitted the grievor, is clear. His refusal to accept an accommodation was not a failure to cooperate and did not, in and of itself, relieve the employer of its obligation to continue to accommodate him and to try different options.

[411] In *Kelly*, submitted the grievor, it was understandable and reasonable and not a failure to cooperate that the employee was not able to accept a position outside St. John's, Newfoundland, due to obligations to care for his parents and disabled son.

[412] Similarly, submitted the grievor, in *Nicol*, the failure to accept one of three offered positions was not a failure to cooperate.

[413] In summary, the grievor maintained that he acted in good faith throughout the accommodation process. He engaged the priority referral process as best he could. In the context of Ms. Bohan's involvement, he maintained that his inability to complete the application process in late 2014 and 2015 was entirely understandable. He needed to work when he could while on LWOP, especially in light of Ms. Casper's failing health.

[414] By way of remedy, the grievor asked that the cessation of employment by way of s. 42 of the *PSEA* be quashed. It would never have occurred had a proper accommodation been put in place. He should be returned to his substantive position; that is, where he would have been had he been appropriately accommodated as of the filing of the August 2013 grievance.

C. Decision and reasons with respect to the grievances in files 566-02-10192 and 10938

[415] Some of the cases advanced in Part I of this decision (the disciplinary grievances) apply to Part II. I read all the cases that the parties submitted, but as I did in Part I, I will refer only to those that serve to illuminate my reasoning in arriving at my decision to deny the grievances in files 566-02-10192 and 566-02-10938.

[416] Unlike Part I, in which the employer claimed no knowledge of the grievor's disability, it accepted Dr. Ribeiro's letter, which recommended that "… Mr. Casper be accommodated by returning permanently to an office other than the Case Processing Centre in Vegreville, either another Citizenship and Immigration office or federal department".

[417] Dr. Ribeiro went on to add this:

…

> *Given the nature and severity of Mr. Casper's condition, its relationship to the Vegreville workplace and various preceding difficulties negatively impacting his mental health, Mr. Casper should not have and* [*sic*] *further dealings with any current or*

> *former management of the Case Processing Centre in Vegreville or any management with which he may have been involved.…*
>
> *…*

[418] The grievor signalled a desire to return to work in the public sector in February of 2013, and it is important to note that he did so from a situation of his own design, namely, LWOP for personal needs. He left the workplace in December of 2010 for medical reasons that were documented in early January of 2011, but after a time, on his doctor's recommendation, he went on leave of absence for personal needs and obtained employment in the private sector.

[419] In 2013, the grievor was not returning from a leave of absence for medical reasons. This is an important fact because it affected how the employer intended to reintegrate him into the public service. This was made clear by Mr. Stack's testimony. This is an important distinction because many of the cases that the grievor submitted dealt with accommodating individuals suffering from disabilities who returned to the workforce once doctors cleared them to return after a period of medical leave.

[420] However, the evidence is clear that the employer accepted the grievor's disability, honoured Dr. Ribeiro's recommendations, and was prepared to return him to work with those restrictions in place.

[421] Two grievances were filed with respect to the efforts to accommodate the grievor's return to work. The first was filed in August of 2013, approximately six months after he signalled a desire to return. The important distinction between this grievance and the second one, filed in November of 2014, centres on the issue of whether he failed to cooperate in the accommodation process. This argument simply cannot be made with respect to the first grievance because it took some time for the priority referral process to get up and running. Therefore, I will deal with the two grievances in chronological order.

[422] A threshold question, common to both grievances, is whether the grievor made out a *prima facie* case of discrimination. It is settled law that the framework for analysis is *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. The grievor had to establish the following on a balance of probabilities:

> 1) He has a characteristic protected from discrimination;
> 2) he experienced an adverse impact; and

3) the protected characteristic was a factor in the adverse impact.

[423] Unlike Part I, all the parties accept that the grievor's disability is a characteristic protected from discrimination. The employer accepted its duty to accommodate on that basis. On the balance of probabilities, I find that the grievor suffered an adverse impact directly related to the protected characteristic. He was not able to return to his substantive position because of his disability, so he had to take a leave of absence without pay, which affected him financially as well as psychologically. He wanted to return to work but he could not. That was an adverse impact.

[424] I find that with respect to both grievances, in files 566-02-10192 and 566-02-10938, the grievor established a *prima facie* case of discrimination.

1. The grievance in file 566-02-10192 (August 2013)

[425] Ms. Hovington testified to the prevailing economic climate in 2013. The grievor did not contest that at that time (and I take judicial notice of this) the federal public sector was still dealing with the impact of the Deficit Reduction Action Plan, frequently referred to as the "DRAP" at the hearing and elsewhere. A notice from the minister, dated April 13, 2013, was entered into evidence pertaining to the 2012 budget cuts and the impact of workforce adjustment measures. Nineteen offices were closed. The Vancouver office amalgamated with the one in Calgary. In the west, the only CPC was in Vegreville, where the grievor could not return. Other CPCs were in Sydney, Ottawa, and Mississauga.

[426] I accept Ms. Hovington's testimony that that economic backdrop coloured the employer's approach to the grievor's accommodation. In an email dated May 24, 2013, she made it clear that no PM-03 positions were then available.

[427] Given the prevailing economic circumstances, testified Ms. Hovington, an appropriate strategy was to backfill the grievor's position, thus making him eligible for job referrals under the priority referral process. The employer considered such a strategy well in advance of the May 24, 2013, email; Ms. Hovington testified that it was being discussed since the grievor signalled his intention to return in February of 2013.

[428] I carefully considered the evidence and the arguments pertaining to the employer's decision in this respect, and I can find nothing unreasonable in this aspect

of its approach. Although it is not perfect, the priority referral process is an accepted method of reintegrating employees into the workforce.

[429] Equally significant at this stage of the analysis is recognizing the employer's exercise of its discretion when it expanded the scope of referrals coming the grievor's way by including him in the priority referral process, which is supposed to be reserved for those affected by workforce adjustment. The employer did not have to take that extra step; to me, it was a clear indication of good faith.

[430] The only aspect of the grievance in file 566-02-10192 warranting analysis is that accommodation did not occur immediately. I agree that it must have been frustrating for the grievor to have made the decision to return, to have accepted inclusion (albeit with misgivings) into the priority referral process, and to have received only a paucity of referrals by the time he filed his grievance in August 2013.

[431] I agree with the employer's characterization of *Taticek* as standing for the proposition that an accommodation need not be instantaneous. I accept the evidence of the employer's witnesses, who acknowledged that a few "glitches" occurred in implementing the priority referral process. This was to be expected. I also accept the employer's referral to the Federal Court of Appeal's case of *Duval*, which holds that there is no separate procedural right to accommodation that imposes any particular procedure that an employer must follow in seeking to accommodate an employee.

[432] I find that by implementing the priority referral process as soon as the grievor agreed to participate in it by submitting the required leave forms, and by implementing the steps necessary to include him in as many referrals as possible, the employer acted reasonably. The grievance in file 566-02-10192, filed in August of 2013, is denied on that basis.

2. The grievance in file 566-02-10938 (November 2014)

[433] This grievance was filed on November 4, 2014, and pertains to the lack of success returning the grievor to the workplace.

[434] The evidence indicates the employer did the best it could under the circumstances. It accepted Dr. Ribeiro's sole accommodation provision, namely, to avoid placing the grievor in the Vegreville CPC. This complicated the process, but the

employer remained diligent in its attempts to find him a suitable placement elsewhere, by way of either the priority referral process or a deployment offer.

[435] I reject the grievor's argument referencing *Fair*, in which the returning employee was on disability leave with a right to return to work. This was not the grievor's circumstance at all, because he was not returning from disability leave; he was seeking re-entry to the public service following a leave of absence for personal needs.

[436] I find the testimony of the employer's witnesses compelling with respect to the description of the efforts made to return the grievor to work. He received over 110 referrals, 36 from the CIC, and 76 from the PSC. When he identified issues with respect to his inability to meet the qualifications, the employer accommodated him by reducing the number of references required, by exempting him from the "recent and significant experience" qualification, and by modifying the examination and interview processes when Dr. Ribeiro pointed to that need. Ms. Bohan was assigned specifically to help place him. I find her testimony particularly compelling on the issue of the grievor's lack of cooperation with the process, and her frustration on the witness stand was tangible.

[437] A deployment to Ottawa was offered in March of 2014, which the grievor ultimately refused. This is an important consideration in my decision to deny this grievance. Although I accept that moving to Ottawa would have been a challenge in many respects, it represented an entirely reasonable approach by the employer to reintegrating him into the workplace. This is especially true given the difficulty he was experiencing with the priority referral process. A deployment was exactly what he had requested, and he should have accepted it. I accept the employer's references to the cases of *Leclair*, *Central Okanagan*, and *Ahmad* on this issue. The grievor could not dictate the terms of his accommodation and was not entitled to the perfect or a preferred accommodation. He had to accept a reasonable accommodation that suited his needs, and I find that by refusing the Ottawa deployment, he did not.

[438] Having chosen to decline the deployment, the grievor returned to a process he was already unhappy with, and his efforts to assist in the priority referral process became half-hearted and sporadic.

[439] I find that the grievor made no effort to return to the public service outside the process that the employer put in place. When he accepted a CN training program in

December of 2014, which took him out of Internet access range to remote locations for extended periods, he effectively made it impossible to diligently follow up on or participate in the interview process for the PM-03 positions in Calgary, Edmonton, and Saskatoon.

[440] The observations made at paragraph 134 of *Leclair* resonate and bear repeating, as follows:

> *[134] Many employees, like the grievor, think that finding an accommodation is carte blanche to be given the position of their choice because of the employer's duty to accommodate them to the point of undue hardship. This is a misconception; employees are not entitled to their preferred accommodations. They are entitled to reasonable accommodations that meet their identified needs. The employer in this case made the effort to find a reasonable accommodation based on the medical information it had been provided. The grievor was not willing to consider the options being put forward, and he delayed the process.*

[441] I also accept the employer's characterization of the findings in *Nash* and *Sioui* to the effect that the person seeking accommodation must consider options that may not be entirely to his or her liking but that suit his or her needs. By absenting himself from the interview process for the PM-03 positions in Calgary, Edmonton, and Saskatoon, the grievor effectively made it impossible for the employer to accommodate him.

[442] For the above reasons, the grievance in file 566-02-10938 is also denied.

[443] For all of the above reasons, the Board makes the following series of orders with respect to the grievances that were the subject of the hearing:

(The Order appears on the next page)

VI. Order

[444] The grievance in file no. 566-02-4291 is allowed, and the disciplinary penalty is set aside. The employer will reimburse the grievor for the five days of unpaid suspension that were imposed. This consists of all salary and benefits lost, less the appropriate deductions.

[445] The grievance in file no. 566-02-4292 is denied.

[446] The grievance in file no. 566-02-4293 is allowed in part. The disciplinary sanction of seven days of unpaid suspension is reduced to a written letter of reprimand. The employer will reimburse the grievor for the seven days. This consists of all salary and benefits lost, less the appropriate deductions.

[447] The grievance in file no. 566-02-4294 is allowed. I award damages in the amount of $7000 under s. 53(2)(e) of the *CHRA* and a further $7000 under s. 53(3).

[448] The grievance in file no. 566-02-6301 is allowed in part. The 10-day disciplinary suspension is reduced to 1 day, and the difference of 9 days is to be reimbursed to the grievor. This consists of all salary and benefits lost, less the appropriate deductions.

[449] The grievance in file no. 566-02-6300 is allowed, and I award damages in the amount of $20 000 under s. 53(2)(e) of the *CHRA* and a further $20 000 under s. 53(3).

[450] Interest is payable on the grievances in file nos. 566-02-4291, 4293, and 6301 in the manner outlined earlier. Interest is not payable on awards under the *CHRA*.

[451] The Board remains seized of this matter for one year following the publication of this decision in the event that the parties encounter difficulties implementing these remedies.

[452] The grievances in file nos. 566-02-10192 and 10938 are denied.

[453] The grievor's personnel file will be amended to reflect these decisions.

April 13, 2023.

James R. Knopp,
a panel of the Federal Public Sector

Labour Relations and Employment Board