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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

JANE DOE

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Doe v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Michael F. McNamara, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Andi MacKay, counsel

For the Respondents: Andréanne Laurin, counsel

Heard by at Vancouver, British Columbia,
February 17-18 and 20, 2015

REASONS FOR DECISION

I. Overview – individual grievances referred to adjudication

[1] On March 25, 2010 the grievor, Border Services Officer (BSO) Jane Doe, filed two grievances, as follows:

> ***Grievance #10-3961-101797****: I grieve that the employer has violated Article 19 and 20 of my collective agreement and failed to provide a harassment free workplace.*
>
> *Corrective Action Requested: I request that the employer provide a harassment free workplace and that harassment awareness education take place in the workplace; and*
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> ***Grievance #10-3961-101798****: I grieve that the employer has failed to provide me with WorkSafeBC protection as required by B.C. laws and has failed to provide me with leave to make up for this. I grieve that the employer has done nothing to protect me from the emotional damages of harassment which happened in the workplace.*
>
> *Corrective Action Requested: that the leave credits that I used be reinstated; that I be paid for missed overtime opportunities; that the employer compensate me for pain and suffering and for damages; and any other corrective action appropriate in the circumstances to make me whole.*

[2] On February 9, 2012, the grievances were referred to adjudication, and notice was given to the Canadian Human Rights Commission, which declined the opportunity to make submissions.

[3] The Canada Border Services Agency (CBSA or "the employer") raised a number of preliminary objections to the grievances. The gist of the objections boils down to the following:

- that grievance #10-3961-101797 ("grievance 101797") does not contain a request for damages. Therefore, any request for damages at adjudication is an enlargement of the scope of this grievance and cannot be considered;

- that grievance #10-3961-101798 ("grievance 101798") does contain a request for damages, but I lack jurisdiction to hear it for a number of reasons; and

- therefore, the only grievance properly before me is grievance 101797, and the only remedies that I can consider are the remedies requested in it (which do not include damages).

[4] I find that none of the employer's objections have merit. I find that I have jurisdiction to consider both grievances and to consider all remedies requested, including damages for pain and suffering.

[5] I further find that the employer failed to deal effectively with verbal harassment so as to prevent the more serious act of physical harassment that occurred on August 28, 2009. In doing so, the employer failed to provide a harassment-free workplace.

[6] I find that in the circumstances of this case, damages for that failure are not warranted. The allegation that the grievor's extreme emotional damage is attributable to sexual harassment in the workplace is not supported by the evidence.

[7] I further find that it is not necessary to order the employer to provide a harassment-free workplace; it is well aware of its obligations.

[8] The CBSA provided harassment training both before and after the incident and provides ongoing training. However, I am prepared to order it to ensure that training take place regularly and to ensure that management training contains a special emphasis on awareness and prevention.

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

II. Summary of the evidence

[10] About 100 BSOs work at the CBSA's Douglas, British Columbia, Port of Entry ("the Douglas Port") in 6 or 7 teams of 12 BSOs each. The general duties of the position include clearing traffic, verifying work permits, carrying out vehicle exams, and making

arrests. The teams are assigned to work at counters inside a depot or outdoors, clearing traffic. A superintendent is assigned to each team.

[11] At all material times, Chantal Boulet was the grievor's superintendent. Derek Collins was the chief of operations at the Douglas Port, and Kathy Closter was the acting assistant chief. Mr. Collins reported to Mr. Scoville, the district director of the CBSA's Lower Mainland area, who in turn reported to Blake Delgaty, the CBSA's regional director general of its Pacific Region.

[12] In May 2008, BSO Doe began working on a team with the co-worker with whom she later had difficulties.

[13] The grievor testified that she got along with everyone on her team but that she soon became concerned with some of the things the co-worker would say. He habitually made vulgar sexual comments about women in general and sometimes about the grievor in particular. He also offended in other ways, for example, by sending offensive emails with pictures and videos of Iraqi prisoners being set on fire.

[14] The grievor testified that the co-worker made the comments summarized in Exhibit 1, entitled, "Conduct." These comments need not be repeated in this decision. Suffice it to say that they are crude and sexual and in general that they indicate in vulgar terms what the co-worker would have liked to do with and to women.

[15] After four or five months of working together, the grievor began telling the co-worker that she considered some of his comments offensive. She told him to stop. He responded by accusing the grievor of always "busting his butt".

[16] The grievor stated that she was always professional and never flirtatious or sexual with the co-worker and that they did not engage in pranks or practical jokes but that other BSOs did engage in banter and pranks in the workplace. However, a number of the witnesses testified that the grievor did engage in friendly banter, at times with sexual content, with the other BSOs, including with the co-worker. Several witnesses mentioned that she and the co-worker socialized outside the workplace and had a friendly relationship. For example, Ms. Boulet testified that she witnessed the grievor giving the co-worker a shoulder massage.

[17] All witnesses but the grievor described the workplace as positive, although sometimes stressful. There was no prevailing atmosphere of fear or of sexual or any

kind of harassment, and the relationship between management and the BSOs was open and positive.

[18] The testimonies of all the witnesses but the grievor was that the co-worker's comments were typically in line with the banter of the other BSOs but that he sometimes went too far and crossed the line. On those occasions, other employees would tell him so and walk away, putting an end to such conversations.

[19] The grievor testified that in the fall of 2008, she spoke with her superintendent, Ms. Boulet, and told her that the co-worker was becoming ridiculous and that Ms. Boulet should speak with him about his behaviour.

[20] Superintendent Boulet testified that she supervises 8 to 10 officers and that she had a good relationship with the grievor. They spoke often but not about their private lives.

[21] She recalled the grievor speaking with her about the co-worker. It was not expressed as a complaint; it was just a conversation in passing to the effect that the co-worker was ridiculous and that he made inappropriate comments. Ms. Boulet asked the grievor if she should talk to him; the grievor indicated that she should not. However, Ms. Boulet could see that the grievor was not happy, and she was concerned, so she decided to speak with the co-worker, which she did. He said it would not happen again, and she considered the matter closed.

[22] After the meeting with Ms. Boulet, the co-worker told the grievor that he "would have to put his filters on or shit was going to happen". According to the grievor, this happened twice in the fall of 2008; however, the co-worker's resulting behavior changes would last only about a day before he returned to his normal behaviour.

[23] The grievor testified that she also spoke to Ms. Boulet following a social event outside the workplace in December of 2008. The co-worker had made an inappropriate comment and gesture to a server about the size of her breasts, which both the grievor and Ms. Boulet witnessed. The grievor testified that Ms. Boulet told her that she was never going out again with the co-worker because he was always offensive. Dave Bernard, an acting superintendent at the time, was also at this event.

[24] Ms. Boulet acknowledged that she had witnessed the co-worker's inappropriate exchange with the server. She testified that she did not consider herself the co-worker's supervisor when they were outside the workplace at a social event.

[25] There are two counters at the Douglas Port where BSOs are assigned to work. The grievor testified that in the spring of 2009, Ms. Boulet asked her why she never worked at the same counter as the co-worker. The grievor told her that when she was assigned to a counter with the co-worker, she would take the work to the other counter and work there to avoid being near him. Ms. Boulet acknowledged that she was aware that the grievor would do that.

[26] The grievor stated that in the spring of 2009, she told the co-worker not to talk to her at all, unless he was required to.

[27] The grievor testified that in mid-2009, she again spoke to Ms. Boulet about the co-worker, reporting that his behaviour was becoming worse and that he was being ridiculous. She said that Ms. Boulet spoke with the co-worker again and that again he made a comment to the grievor about putting his filters on or else there would be bigger trouble. The grievor further testified that the comments continued and that Ms. Boulet spoke to him again.

[28] However, Ms. Boulet testified that the grievor spoke to her about this on only one occasion and that she spoke to the co-worker on only that occasion; she did not recall doing so a second time. However, Ms. Boulet acknowledged that it had occurred five years ago. However, she was confident that if the grievor had complained about the co-worker more than once, she would have put something in writing, as she (Ms. Boulet) was known for doing that.

[29] The grievor testified that although she had told the co-worker to stop talking to her, he did not stop, and that by July of 2009, he was making sexually explicit comments to her several times a day.

[30] At the end of July 2009, the grievor says that she told Mr. Bernard that the situation was ridiculous and that working with the co-worker was exhausting. He was offensive, crass, disgusting, inappropriate, and vulgar. She also told Mr. Bernard that when she told him to stop, the co-worker responded that the grievor was always "busting his balls".

[31] However, Mr. Bernard testified that neither the grievor nor anyone else had ever raised an issue with the co-worker to him and that therefore, he had never had occasion to speak to the co-worker about these issues.

[32] The grievor acknowledged that she never filed a written complaint but that she expected that bringing her concerns to her manager would be sufficient.

[33] Ms. Boulet testified that the grievor's claim that she had been sexually harassed for approximately a year and four months before the August 28 incident was personally offensive to her and that it was an attack on her integrity. She stated that she had never heard the comments listed in Exhibit 1 and that they were never reported to her. Nor was anything else about sexual harassment reported to her, and it was disturbing to her to hear these allegations.

[34] She stated that there is an open-door policy and that she assumed that if the grievor wanted to make a complaint, she would have made one.

[35] Ms. Boulet testified that she is known not to tolerate vulgar language in the workplace, let alone sexual harassment. Had it been going on and had she been aware of it, she would have acted immediately.

[36] The grievor spoke of the incident that took place on Friday, August 28, 2009, when the co-worker took her plastic wedge tool from her work belt and shoved it into her buttocks while saying "Wedgie". He said it was a joke. Several times, he tried to apologize. He asked her not to get him fired.

[37] Following the incident, the grievor went to Ms. Boulet's office. She was upset and needed to talk. She told Ms. Boulet what the co-worker had done. Ms. Boulet took the grievor to see Ms. Closter. The CBSA's Labour Relations branch was contacted. So were Mr. Scoville and Mr. Delgaty. Ms. Boulet picked up the co-worker and took him to another area to keep him and the grievor separate.

[38] Ms. Closter suspended the co-worker on that day, pending an investigation. She took his belt and tools and dismissed him. She directed him to not go to the Douglas Port without authorization and to have no contact with the grievor.

[39] On Sunday, April 30, the co-worker was called in with his union representative, Dan Sullivan, and was asked to give his statement.

[40] Three days after the incident, the co-worker was assigned to temporary duties in the Nexus office, 2.4 km away, pending a further investigation. He subsequently received a five-week suspension and was ultimately deployed to the Nanaimo, B.C., Port of Entry in June 2011. He never returned to work at the Douglas Port after the incident.

[41] The grievor testified that during the next few weeks, she spoke with Ms. Boulet several times, as well as with Derek Collins and Kim Scoville. At work, she was emotional. She often cried and went home. She considered pressing criminal charges.

[42] She was referred to the Employee Assistance Program (EAP) immediately after the incident but was advised that she needed to contact a different number as she was calling from a cellphone out of Calgary, Alberta. When advised of this, Mr. Collins immediately contacted Labour Relations and obtained the correct number for the grievor.

[43] The grievor testified that at some point, Mr. Collins told her at a meeting that "… it's like a hockey game, get over it." He denied making that statement.
She indicated that she was made to feel like she was letting him down by not getting over it, that she realized that the CBSA did not think it was a big deal, and that it would have been a bigger deal had it happened in a mall rather than in a law-enforcement environment.

[44] At some point, the grievor became aware that a video of the incident had been recorded and that it was on a CD labelled with her name. She testified that it had been made available to the Superintendent, the chiefs, the Director, and the Acting Superintendent. When she learned that others had watched the video, she was very disgusted and felt that they were making fun of her life. Her request for a copy of it was denied.

[45] The evidence was somewhat conflicting as to whether there was more than one copy of the CD and whether a copy went to the RCMP. However, all the witnesses who testified on this matter indicated that the video was password protected and that it was viewed only with authorization. There was no evidence that it was handled recklessly or that anyone viewed it improperly.

[46] Mr. Collins testified that the employer filed a report with the RCMP and that numerous employees gave statements to the police. The RCMP recommended and the Crown agreed that it was not in the public interest to lay charges.

[47] The evidence indicates that the employer did not realize immediately that the grievor had sustained a compensable work injury; nor did the grievor so indicate to the employer. There was no discussion at first about WorkSafeBC. Instead, the employer allowed her to use her leave credits for her increasingly frequent and then long-term absences from the workplace.

[48] Ms. Boulet called the grievor to advise her when her leave credits were about to run out. Only then did the grievor and her union meet with the employer and advise it that she was suffering from a work injury.

[49] In March 2010, WorkSafeBC forms were completed and filed with help from Mr. Collins and the grievor's union representative, Mr. Sullivan. Her claim was accepted on April 8, 2010, and at the end of May 2010, she began to receive benefits retroactive to August 2009.

[50] After WorkSafeBC accepted her claim, the grievor's leave was converted to injury on duty leave, and her leave credits were restored. Hence, she was made whole in respect of the filing delay and received 100% of her salary since she left the workplace. Once the claim was filed and accepted, she also received counselling from WorkSafeBC.

[51] Ms. Boulet, Ms. Closter, and Mr. Collins testified that they spoke to the grievor several times shortly after the incident to encourage her to return to work. Ms. Boulet advised her that the longer she stayed away, the harder it would be to come back, and in reference to the co-worker, advised the grievor to "not let him ruin [her] career". However, Ms. Boulet also stressed that it was the grievor's decision. Ms. Closter advised the grievor to "exercise [her] courage muscles", return to work, and take control of her career. Mr. Collins also advised her that it was important to get back into the workplace.

[52] However, the grievor felt that she could not return to the Douglas Port despite the co-worker's absence from the day of the incident and asked to be deployed

elsewhere. The employer has been making efforts, thus far unsuccessful, to find her a position somewhere else.

[53] The grievor testified that Mr. Delgaty informed her that a harassment complaint had been filed against her by the co-worker as a result of comments she had made in a loud voice at the 7 Seas Fish Market on September 25, 2010. The grievor allegedly pointed at the co-worker and yelled that he was the man who had sexually assaulted her. She testified that she did so only in response to the co-worker's provocation. The incident happened outside the workplace and was not in conflict with the CBSA's "Code of Conduct"; therefore, the employer took no action.

[54] The grievor stated that she tried not to be anywhere near the co-worker and that he did not take his complaint against her seriously and often made a joke of it to her. This was curious testimony as the evidence was that she was no longer in contact with the co-worker after the incident. It is unclear on what occasions he would have been in a position to joke with her about this complaint.

[55] The grievor identified a document entitled "Morning Media Clips", which was sent to the CBSA's Pacific Region on September 8, 2011. It was a clipping from an article in the Vancouver Sun that identified her and her court action against the CBSA and the co-worker (which was later withdrawn).

[56] The grievor felt that the clipping had been sent out deliberately in a wilful and reckless fashion to mock her and to invade her privacy. However, Mr. Collins testified that an automated service gathers news clips of interest to the CBSA. It was regrettable, but having been published in the Vancouver Sun, the automated system simply added it to the other media clips.

[57] In May of 2014, the CBSA sent information to the grievor about the possibility of a deployment offer to a position at the Sidney Port of Entry. An email from her rejecting it was introduced into evidence. She felt that it was an inappropriate option for her and that it was unfair to ask her to assume dual housing costs in addition to being without pay for several months. She characterized the offer as wilful and reckless conduct on the part of the employer. It showed that the CBSA did not take her situation seriously, since it was "… offering her a position in the same location as [the co-worker]."

[58] Additional evidence was adduced to the effect that it was not a deployment offer but rather an invitation to apply. Despite the grievor's characterization of it as being in the same work location as the co-worker, the Port of Sidney, although in the same region as the Port of Nanaimo, is two hours away from it.

[59] The grievor spoke of how her life has changed. Before the incident, she was fearless and career driven, and she liked adventure and travelling. Since the incident, she has trouble with daily activities and generally has a hard time managing.
She described many of her symptoms and feelings. She has put on weight, is no longer social. She goes out only for an odd coffee. She is no longer happy-go-lucky, and her romantic life has changed.

[60] The grievor's partner also gave evidence about the change in the grievor. He is a superintendent at the CBSA and is the grievor's fiancé and partner. He was not present for the August 28 incident.

[61] He explained that before the incident, the grievor had many friends and often went out. She was outgoing and was unafraid. She had management career aspirations, had a great outlook on life, was happy-go-lucky, always had a smile, could handle the work easily, and loved to travel and do fun things.

[62] Her partner testified that the grievor had changed socially. She is now worried about her career and is reserved in her outlook on life. He described some of her symptoms. She needs medical care. Her daily activities since the incident find her staying close to home, and she avoids going out, in case she might run into the co-worker.

[63] The grievor and her partner started at the CBSA at about the same time. He is now a superintendent and has many opportunities - the grievor has none of this.

[64] Her partner was aware of the harassment at the time and had some discussions with her about it, but he did not advise her to file a complaint.

[65] Medical evidence was provided by the testimony of the grievor's family doctor, Dr. Icton, and psychologist, Dr. Bannerman. Medical reports were also entered as exhibits. The medical evidence indicates that a very significant change took place in the grievor's personality and with her outlook on life. However, the reports do not indicate that this change necessarily resulted solely from the workplace incident.

[66] The medical evidence notes that the grievor had had issues with anxiety before. And that she began to experience problems in her personal life in the months before the incident that coincidentally escalated significantly and became very serious shortly after it.

[67] The medical reports also note that the grievor's symptoms did not improve as the workplace incident became more distant in time; rather, they seemed to worsen. Initial reports with hopeful prognoses of a speedy recovery became less positive over time.

III. Reasons

A. Scope of grievance 101797

[68] The employer argued that I lack jurisdiction to award damages with respect to grievance 101797 because a request for damages was not made in the original grievance form.

[69] The employer took the position that "… any request to enlarge the scope of this grievance to deal with damages or financial compensation would be contrary to the established *Burchill* principle." It relied on *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), *Boudreau v. Canada (Attorney General)*, 2011 FC 868, *Babiuk v. Treasury Board (Department of Citizenship and Immigration)*, 2007 PSLRB 51, and *Chase v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 9, for this proposition.

[70] I cannot see how requesting damages at adjudication enlarges the scope of the grievance.

[71] The scope of a grievance is defined by the issue or issues it raises. The purpose of the *Burchill* principle is to ensure that grievors do not attempt to adjudicate issues that were not raised during the grievance procedure, thus taking the responding party by surprise. It ensures that the responding party always knows the case it has to meet, which is a well-known principle of fairness and natural justice.

[72] A change to the remedies sought does not necessarily change the nature of the dispute raised by the grievance. The employer knew the case it had to meet. The allegation was clearly stated in the grievance. The employer failed to provide a

harassment-free workplace. That was the same issue presented and argued at adjudication. There was no change in position and no surprises.

[73] Accordingly, I find that the *Burchill* principle does not prevent me from considering a claim for damages in respect of grievance 101797, despite the fact that the claim was first raised at the adjudication stage.

B. Exclusive jurisdiction of the workers' compensation system - grievance 101798

[74] Grievance 101798 alleges that the employer failed to provide WorkSafeBC protection or leave in lieu and bases this on the employer's failure to immediately report to WorkSafeBC and on the grievor using her leave credits until a workers' compensation claim was made and was accepted.

[75] The employer argued that I lack jurisdiction to deal with this grievance as it deals with workers' compensation. I cannot see how these issues would not be within my jurisdiction. The issue is not determining compensation - it is the employer's failure to fill out the forms and submit them in a timely manner.

[76] The allegation that the employer failed to provide WorkSafeBC protection to the grievor is without substance. I accept the employer's evidence that in the case of psychological injuries, it is not always immediately apparent that an injury has occurred. Daniela Evans, a labour relations manager, testified that it is sometimes difficult for employers to speculate as to when an employee's mental state crosses the line between stress and a workplace injury. Mr. Collins testified that he did not initially see it as a workplace injury because very early on in the process, the grievor indicated that she was fit to work in another region but preferred not to be at the Douglas Port. Indeed, she never indicated that she could not work.

[77] Both employers and employees are obligated to report to WorkSafeBC when there is a workplace injury. The grievor had the support of her union president but neither she nor the union completed the forms or asked the employer to. She was in a better position than the employer was to know that a workplace injury had occurred.

[78] It is telling that only when she was advised that her paid leave would soon run out did the grievor and her union advise the employer that they considered the impact of the incident on her to be a workplace injury.

[79] The grievor alleged that because the employer failed to submit the workers' compensation forms in a timely way, she did not have timely access to counselling services. However, she had access to the EAP, which is a 24/7 confidential referral service that includes counselling services. That was brought to her attention immediately after the incident, and she was given the number. After an initial access difficulty, she never indicated to the employer that there was any problem accessing the EAP.

[80] From the date of the incident, the grievor used her leave credits to be absent from work and therefore continued to be paid her full salary. Once WorkSafeBC accepted her claim, her status was changed to being on injury-on-duty leave retroactive to the day after the injury, and her leave credits were fully restored.

[81] As of the date of the hearing, the grievor has been compensated at 100% of her full salary, plus the accrual of vacation and leave benefits. Therefore, this aspect of the grievance is moot.

[82] The employer further argued that I lack jurisdiction to award damages in respect of grievance 101798 because any compensation for a work injury is to be determined exclusively by the workers' compensation system.

[83] The employer noted that the grievor sustained a work injury and filed a claim to that effect. The claim was accepted, and she received compensation for that injury.

[84] Subsection 208(2) of the *PSLRA* prohibits filing a grievance if there is an administrative procedure for redress provided under any Act of Parliament other than the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[85] The *Government Employees' Compensation Act* (R.S.C., 1985, c. G-5; *GECA*) provides an "administrative procedure for redress" within the meaning of the *PSLRA*, which specifically addresses compensation for workplace injuries. It provides that an employee injured in the course of employment is entitled to receive compensation at the rate provided under the laws of the province where the employee works. The compensation payable is determined by the applicable provincial workers' compensation board.

[86] Section 12 of the *GECA* states as follows:

> ***12*** *Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependents to compensation under this Act, neither the employee nor any dependent of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.*

[87] That is the historic trade-off of the workers' compensation system. Workers cannot sue their employer for damages relating to workplace injuries. In exchange for that loss, workers have access to a comprehensive claims adjudication system based on neither the employer's liability nor its ability to pay.

[88] However, that does not mean that I am without jurisdiction to consider a remedy of damages in respect of a grievance about an employer's failure to provide a safe workplace. That is a very different proposition. The grievor provided the following case law with respect to this issue: *Eyerley v. Seaspan International Ltd.*, [2000] C.H.R.D. No. 14 (QL); *Franke v. Canada (Canadian Armed Forces)*, [1998] C.H.R.D. No. 3 (QL); *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35; and *Charlton v. Ontario (Ministry of Community Safety and Correctional Services)*, [2007] O.P.S.G.B.A. No. 4 (QL).

[89] *Charlton* deals with a grievance about racial harassment in the Ontario Correctional Service. Paragraphs 20 to 24 set out the facts in respect of the grievor's workers' compensation claim. Similar to the facts in this case, the grievor in *Charlton* had remained off work continuously from shortly after the incident of racial harassment and had medical documentation to support the absence.
The Workplace Safety and Insurance Board provided the grievor with benefits after concluding that she had suffered mental stress as a result of the incident. As in this case, the grievor in *Charlton* received 100% of her salary.

[90] In *Charlton*, the respondent argued that the exclusive jurisdiction of the workers' compensation system precluded any claim for loss of income but conceded that the possibility of a claim for damages for injured feelings or loss of dignity remained.

[91] At paragraph 14, the Ontario Public Service Grievance Board, chaired by Donald Carter, commented as follows:

> *In this case, the claim is for breach of the contractual guarantee of freedom from racial harassment in the workplace. What occurred here was much more than an 'accident' as defined by the Workplace Safety and Insurance Act, 1997. It was a vicious and hurtful racial slur that not only affected the grievor's health but also caused substantial injury to the grievor's dignitary interest. While the worker's compensation scheme has exclusive jurisdiction over that aspect of her injury dealing with her health, exclusive jurisdiction over this one aspect of her injury does not preclude this Board from dealing with the very substantial injury to her dignitary interest. Indeed, counsel for the employer recognized this distinction, but argued that any compensation for loss of income was related only to the injury to her health and so fell within the exclusive jurisdiction of the workers' compensation regime.*
>
> *The Board does not accept the argument that, where there has been the [sic] breach of the contractual guarantee of freedom from racial harassment in the workplace, that compensation for loss of income relates only to the injury to the victim's health. The jurisdiction of this Board is to compensate the grievor for damage to her dignitary interest as far as can be done by a monetary award….*

[92] I agree with that reasoning and find that the grievor's workers' compensation claim does not oust my jurisdiction to consider her claim for damages for pain and suffering based on damage to her dignitary interest.

C. Grievance 101798 is not adjudicable under s. 209(1) of the *PSLRA*

[93] The employer further submitted that grievance 101798 is not properly before me as it refers only to the employer's obligation to provide workers' compensation and does not allege disguised discipline or a breach of the collective agreement. As a result, the employer argued that it is not adjudicable under s. 209 of the *PSLRA*. I disagree.

[94] Although the grievance does not cite articles of the collective agreement, it does refer to the employer's responsibilities with respect to workers' compensation, leave in lieu, missed overtime opportunities, and compensating the grievor for emotional damages. It is implicit but nevertheless quite clear that the bases for the grievance are the employer's responsibilities towards the grievor. The source of those obligations is clearly the collective agreement, specifically articles 19 and 20. In addition, the grievor also provided a comprehensive statement of particulars. Form should not be allowed to triumph over substance.

[95] This grievance was filed and argued together with grievance 101797, which specifies that it is based on articles 19 and 20 of the collective agreement. The employer responded to both in tandem and has clearly been aware of what the allegations were based on. The employer has waived any right to make this objection.

D. Grievances 101797 and 798: pre-incident conduct and timeliness

[96] The employer objected to considering the pre-incident period as part of the grievance as it is outside of the period stated on the grievance form. The employer's pre-incident conduct is part of the legal test to determine whether it failed to provide a harassment-free workplace. It is only logical that it is necessary to look at events from before the incident to determine whether the employer exercised all due diligence to prevent harassment. I also note that the employer did not raise this issue before the hearing.

E. Failure to provide a harassment-free workplace

[97] The employer acknowledged that the co-worker's action on August 28, 2009, was an act of sexual harassment and that therefore there was a failure to provide a harassment-free workplace. However, as to whether there should be any remedy for it, the employer submitted that it should not be held responsible for the actions of the grievor's co-worker. The employer relies on the due diligence defence set out in s. 65(2) of the *CHRA.*

[98] Subsection 65(2) of that Act deems that any act committed by an employee in the course of employment is an act committed by the employer except if the employer did not consent to it, if it exercised all due diligence to prevent it from being committed, and if it exercised all due diligence to mitigate its effects.

[99] Clearly, the employer did not consent to or condone the actions of the grievor's co-worker on August 28, 2009. All its witnesses indicated that the co-worker's actions were reprehensible and that they were not condoned in any way. The grievor provided no credible evidence to the contrary.

[100] To determine whether the employer exercised all due diligence to prevent harassment in the workplace, I need to consider the workplace atmosphere and what took place before the incident.

[101] The evidence shows that the collective agreement has a no-discrimination clause and a sexual harassment clause, that there are no-discrimination and harassment policies on the CBSA and the Treasury Board intranet sites, and that mandatory training has taken place on these policies. It was stated that the union and the employer cooperated on these issues; for instance, they jointly created a template for anti-harassment workshops at the national level.

[102] There had never been a harassment complaint or grievance in the workplace; nor has the union ever raised harassment as an issue for discussion, either formally or informally.

[103] The grievor did not file a harassment complaint and said that she did not know she could. That evidence was contradicted by her fiancé, who testified that they had discussed the possibility of making a complaint. Nor did she ask to change teams or alter her hours to avoid the co-worker or ask the union for any assistance.

[104] All the witnesses denied seeing harassing behaviour in the workplace, which was 50% female. It emphasized gender balance in the teams and a strong and supportive female presence in management.

[105] However, the evidence also indicates that all the BSOs engaged in banter, which was sometimes sexual, including the grievor. It is also clear that at times, the co-worker's comments were out of step with the kind of banter the others engaged in and that his comments frequently crossed the line.

[106] The testimony suggested that the co-worker's penchant for vulgar sexual banter was well known by the other BSOs in the workplace. As James Ewing, a shop steward, expressed it, bargaining unit members were surprised to hear there was a sexual harassment complaint in the workplace. However, they were not at all surprised to hear that it involved the co-worker.

[107] Management was less aware, but in my view, it knew or ought to have known enough about the co-worker's conduct in the workplace to have initiated a more proactive response.

[108] The grievor testified that she complained several times to Ms. Boulet and Mr. Bernard about the co-worker's vulgar comments before the August 28 incident and that both managers spoke to the co-worker a number of times. However, those

witnesses testified to the contrary. Ms. Boulet stated that the grievor spoke to her only once. Mr. Bernard stated that he never received a complaint and that he never spoke to the co-worker.

[109] However, Ms. Boulet acknowledged that five years had gone by. She was not sure they spoke only once. Rather, she indicated that if it was more than once, she would have filed a report. She deduced from the fact that no written report had been made that only one complaint had been made.

[110] The grievor testified that she told Ms. Boulet that she changed counters to avoid being near the co-worker whenever they worked at the same counter. Ms. Boulet acknowledged that she knew the grievor changed counters to avoid being near the co-worker.

[111] Ms. Boulet was present in the restaurant and witnessed the co-worker's gesture and remarks about a server's breasts. While it was a social gathering away from the workplace, it nevertheless provided corroborating information to Ms. Boulet that the grievor's concerns about the co-worker's inappropriate and vulgar conversations in the workplace might bear some further investigation, particularly given Ms. Boulet's strong reaction to it. Mr. Bernard was also present.

[112] The evidence is contradictory with respect to what the grievor told or did not tell Mr. Bernard. Regardless, as he was one of the BSOs when not acting in a superintendent position, I think it is more likely than not that he was privy to more of the co-worker's comments than other members of management were. And testimony indicated that Mr. Bernard did hear at least some of the comments listed in Exhibit 1.

[113] Mr. Bernard's evidence was that no one ever complained to him about the co-worker. Providing a harassment-free workplace should not be solely a complaint-driven process.

[114] Ms. Boulet testified that there was an open-door policy and that she assumed that if the grievor had wanted to make a complaint, she would have. Again, providing a harassment-free workplace should not be solely a complaint-driven process.

[115] The grievor raised a concern with management at least once. All the witnesses agree to that. And Ms. Boulet immediately spoke to the co-worker, which was an appropriate response. Unfortunately, it was not effective, and no follow-up was done.

[116] Ms. Boulet accepted the co-worker's statement that it would not happen again and felt that the case was closed. No one checked with the grievor or with other members of the bargaining unit to determine if the comments had stopped. A follow-up would have informed management that the comments had not stopped. According to the grievor's testimony, the comments continued and became more frequent.

[117] I have no doubt that management would have recognized that as a warning sign and would have dealt with it. Ms. Boulet's evidence was very clear about that. However, the lack of follow-up meant that management was not aware of the escalation of the conduct. It should have been.

[118] Accordingly, I find that the employer did not exercise all due diligence to prevent sexual harassment from occurring and therefore that it failed to provide a harassment-free workplace.

[119] To determine whether the employer exercised all due diligence to mitigate the effects of the co-worker's actions, I need to consider the evidence with respect to the employer's response to the wedge tool incident. I note the following.

[120] The moment the employer became aware of the co-worker's actions, on the day of the incident, he was suspended and directed to not attend the workplace without authorization and to have no contact with the grievor. He was sent to work a few kilometres away. Ultimately, he received a five-week suspension, and in June 2011, he was deployed to Vancouver Island. He never returned to work at the Douglas Port.

[121] The employer filed a report with the RCMP, and several employees gave statements to the police. However, the RCMP recommended and the Crown agreed that it was not in the public interest to lay charges.

[122] I note the immediate and continuing responses of Chantal Boulet, Kathy Closter, Derek Collins, Kim Scoville, and Blake Delgaty, all of which indicate that management took an extremely serious view of this harassment incident.

[123] I also note that the union's initial response was that management was taking too harsh an approach and that the incident should have been dealt with locally rather than being elevated to the regional level.

[124] Management made sure that the grievor was supported and that she was immediately given the EAP's number, which provides 24/7 access to counselling and assistance. When management was advised that she needed a different EAP number due to her Calgary phone number, Mr. Collins immediately contacted Regional Labour Relations to get her the proper number.

[125] The grievor never indicated that any issue arose later with accessing the EAP. Hence, if she did experience any further difficulty, it cannot be the employer's responsibility. As Mr. Collins explained in his testimony, the EAP provides completely confidential access to employees. The employer does not and should not involve itself beyond providing the contact information.

[126] I find that the grievor was given access to counselling immediately after the incident through the EAP and that therefore her claim to have suffered damage by not having had access to counselling through WorkSafeBC until several months later is not supported by the evidence.

[127] The grievor was given the cellphone numbers of Ms. Boulet, Ms. Closter, and Mr. Collins. The grievor testified that she spoke to Ms. Boulet, Mr. Collins, and Mr. Scoville several times in the weeks following the incident.

[128] The grievor was allowed to take leave as needed but was also strongly encouraged and supported to return to work by Mr. Collins, Ms. Closter, and Ms. Boulet. Boulet and Closter, in particular, were very supportive and gave the grievor the excellent and well-intentioned advice that the sooner she got back to work the better it would be for her and that she should not let the co-worker and his actions negatively affect her career.

[129] This also set a positive tone in the workplace for the grievor's return to work in a supportive environment. A number of bargaining unit witnesses also testified that they offered support to the grievor, telling her that everyone liked her and wanted her back at work.

[130] With respect to the grievor's receipt of a staffing offer for the Port of Sidney in May 2014, Mr. Collins testified that it was sent from a centralized staffing unit by Carla Clifford who, for privacy reasons, was completely unaware of the circumstances between the grievor and the co-worker. It was not sent by Ms. Evans, the local labour

relations manager, or by anyone at the CBSA who was working on the grievor's return to work. Ms. Evans was charged with ensuring that no referrals from the Pacific Region were sent to the grievor. The evidence was that over 80 potential referrals were caught before being sent out.

[131] The email was not a deployment offer; it was merely an invitation to express interest, which is part of a standard practice at the CBSA to facilitate placing priority appointments across the country. It was not at the same location where the co-worker worked, as the grievor alleged, but rather was a port some two hours away.

[132] It was sent to the grievor almost five years after the incident by someone who had no idea of her situation and who ought not for privacy reasons to have had any idea of her situation.

[133] If it was not of interest, the grievor could have simply ignored it. The suggestion that the employer acted in a wilful and reckless fashion by sending it is not supported by the evidence.

[134] The grievor also suggested that the employer harmed her by sending out the Morning Media Clip. It is understandable that she would not have wanted that article widely read at the workplace. However, she had filed a court action. Court documents are public, and the article was published in the Vancouver Sun. The fact that it was picked up by the automated clipping service is unfortunate, but the suggestion that it was a wilful or reckless act of the employer is not supported by the evidence.

[135] Applying the three-part test set out in s. 65(2) of the *CHRA*, I find that the employer did not condone the co-worker's actions and that it exercised all due diligence to mitigate the effects of those actions. However, in my view, it did not exercise all due diligence to prevent the occurrence of harassment in the workplace.

IV. Remedies requested

[136] As indicated, I find that I have jurisdiction to award damages in this matter, whether pursuant to grievance 101797 or 101798. However, I find that no damages are warranted.

[137] The grievor referred me to several tribunal decisions that suggest the kind of analysis required to determine the appropriateness of an award of damages.

[138] Adjudicator Pineau set out as follows some factors to consider in *Pepper v. Deputy Head (Department of National Defence)*, 2008 PSLRB 71 at para 21:

> *[21] The adjudicator's decision to fashion an appropriate remedy is a discretionary one. It is left to the adjudicator to adopt a balanced approach, taking into account* ***the character of the violation of the grievor's rights and his other particular circumstances at the time of the violation****.*

[139] At paragraph 30 the adjudicator cites s. 54 of the *CHRA* which sets out a number of factors to consider in determining an appropriate amount of compensation – the nature, circumstances, extent and gravity of the discriminatory practice, the willfulness or intent of the person who engaged in the discriminatory practice and any prior discriminatory practices that the person has engaged in.

[140] Adjudicator Paquet, in *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 110, looked at cases in which damages had been awarded. At paragraph 36, he stated the following:

> *[36] When analyzing the eight decisions referred to by the parties … it became apparent that most of them do not include a detailed analysis of the rational [sic] used by the Tribunal or the adjudicator to arrive at the specific amount ordered for pain and suffering and for special compensation, if applicable. However, it is clear that* ***the seriousness of the psychological impacts that discrimination or the failure to accommodate had on the complainants or the grievors*** *is the main factor that justified each decision. It is also clear that recklessness rather than wilfulness was the principal ground used to grant special compensation to the grievors ….*
>
> [Emphasis added]

[141] The Canadian Human Rights Tribunal, in *Bouvier v. Métro Express*, [1992] C.H.R.D. No. 8 (QL), had this to say on page 17, at the second paragraph:

> *The tests to be applied in assessing compensation for the psychological damage inflicted on a victim of sexual harassment, for which provision is made in para.53(3)(b)* C.H.R.A.*, were set out in 1982 by Peter A. Cumming in an Ontario case which has been followed since that time:* Torres v. Royalty Kitchenware Ltd. *(1982), 2 C.H.R.R. C/858, para. 7758. Account must be taken of* ***the nature of the harassment (verbal or physical), the degree of insistence or of physical contact, the duration of the harassment, the frequency of the acts, the age of the victim, the***

> ***vulnerability of the victim and the psychological impact of the harassment on the victim.***
>
> [Emphasis added]

[142] By all accounts, the grievor was a confident employee who handled the work easily and had aspirations of joining the management team. She was well-liked by the other BSOs and engaged in friendly banter with them, including the co-worker. Sometimes that banter had sexual content. She was outgoing, and she socialized outside the workplace with the co-worker and others. She worked in a half-female environment with a strong and supportive female presence in management. She liked and respected her superintendent. The grievor was not a vulnerable employee, and the co-worker was not someone who had power over her in the workplace.

[143] There were steps that a confident employee like the grievor could have taken, such as asking to switch teams and clearly outlining her concerns to management, or making a formal complaint. The fact that she did not suggests to me that the pre-incident comments, as crude as they were, did not create a work environment as difficult to cope with as the grievor now describes it.

[144] The wedge tool incident was a vulgar prank and undoubtedly humiliating in the moment. However, it seems unlikely, to say the least, that it caused the extreme emotional impact described by the grievor and her partner.

[145] The act was immediately followed by the co-worker apologizing repeatedly when he saw the grievor's reaction and asking her multiple times not to get him fired. The co-worker evidently quickly realized that he had crossed a line and was likely to lose his job if the grievor told management. This is telling in and of itself of the degree to which sexual harassment was not wilfully tolerated in the workplace. The co-worker is clearly not a person of good judgment, yet after impulsively carrying out a grossly immature and appalling prank, he realized very quickly that the consequences would be harsh.

[146] There is no doubt that the grievor was angry and that she felt demeaned. However, given all the evidence before me, I cannot make a finding that this one unpleasant experience caused a sea change in the grievor's personality and lifestyle from confident, cheerful, and outgoing to timid, anxious, and fearful.

[147] I also cannot conclude that this experience rendered the grievor unfit to work at the Douglas Port for five-and-a-half years as of the date of the hearing, since the co-worker has not been there since the date of the incident and has been on Vancouver Island since June of 2011. The grievor indicated throughout that she was able to work, just not at the Douglas Port, despite the absence of the co-worker from the date of the incident and despite the support and encouragement of management and her co-workers in the bargaining unit.

[148] I think that the grievor's reaction was extreme and that the pain and suffering that she feels she incurred as a result of the co-worker's act is grossly exaggerated. The medical evidence indicates that she was undergoing a serious personal situation of emotional trauma, which began in the months before and escalated very significantly shortly after the incident. In some of the medical reports, she attributed much of her ongoing anxiety to those other issues in her personal life.

[149] However, at the hearing, the grievor chose to attribute all of her ongoing emotional damage to this one act of the co-worker, which happened more than five years ago. Both common sense and the medical reports suggest otherwise.

[150] The grievor sought to strengthen her case for damages by highlighting certain of the employer's actions after the incident and by alleging that they were wilful and reckless acts that further harmed her; for example, the allegations about the incident video, the Morning Media Clip, and the staffing offer to the Port of Sidney.
As indicated, the evidence does not support that the employer acted wilfully or recklessly with respect to any of those issues. To the contrary, in my view, its post-incident actions were exemplary.

[151] It is unfortunate that the employer was not more proactive when faced with warning signs, as it seems likely that this incident might have been prevented had effective action been taken early on with respect to the co-worker.

[152] However, in my view, a case for damages due to this failure has not been made. The grievor's extreme reaction, which continued and worsened over the years, simply cannot, on the evidence, be attributed to the co-worker's act or to the employer's post-incident response.

[153] I further find that the employer has policies in place and that it is aware of its obligations. Although it should have dealt with the co-worker's verbal comments more effectively, the swift and decisive response to the physical incident, as well as the support offered to the grievor, persuades me that no further order is required with respect to the need to provide a harassment-free workplace.

[154] In addition, the employer already provides harassment training in the workplace. However, given the lapse in prevention illustrated in this case, I am prepared to order the employer to ensure that training take place regularly and to ensure that management training contains a special emphasis on awareness, proactive intervention, and prevention.

V. Confidentiality order

[155] The Board published its "Policy on Openness and Privacy" on its website. It acknowledges that hearings before the Board are open to the public. It states as follows:

…

> *The open court principle is significant in our legal system. In accordance with this constitutionally protected principle, the Board conducts its hearings in public, save for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability and fairness in its proceedings.*
>
> *… Parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them, including the public availability of decisions. Parties and their witnesses are subject to public scrutiny when giving evidence before the Board, and they are more likely to be truthful if their identities are known. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.*

…

[156] However, the policy acknowledges, as follows, that in some instances, mentioning an individual's personal information during a hearing or in a written decision may affect an individual's life:

…

> *In exceptional circumstances, the Board departs from its open justice principles, and in doing so, the Board may grant requests to maintain the confidentiality of specific evidence and tailor its decisions to accommodate the protection of an individual's privacy (including holding a hearing in private, sealing exhibits containing sensitive medical or personal information or protecting the identities of witnesses or third parties). The Board may grant such requests when they accord with applicable recognized legal principles.*
>
> …

[157] The *Dagenais/Mentuck* test is the relevant test to consider for protecting information or exhibits; see *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835. The test is, essentially, to ask whether the order is necessary to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk. And to further ask whether the salutary effects of the order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, which would include the effects on the right to free expression and the public interest in open and accessible court proceedings.

[158] In light of that test, I find that information in some of exhibits entered into evidence is not relevant to transparently understanding this decision. The privacy interests of the grievor, the co-worker, and several third parties mentioned in them outweigh the value that exposing this information would contribute to the open court principle.

[159] I order the parties to redact from the exhibits any highly sensitive personal or medical information of the grievor, the co-worker, or any third party that is not relevant to transparently understanding this decision. I further order the parties to remit the redacted versions of the exhibits to the Board within two weeks of the date of this decision. To enable the parties to complete this process, the Board will temporarily seal its files for a period of one month.

[160] It is my view that this order is the least-intrusive measure to balance the public's right to open and accessible proceedings with the protection of the privacy of individuals who are directly or indirectly involved in this proceeding.

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

(The Order appears on the next page)

VI. Order

[162] Grievance 101797 is upheld in part.

[163] Grievance 101798 is dismissed.

A. Confidentiality order

[164] The parties must prepare a copy of the exhibits in which any personal or medical information of the grievor, the co-worker, or any third party that is not essential to the transparency of the decision has been redacted. The parties must provide the redacted versions of the exhibits to the Board within two weeks of the date of this decision.

[165] When the parties provide the redacted versions to the Board, its registry will contact counsel and determine whether the versions of those documents already in the Board's possession should be returned to the parties or destroyed.

[166] The files and exhibits are to be sealed for a period of one month from the date of the decision.

May 19, 2017.

Michael F. McNamara,
a panel of the Public Service Labour Relations and Employment Board