Date: 20240215

Files: 566-02-13810, 13811, and 13812

Citation: 2024 FPSLREB 21

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

MICHELE REMILLARD

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs, Trade and Development)

Employer

Indexed as
Remillard v. Treasury Board (Department of Foreign Affairs, Trade and Development)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Dejan Toncic, Professional Institute of the Public Service of Canada

For the Employer: Amanda Bergmann, counsel

Heard via videoconference,
April 21 and 22 and December 5 to 7, 2022.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Michele Remillard ("the grievor") was, at all times relevant to the facts in this decision, employed by the Treasury Board (TB or "the employer") and working for Global Affairs Canada (GAC) as a contracting specialist, or contracting advisor, classified in the Purchasing and Supply (PG) group at the PG-04 group and level in Ottawa, Ontario.

[2] At the relevant time, her terms and conditions of employment were partially governed by a collective agreement between the TB and the Professional Institute of the Public Service of Canada (PIPSC or "the union") for all employees in the Audit, Commerce and Purchasing group that was signed on December 14, 2012, and that expired on June 21, 2014 ("the collective agreement").

[3] On December 18, 2014, the grievor filed a grievance that has become Board file no. 566-02-13810 and that states as follows ("the accommodation grievance"):

…

> *GRIEVANCE DETAILS …*
>
> *I grieve that the employer has failed to fulfil its duty to accommodate me up to the point of undue hardship and in a timely manner; contrary to the no discrimination clause of my collective agreement (article 43) as well as any and all other related or applicable articles, acts and policies.*
>
> *CORRECTIVE ACTION REQUESTED …*
>
> *That the employer offer me an adequate and timely plan of accommodation;*
>
> *That the time I took in sick leave be restored to me;*
>
> *Any other relief necessary to remedy the situation;*
>
> *To be made whole in every way*

…

[4] On January 9, 2015, the grievor filed a grievance that has become Board file no. 566-02-13812 and that states as follows:

…

> *GRIEVANCE DETAILS …*

> *I alleged that I have been deployed without my consent, contrary to section 51 of the Public Service Employment Act (PSEA)*
>
> *I do not accept the new position of Contracting Advisor within the SPP section;*
>
> *That work is not commesurate with my education or experience;*
>
> *It should be noted that initially, I only agreed to try AACR with a written guarantee to return to my substantive if it didn't suit me.*
>
> *CORRECTIVE ACTION REQUESTED …*
>
> *To be offered a position commesurate with my education and or experience.*
>
> *Any other relief deemed necessary to remedy the situation.*
>
> *To be made whole in every way.*
>
> …
>
> [*Sic* throughout]

[5] On November 1, 2016, the grievor filed a grievance that has become Board file no. 566-02-13811 and that states as follows ("the leave grievance"):

> …
>
> *GRIEVANCE DETAILS …*
>
> *I grieve the employer's failure to provide me with a flexible working arrangement*
>
> *I grieve the employers* [*sic*] *failure to grant me leave with pay for various entitlements under my collective agreement.*
>
> *CORRECTIVE ACTION REQUESTED …*
>
> *To be made whole.*
>
> …

[6] It became clear during the course of the hearing that the grievor was intimating that her use of the phrase "flexible working arrangement" in the grievance in Board file no. 566-02-13811 meant failure to accommodate. As such, in the "Reasons" section of this decision, I will address that allegation under a global heading of the alleged failure to accommodate and will reference both Board file nos. 566-02-13810 and 13811.

[7] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service*

Labour Relations Act to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), and the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2).

[8] With respect to the grievances, I find that the grievor has not established a violation of the collective agreement or that she was discriminated against by the employer based on a disability, and as such, for the reasons that follow, the grievances are dismissed.

II. Summary of the evidence

A. Background information

[9] The parties submitted a joint book of documents (JBD).

[10] At the time of the hearing, the grievor was still employed by the TB; however, her exact position and work location were not clear. The grievor testified that she joined the federal public service in 2008 as a senior procurement officer; however, in cross-examination, she identified her work description, which identified her position as a contracting specialist. The witnesses often used the term procurement officer rather than contracting specialist; however, nothing turns on this distinction. The grievor said that she initially started at the Department of National Defence; however, she moved to the Royal Canadian Mounted Police (RCMP) sometime between 2008 and 2013, the exact details of which were not provided to me.

[11] On April 17, 2013, the grievor was deployed from the RCMP to GAC, into the Contracting Policy, Monitoring and Operations unit, often identified in the evidence as the "SPP". While I heard conflicting evidence about how and why the grievor moved from the RCMP, those reasons are not relevant to the issues that I have to decide.

[12] At the time of the hearing, Tony Varriano was retired. At the times relevant to the matters at issue in the hearing, he was the director general of corporate procurement, which was responsible for the SPP. He joined GAC and the SPP in 2009.

[13] At the time of the hearing, John Biard was retired. At the times relevant to the matters at issue in the hearing, he was the director of the SPP. He joined GAC and the SPP in 2009. He reported to Mr. Varriano.

[14] At the time of the hearing, Cindy Bristow was the director of the SPP. At the times relevant to the matters at issue in the hearing, she was a manager in the SPP, and during some of those times, the grievor reported to her. She in turn reported to Mr. Biard. Between November of 2013 and November of 2014, she was on leave.

[15] At the times relevant to the matters at issue in the hearing, Catherine Désormeaux-Dufour was a senior advisor in the GAC Labour Relations (LR) unit. She was actively involved in matters relating to both the accommodation and leave grievances.

[16] At the times relevant to the matters at issue in the hearing, Roselyne Daoust was an LR advisor at GAC and was also actively involved in matters relating to the accommodation grievance.

[17] At the times relevant to the matters at issue in the hearing, Dejan Toncic was employed by the union and represented the grievor in the dealings she had with the employer, specifically with members of management and LR. In addition, Mr. Toncic represented the grievor at the hearing.

[18] None of Mses. Désormeaux-Dufour and Daoust or Mr. Toncic testified.

[19] At the times relevant to the matters at issue with respect to the accommodation grievance, the Sun Life Assurance Company of Canada (“Sun Life”) held the contract for providing employee disability insurance (DI) for the employer.

[20] At the times relevant to the matters at issue with respect to the accommodation grievance, Andrea Campbell and Celine Cochrane appeared to be in the employ of Sun Life. Ms. Campbell was identified as a health management consultant in group disability, and Ms. Cochrane was identified as an abilities case manager. From the correspondence contained in the JBD and the evidence of Mr. Biard and the grievor, they were the people at Sun Life who appeared to be involved in managing the grievor’s disability benefits and return to work. Neither Mses. Campbell nor Cochrane testified.

[21] When the grievor joined the SPP, it was responsible for domestic purchasing for GAC, although there was some suggestion that it was also responsible for some purchasing outside the country. The exact nature of the purchasing, however, is not germane to the issues that I must decide.

[22] Shortly after the grievor joined the SPP, it became apparent that she and Ms. Bristow were, for want of any better words, having issues. While I heard and saw a significant amount of evidence about what appears to have been the catalyst for the initial difficulty between the two of them, it is not relevant to the issues that I must decide. What the evidence did disclose is that almost from the start of her tenure at the SPP, the grievor and the SPP seemed to be a bad fit. The testimony of the grievor largely laid the blame for her difficulties at the doorstep of the employer, and in particular Mr. Biard and Ms. Bristow, while the evidence led by the employer largely pointed to the grievor's difficulties being caused by her.

[23] The accommodation grievance deals with an allegation of a failure to accommodate related to a disability. Clause 43.01 of the collective agreement is the portion relevant, and it states as follows:

43.01 *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status, mental or physical disability, conviction for which a pardon has been granted or membership or activity in the Institute.*	***43.01*** *Il n'y a aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire exercée ou appliquée à l'égard d'un employé du fait de son âge, sa race, ses croyances, sa couleur, son origine ethnique ou nationale, sa confession religieuse, son sexe, son orientation sexuelle, sa situation familiale, son état matrimonial, son incapacité mentale ou physique, une condamnation pour laquelle l'employé a été gracié ou son adhésion au syndicat, ou son activité dans l'Institut.*

B. The period from January 2014 through April 2015

[24] Entered into evidence was an email chain dated January 29, 2014, which included the grievor, Mr. Biard, and Amy Muldoon, whom Mr. Biard identified as someone who, at times, supervised the grievor. The topic of the email chain was a request by the grievor to work from home or "telework". In cross-examination, the grievor admitted that the request was not an accommodation request for telework.

[25] The grievor's family physician is Dr. Tracy Burgess. A series of notes signed by Dr. Burgess were entered into evidence. None of Dr. Burgess's clinical notes or records were entered into evidence; nor did Dr. Burgess testify. At times, in the correspondence, there is a generic reference to the grievor's "doctor" or "family doctor" or "family physician" without using Dr. Burgess' name; however, the grievor indicated that Dr. Burgess was her physician and did not reference any other family or personal doctor. However, the grievor did say that she had seen other doctors, but no names were ever disclosed to the hearing; nor were there any documents produced at the hearing that had been authored by any other doctor.

[26] Entered into evidence was a note from Dr. Burgess dated March 3, 2014 ("the March 3 note"), and addressed "To Whom It May Concern", and all it stated was that "Michele requires accomodation [*sic*] for tele-working for medical reasons for a 3 month trial to be re-assessed in May 2014". No restrictions or limitations were identified by Dr. Burgess in the note. I neither heard nor saw any evidence as to what medical reasons Dr. Burgess suggested that required the grievor to telework. Indeed, the grievor testified that she never disclosed her medical situation to the employer at that time or up to and including the hearing. The grievor did not disclose any health restrictions or limitations in her evidence.

[27] Entered into evidence was an email chain dated March 5, 2014, which included the grievor forwarding the March 3 note to Mr. Biard and referencing a meeting with him to discuss the issue. Mr. Biard responded to the grievor that day, and they exchanged two further emails that day in which Mr. Biard asked the grievor for a plan (the gist of which was determining what work could and could not be done at home). While the grievor said that she followed up with providing a plan, no written plan was in the JBD, and none was produced into evidence. In cross-examination, the grievor was asked if she had any documentary evidence of a plan, to which she stated that it was either in her emails or the departmental emails or she would have to make an access-to-information request. She agreed that she did not produce a detailed plan as part of the documentary production for the hearing of this grievance; nor did she point to one in the JBD.

[28] Mr. Biard said that he saw the March 3 note but that it was vague and that it was difficult to determine what the grievor could or could not do. He said that he did not know what tasks could or could not be done or if there was a limit to the types of

tasks or anything, including the times she could or could not work. He said that he asked the grievor for a work plan but that she was reluctant to provide one.

[29] Mr. Biard testified that shortly after the March 3 note and his exchanges with the grievor, she began reporting to Olivier Caron in the "AACR" unit, which was referred to as the "Platforms Branch". When asked in cross-examination if she worked there as a contracting specialist, the grievor responded with this: "I won't say yes or no." She said that she thought she was working as an AS-05. Mr. Biard stated that the Platforms Branch did procurement but different from what the SPP was doing. The specifics of the differences are irrelevant for the issues that I have to determine. Mr. Biard's recollection was that the grievor was working at the Platforms Branch at her AS-04 group and level. Mr. Biard did state that he recalled the grievor going to another part of GAC in an acting AS-05 position but that it was for a short time, and it did not work out. He said that he had no information about the grievor either asking for telework with Mr. Caron in the Platforms Branch or with respect to the AS-05 position.

[30] On Monday, June 9, 2014, at 06:19, the grievor emailed Mr. Caron and stated that she was sick and that she would not be in the office. Mr. Caron emailed her in reply at 07:35 and said, "OK Take care and see you soon." On Tuesday, June 10, 2014, at 06:44, the grievor emailed Mr. Caron and stated this: "I will not be in today, I need another day to shake a bug I caught over the weekend. I should be back in the office tomorrow." Mr. Caron emailed her in reply at 07:30 and simply said, "OK".

[31] In cross-examination, the grievor was brought to the June 9, 2014, email and was pointed to the fact that she was off work sick that day. Her reply was this: "Yes, I asked to go back to SPP job on that day." There is no documentation that references the grievor going back to her position at the SPP on that day. In cross-examination, the grievor was then brought to the June 10, 2014, email that she sent, which referenced shaking a bug that she caught over the weekend, and she stated this: "Yeah, I didn't know what I was going to do. I took time to reflect. I took three months off to deal with my legal issues."

[32] It was then put to her by counsel for the employer that she said that she had a bug but that she did not, to which she said, "Yes, that was a ruse to buy time." Counsel then put to her that she did not tell the managers that, to which the grievor said this:

"Absolutely not; I didn't know what to do, so I wanted to shake my mental health bug. How's that?"

[33] Entered into evidence was a note from Dr. Burgess dated June 12, 2014 ("the June 12 note"), which said only this: "This patient was totally disabled on Friday, June 13, 2014 and I estimate through to Thursday, July 24, 2014."

[34] On June 30, 2014, Mr. Toncic wrote to the employer, stating he had been contacted by the grievor with respect to potentially being able to telework or be reassigned to another division. There was a response from the employer and further back and forth; however, nothing appeared to come of it.

[35] Entered into evidence was a note from Dr. Burgess dated July 22, 2014 ("the July 22 note"), which said only this: "This patient was totally disabled on Tuesday, July 22, 2014 and I estimate through to Sunday, August 31, 2014."

[36] The grievor testified that she thought that she was able to return to work on September 5, 2014. Entered in evidence was an exchange between Mr. Toncic and Ms. Désormeaux-Dufour with respect to the grievor returning to work and teleworking. Mr. Biard said that at this time, the grievor had been off work for a few months, and that management was trying to figure out how to accommodate her. He said that it felt that it did not have the tools to deal with it, as there was no information from her doctor, and management did not have a feeling for what the issue was that was to be accommodated. He said that he thought that perhaps an evaluation by Health Canada would help. He described the grievor as stressed, unhappy, and bitter. He said that working from home was convenient but that he was not sure that it was an accommodation or that the quality of her work or behaviour would be satisfactory. He said that management was not clear on it being a solution and that it needed some guidance.

[37] The grievor sent an email dated September 8, 2014, to Mr. Biard ("the Sept. 8 email"), which stated the following:

…

> *Please excuse my oversight by engaging labour relations too late last week.*
>
> *I had misplaced my medical ccertificate* [*sic*] *and believed my return was scheduled for the fourth of September, I engaged Dejan*

> *in advance of what I thought was my return to work, for the one day, (Friday) as discussed with my doctor, before she left for holiday.*
>
> *Given that I am not permitted to return to work without a certificate demonstrating my capacity, I plan to meet with my doctor upon her return (15th of September) and will provide all necessary documentation to the occupational health group as requested.*
>
> …

[38] In her examination-in-chief, the grievor was brought to the Sept. 8 email. She said that her doctor had left on holiday and that she did not have a note; however, she said that she met with her doctor on September 15, 2014, to prove that she was fit. In cross-examination, she was again brought to the Sept. 8 email, and she said that she went to her union representative and that the certificate she referred to in the Sept. 8 email was a note dated the end of August (of 2014). When she was asked why she did not reach out to management, she suggested that she did with Mr. Caron and that she would have to pull up the document. When it was suggested that she did not provide this information as part of the disclosure process, she would not agree; however, when it was put to her that there was nothing in the JBD about reaching out to Mr. Caron, in this respect, she agreed.

[39] There were no documents in the JBD that suggested that she had reached out to Mr. Caron at this time or any note from Dr. Burgess dated in or about the end of August.

[40] Entered into evidence was a letter dated September 12, 2014, and sent by LR to Dr. Burgess ("the Sept. 12 request"), the relevant portions of which state the following:

> …
>
> *The Department of Foreign Affairs, Trade and Development Canada (DFATD) is committed to supporting employees to maintain their health, and to recover from illness or injury when it occurs, and are respectful of the principles articulated in Canadian Medical Association policies on the physician's role in supporting ill or injured employees. We strive to enable employees to remain at work, by accommodating their needs, or to return to work as soon as it is medically appropriate in order to facilitate their recovery and maintain their connection to the workplace. As Ms. Michele Remillard's doctor, your observations and advice are crucial to ensure a successful recovery and return to work.*

> *Ms. Remillard has been away on medical leave since July 22, 2014. According to the last medical note we have on file, Ms. Remillard was estimated to remain off work for medical reasons until August 31, 2014. On September 2, 2014, Ms. Remillard informed the Department that she would be ready to return to her duties on September 5, 2014. In addition, she indicated she would provide a medical note to her manager recommending that she works from home or, in the alternative, report to another division than her home division (i.e. the Contracting Policy, Monitoring and Operations Division). However, Management has no information on Ms. Remillard's functional abilities at this point in time and is not in a position to appropriately assess Ms. Remillard's accommodation request. Therefore, prior to reintegrate* [*sic*] *Ms. Remillard in the workplace, Management has requested that Ms. Remillard provide additional information from her doctor with regard to her ability to return to work and her functional abilities to ascertain that she is fit to return to work and determine, if applicable, the accommodations measures that could be put in place to facilitate her return while enabling her to effectively perform the duties of her position.*
>
> *To this end, I am writing to you to request that you complete the enclosed* Functional Capacity for Return to Work Form. *We request that you complete the form with a view to providing as much information as necessary to specify Ms. Remillard* [*sic*] *functional limitation(s) and restriction(s). We would also request, for each limitation and restriction, that you specify the duration of the limitation. This information will enable us, in collaboration with Ms. Remillard, to establish a reasonable accommodation plan (e.g. modified/alternate duties and/or work schedule, gradual return to work, adjustments to equipment), if applicable, and ensure a healthy, safe and supportive work environment. For your convenience, I am also including a copy of Ms. Remillard's work description which provides additional details on the duties and requirements related to her position. If you notice any duties that you think would not be compatible with Ms. Remillard's medical limitation(s) or restriction(s), please indicate these in section B1 and B2 of the* Functional Capacity for Return to Work.
>
> ***Please do not include any diagnostic or treatment information (including medication).*** *If you require additional information in order to complete the form (e.g. specialist referral(s), diagnostic tests, laboratory analysis, etc.), please complete the form to the best of your ability and advise when this additional information may be available.*
>
> …
>
> [Emphasis in the original]

[41] The copy of the Sept. 12 request entered into evidence disclosed that it was copied to both the grievor and Mr. Biard and that it had attached a copy of the "Functional Capacity for Return to Work Form" and the grievor's work description.

[42] Entered into evidence was a copy of a fax cover sheet from Dr. Burgess to LR dated October 2, 2014, which had attached six pages of the Functional Capacity for Return to Work Form completed and signed by Dr. Burgess on October 1, 2014 ("the Oct. 1 RTW form"). It appears that Dr. Burgess saw the grievor on September 19, 2014. The Oct. 1 RTW form stated that the grievor could return to work gradually as follows:

- 25 hours per week for 3 weeks;
- 30 hours per week for 2 weeks;
- 35 hours per week for 2 weeks; and
- a return to full-time hours after that.

[43] The Oct. 1 RTW form further indicated no specific return-to-work date, instead stating, "whenever you are able to accomodate [*sic*] her needs"; however, it did not identify any physical limitations. The Oct. 1 RTW form has a section titled, "Other Limitations". In it, there is a list of 15 identified issues that have space next to them for a doctor to write something about. Next to the issues of sight, speech, hearing, ability to provide supervision, and chemical exposure, Dr. Burgess wrote "N/A", which I have taken to mean "not applicable". Next to the issues identified as remember and apply information, attention to detail, dealing with deadlines, exercise judgment, exercise appropriate behaviour, dealing with clients, and multiple tasks, Dr. Burgess placed a check mark. I understand this to mean that there might have been some issue relating to them; however, no specifics are set out.

[44] Next to the issue identified as dealing with the public, Dr. Burgess wrote "N/A", but then there is an arrow, and it states, "except she is agreeable to deal with the public (limited number of people) as per her job description". Next to the issue identified as ability to receive supervision, there is an arrow, and it states, "She would appreciate an appropriate supervisor". Next to the issue identified as environmental exposure (e.g., heat, cold, noise, or scents), Dr. Burgess wrote, "She requires a quiet work environment where she is solitary."

[45] On the Oct. 1 RTW form, in the section titled "B3 – Treatment", Dr. Burgess answered the question, "Are assistive / ergonomic devices required as a result of the condition", by stating, "Please provide a solitary quiet work environment which would improve her ability to focus". In the section that asks about a follow-up scheduled appointment with the grievor, Dr. Burgess wrote, "sometime in Oct/Nov".

[46] When the grievor was brought to the Oct. 1 RTW form, she identified the document, and when her representative asked her about what happened following the submission of the document, she stated that she was not permitted to return to work. When her representative asked what reason was given, she said that she could not recall. When asked by her representative what happened after that, her answer was as follows:

> *It was seven years ago. I can't remember. I wanted to go back to work. We kept going to mediation. I recall something in December. I recall a letter with respect to reorganization. I recall saying I want to go back to contracting. I recall not having a position. I recall a quick ten minute meeting.*

[47] Entered into evidence was a copy of the consent to the Functional Capacity for Return to Work Form, which was filled in by the grievor. It was signed by the grievor and Dr. Burgess on September 19, 2014 ("the Sept. 19 consent"). The grievor wrote on the bottom of the document the following: "I DO **NOT** Authorize the release of **any** iNfornation contained within to John Biard and Josephine Dahan * nor any supervisor" [*sic* throughout] [emphasis in the original].

[48] In cross-examination, the grievor was brought to the Sept. 19 consent where it referenced the information not being shared. The grievor said that she wanted none of her personal information shared with supervisors; sharing with Human Resources (HR) was okay, but not with managers or supervisors, and it was none of their business why she was off work. When counsel for the employer put it to the grievor that the employer had to access the information in the Oct. 1 RTW form to devise a return-to-work plan, the grievor disagreed, stating that LR might, and then she stated that Mr. Toncic asked her that the week before the hearing, and she said that she "refused access to this day!"

[49] On October 9, 2014, at 09:12, Ms. Désormeaux-Dufour emailed Mr. Toncic, stating the following:

> …
>
> *Were you able to talk to Michèle to obtain her consent so that we can share the information we obtain from her doctor with her managers?*
>
> *According to the medical form, Michèle is fit to return to work at the moment. It is important that Michèle provides us with her*

> *consent as soon as possible so we can plan for her return and start developing an accommodation plan. I think it is also important that she understands that if she refuses to provide her consent, Management would not be in a position to reintegrate her at work and develop an appropriate accommodation plan. Consequently, she would fall in a situation of unauthorized leave.*
>
> *Grateful if you could let us know when we can expect to receive Michèle's consent.…*
>
> …

[50] Mr. Toncic replied to Ms. Désormeaux-Dufour at 09:35 that same day, stating the following:

> …
>
> *I have spoken to Michele and she confirms that she will consent to having* ***senior*** *management obtain the medical information, that is, Mr. Baird's* [*sic*] *principals.*
>
> *She has informed me that she has been advised prior to her taking leave on June 11th that her request for telework would be denied and therefore she is reluctant to share her personal information with either Mr. Baird* [*sic*] *or Ms. Dahan.*
>
> *That said, she advised that she will be providing you today with another consent form delivered in person.*
>
> *Perhaps her views have changed since our conversation of yesterday and once you obtain her second consent form, please do contact me to discuss its contents.*
>
> …
>
> [Emphasis in the original]

[51] The grievor was brought to Ms. Désormeaux-Dufour's email to Mr. Toncic dated October 9, 2014, and when she was brought to the section about management not being able to reintegrate her, the grievor said that she had "nothing to do with this correspondence!"

[52] Entered into evidence was a further consent form signed by the grievor and dated October 9, 2014 ("the Oct. 9 consent"). On this form, she deleted the reference to sharing information from the Oct. 1 RTW form with her director, manager, and supervisor and instead wrote, "(EX-2) EXECUTIVE DIRECTOR OR HIGHER xunder **no** circumstances to be shared w/my immediate report/or +Direction" [*sic* throughout] [emphasis in the original].

[53] When the grievor was shown the Oct. 9 consent, she said that she agreed that she would provide another consent form but that she would not agree to pay for it. It was put to her on cross-examination that she maintained that the information not be shared with her immediate supervisor and director, to which she said that she did; she said that she felt that she was being treated improperly and then suggested that "someone should have ethics" and that she "was not comfortable providing any information."

[54] It was at this point in the cross-examination that the grievor was brought to the Oct. 1 RTW form, and when asked if it was from the grievor's doctor, the grievor said that it was and that she was seeing this doctor regularly as well as other doctors. She did not identify any other doctors. When counsel then asked about the regularity, the grievor first said twice a week and then corrected herself and said biweekly. She then referred to having a folder that she received from the doctor the week before the start of the hearing as sitting behind her in the room she was testifying from.

[55] At this point, counsel for the employer submitted to me that she had made a request of the grievor for the disclosure of medical information as well as the grievor's Sun Life file for the period from June of 2013 to November of 2016. The grievor immediately interjected and said that she told Mr. Toncic, "no way!" Counsel for the employer stated that Dr. Burgess's medical file on the grievor was never produced to the employer, and when it made the request, it was told that no further medical information would be forthcoming and that the information it had in its possession would be all that it would have access to.

[56] During the course of 2014, the exact dates not being clear or particularly relevant, GAC undertook a review of the way in which procurement services were being provided. Both Messrs. Biard and Varriano testified about this review and the changes that followed. The process was called the "Procurement Modernization Initiative" and was sometimes referred to as the "PMI".

[57] Without getting into detail, the result of the PMI was to change the way procurement was carried out at GAC. The evidence disclosed that the reorganization was to occur in early 2015 and that as part of it, some employees were to have a change made to some of the tasks that they were assigned. In his testimony, when asked how the changes were to affect the PG group, Mr. Varriano stated that there were

to be large-scale changes. He said that after consulting the unions and HR, it was determined to carry out a workforce adjustment (WFA) and provide all the PGs with guaranteed reasonable job offers at their same group and levels in the new structure. The changes that were to happen in this respect were to affect the grievor and her position.

[58] Mr. Biard described the changes of the PMI as shifting away the procurement that the SPP was doing and sending it to the Platforms Branch. He stated that procurement officers in the SPP were to either stay with the SPP in a slightly different role or move to the Platforms Branch.

[59] Entered into evidence was a copy of an emailed memo sent by Mr. Biard to the PG community at GAC, dated October 16, 2014. The memo stated as follows:

> …
>
> *As discussed at the last Information session for procurement and material management employees held on October 1st, we are preparing for the reorganization of the department's procurement function.*
>
> *Listed below are a number of factors that will be taken into account when assigning employees to new positions:*
>
> - *current responsibilities and level;*
> - *experience and qualifications;*
> - *linguistic profile;*
> - *operational needs; and*
> - *the employee's area of interest*
>
> *Thus, this is an opportunity for you to provide your interest (select one choice) among the areas of expertise listed in the attached survey.*
>
> *Please note that providing your area of interest is optional, as this is not a selection process. Completed survey's* [*sic*] *must be returned to* [name redacted] *no later than October 23, 2014.*
>
> …

[60] Entered into evidence were handwritten notes dated November 4, 2014, which were of a meeting that was held that day ("the Nov. 4 meeting") to discuss the grievor's functional limitations as set out in the Oct. 1 RTW form. The document indicates that at the meeting were the grievor, Mr. Toncic, and Catherine Aubin. Ms. Aubin's position was not disclosed to the hearing. Counsel for the employer asked the grievor if she

recalled the Nov. 4 meeting, to which the grievor indicated that she did. Counsel then put it to her that the meeting involved discussing the functional limitations that were set out in the Oct. 1 RTW form, to which the grievor answered that she could "see what is written." The grievor was then asked if she recalled that the employer had asked her for a better understanding about why she could not come to the workplace, to which the grievor said that she had no input, then that she did not recall, and then that she did not recall the meeting. The grievor was then asked if she recalled the employer's representative telling her that telework was a privilege but that it could be an accommodation if medically justified, to which the grievor said, "Yes."

[61] The evidence disclosed that on November 7, 2014, Mr. Toncic emailed Ms. Désormeaux-Dufour, stating that Mr. Biard could be privy to the Oct. 1 RTW form and that the grievor would provide written authorization on Wednesday (November 12, 2014).

[62] On November 13, 2014, Ms. Désormeaux-Dufour emailed Mr. Toncic about overpayments made to the grievor. The email indicated that at that time, the grievor had in her sick-leave bank 67.7 hours. According to Ms. Désormeaux-Dufour, the sick leave that she had available would cover her time off work up to September 15, 2014. The email further indicated to Mr. Toncic that Mr. Biard was willing to advance the grievor the maximum of 25 sick-leave days in accordance with the collective agreement. This meant that the advanced sick leave would have to be reimbursed and that the grievor would not accumulate any new sick leave into her bank until the advanced sick leave was reimbursed.

[63] The email further advised that the monies inadvertently paid to the grievor would have to be recovered once the grievor returned to work. Finally, the email stated that the employer's objective was to bring the grievor back to work as soon as possible and that the employer would like to establish a return-to-work plan as soon as possible, and it referred to meeting with the grievor the next day and trying to return the grievor to work the following week.

[64] On December 5, 2014, Ms. Désormeaux-Dufour emailed Mr. Toncic and copied the grievor and Mr. Biard ("the Dec. 5 email"). The subject matter of it was the "Return to Work Plan …", and the relevant portions state as follows:

…

John and I have finalised the return to work plan. As you know, SPP is going through an important reorganization, the contracting services are no longer assumed by SPP and as a result, all PGs in John's section are now assuming the functions of Contracting Advisors until the new organizational structure is confirmed and employees are confirmed within the positions that will be created as part of the new organizational structure. For the moment, Michele will have return to her position within SPP and will be required to perform the duties of the Contracting Advisor. John will send you a copy of the work description for the Contracting Advisor on Monday for your review.

We recognize that this is an important change for Michele. To facilitate this transition, John will start by providing a smaller amount of tasks to Michele and progressively provide her with more tasks, as Michele progresses in the return to work plan. In addition, different accommodation measures will be put in place to assist Michèle in her work, in light of the limitations that were identified by her doctor.

I have attached above the proposed return to work plan for your review and comments. The only section that is left to complete is the work schedule. We would like to propose a meeting on ***Tuesday, December 9th, 2014 or on Wednesday December 10, 2014*** *to discuss the return to work plan and that Michele reintegrates the workplace the following day.* ***Grateful if you could confirm your respective availabilities for those dates****.*

In regards to Michèle leave status, John would be ready to pay Michèle for her time on the day we met to discuss the return to work plan with the assistance of Catherine Aubin and bring her back on the payroll the following week for 25 hours (and the following weeks) as recommended by her doctor and until she reintegrates the workplace. John does not feel it would be appropriate to bring her back on the payroll before then for the reasons that I outlined in my previous email to you. As indicated, John would be ready to advance Michele the maximum of 25 days of sick leave as provided by the collective agreement to minimise the financial impact for Michele. However, ***John would require a confirmation from Michele that she would like to be advanced the 25 days of sick leave****.*

Measures will be taken to record Michele's period of absence and recover the days that were overpaid. John and I will contact Compensation to confirm how many days will have to be recovered and how this will be administrated. We will get back to you with more details. Michele may also be eligible to other forms of Compensation (e.g. disability insurance or employment insurance for her period of leave without pay for medical reasons) and we would encourage Michele to contact her compensation advisor to discuss her options.

…

[Sic throughout]

[Emphasis in the original]

[65] A copy of the attached return-to-work plan ("the Dec. 5 RTW plan") was entered into evidence, the preliminary portion of it stating as follows:

> …
>
> *Prior to her leave for medical reasons, Ms. Remillard was temporarily assigned to a Contracting Advisor position within the AACR section. Just before she left on leave, Ms. Remillard requested to return to her substantive position. Therefore, it was determined that Ms. Remillard would return to her substantive position in SPP upon her return from leave. However, as SPP is going through an important restructuration* [*sic*] *at the moment, SPP is now primarily responsible for providing Procurement policy, oversight and reporting services and no longer provides Procurement operations to the department. As a result, Ms. Remillard will no longer perform the duties of a Contracting Specialist (current position) but will perform the duties of a Contracting Advisor position where she will support the Contracting Policy unit. To facilitate this transition and Ms. Remillard's return to work, Management will begin by assigning tasks of a lower complexity and will progressively move to more complex tasks as her limitations permit.*
>
> *This plan will be put in place for a period of 6 months. It was developed in consultation with Ms. Remillard, Mr. Dejan Toncic of the PIPSC, Ms. Catherine Désormeaux-Dufour of HSSS, Mr.* [*sic*] *Remillard's Director and supervisors and it is based on the functional limitations that were identified by Michele's doctor. The functional limitations and accommodations that will be put in place to support the employee in her return to work plan are detailed at* ***Annex 1*** *of the present document.*
>
> *To ensure that the return to work objectives will be attained, regular meetings will be scheduled during the progressive return to work to discuss the progress of Ms. Remillard. Unplanned meetings and discussions are recommended to discuss any issues that may arise in the context of Ms. Remillard's return to work.*
>
> …
>
> [Emphasis in the original]

[66] The Dec. 5 RTW plan stated the following identified proposed accommodation measures:

> • *Assign a smaller amount* [*sic*] *and less complex tasks and progressively assign additional and more complex tasks to Ms. Remillard.*

- *Set weekly meetings to discuss the performance-related difficulties that may be experienced by Ms. Remillard or noted by her supervisor as a result of her limitations, and continue to assess the measures that could be taken by Ms. Remillard or put in place by Management to assist her in meeting the requirements of her position.*
- *Set clear expectations with regard to how Ms. Remillard is expected to communicate/interact with her supervisors.*
- *Offer coaching from DRC to Ms. Remillard to assist in learning how to communicate effectively and respectfully with her manager.*
- *Efforts will be made to place Ms. Remillard in a quieter location at work.*
- *The department will provide headphones to reduce the noise level in her work area.*
- *Where required, the department will provide signage to remind employees to minimize noise in an open work environment.*
- *A telework agreement will be put in place on a trial basis for 2 days a week. The maintenance of the telework agreement will be subject to the quality and quantity of the work performed by Ms. Remillard at home and may be terminated by the Director at any time.*

[67] On December 8, 2014, Mr. Biard emailed the grievor the work description referred to in the Dec. 5 email.

[68] The grievor confirmed in cross-examination that she received the Dec. 5 email and that she knew that she would return to work at the SPP. Despite the email stating that it had the Dec. 5 RTW plan attached, when it was put to her that it was attached, the grievor said that she did not see one attached in the document presented and that she did not accept that one was attached at the time. When she was asked if she advised that it was not attached, the grievor answered as follows: “My father died. I wasn’t paying attention to this. I knew I got this, but I didn’t pay attention to this; it was at the bottom of my list of things.”

[69] Counsel for the employer then told the grievor that Mr. Biard would testify that the Dec. 5 RTW plan was attached to the Dec. 5 email. The grievor emphatically said that it was not and said that she would have to see the email. I note that at this juncture in the cross-examination, this was the email that had just been put to the grievor, and she had denied seeing the Dec. 5 RTW plan attached to it. She then agreed that it was attached and within a minute or so again emphatically denied that it was

attached. Counsel for the employer again asked the question about the Dec. 5 RTW plan being attached to the Dec. 5 email, and the grievor then said that it was attached to the email.

[70] On Monday, December 9, 2014, at 08:35, Ms. Désormeaux-Dufour emailed Mr. Toncic as a follow-up to the Dec. 5 email, seeking a response from him by the close of business on that day about setting up a meeting, together with the grievor, as soon as possible, and asking him whether the grievor wanted the advance of the 25 days of sick leave. Mr. Toncic emailed Ms. Désormeaux-Dufour in reply at 10:28 that same day, proposing a meeting for that day between 13:00 and 14:00 or on the following day.

[71] A meeting was scheduled, and it did take place on December 9, 2014, at 13:00 ("the Dec. 9 meeting"), to discuss the grievor's return to work and the Dec. 5 RTW plan. In attendance were the grievor, Mr. Toncic, Mr. Biard, and Ms. Désormeaux-Dufour. Entered into evidence were notes of the meeting ("the Dec. 9 meeting notes").

[72] The Dec. 9 meeting notes indicate that after Mr. Biard made some opening comments, and shortly after Ms. Désormeaux-Dufour started to go through the Dec. 5 RTW plan, the grievor interrupted, stating that she was trying to be polite but that "this" was not going to work. The notes state that she said that she could not report to a junior supervisor or work in the office. The notes further indicate that the grievor said that she would obtain a medical note if she needed to. The notes then indicate that the grievor left the meeting.

[73] In her examination-in-chief, the grievor testified that the Dec. 9 meeting lasted seven minutes; she confirmed this in cross-examination. In examination-in-chief, when she was shown the accommodation measures set out in the Dec. 5 RTW plan, she first stated that none of the accommodation measures were implemented; then, she said that she never saw the document. She then stated that at the time, she had a lot going on. Her representative then asked her if she agreed with the accommodation plan, to which she said that the conversation at the Dec. 9 meeting was a silly conversation and repeated that it was never implemented (referring to the Dec.5 RTW plan).

[74] In both her examination-in-chief and cross-examination, the grievor said that she walked out of the Dec. 9 meeting and that the meeting was a waste of time. She further stated in her cross-examination that Mr. Biard could have told her this stuff in an email and it was an insult to tell her to her face. She stated that she recalled telling

him that she had more important places to be. When counsel for the employer told the grievor that Mr. Biard would testify that she declined the Dec. 5 RTW plan, the grievor said that she did not but instead that she walked out. She then stated that she accepted the job four months later but that this (either the Dec. 9 meeting or the Dec. 5 RTW plan or both, as it was unclear in her testimony) was insulting.

[75] When counsel for the employer tried to redirect the grievor by pointing out that she was asking about the Dec. 5 RTW plan, the grievor reiterated that she had walked out in disgust, stating that she was not going to decide her entire financial future in a matter of seconds and that she told Mr. Biard that he was wasting her time.

[76] On Monday, December 15, 2014, Mr. Biard and the grievor exchanged emails, which stated as follows:

> [Mr. Biard to the grievor:]
>
> …
>
> *As a follow-up to our meeting of December 9th, were you able to meet with your doctor and, if so, do you have any idea when we can expect to receive more information on your situation? Regrettably, your extended sick leave has used up all the leave credits you had and you are now in a significant deficit position. I have the authority to advance you a maximum 25 days which, as we mentioned at the meeting, I am prepared to do. Please let me know by December 17th if you wish to accept this advance so that I can fill out the leave form appropriately. You should also know that we are taking measures to stop your pay to minimise impact of an overpayment on your return to work. I will be sending you the necessary leave form for the period of June to December 2014 over the course of this week. In addition, Compensation will be sending you the application forms for disability insurance. I wish you well and please don't hesitate to contact me if you have any questions.*
>
> …
>
> [The grievor to Mr. Biard:]
>
> …
>
> *I met with my physician last week and she is prepared to undertake whatever steps necessary with respect to my sick leave/long term disability, as I mentioned I simply cannot return to work given the circumstances. With respect to compensation, it would be greatly appreciated if management could wait until the disability forms have been processed and received to minimize the impact of this unexpected and sudden financial burden, especially at this time.*

…

[77] On Friday, December 19, 2014, Mr. Biard and the grievor again exchanged emails, some of which were copied to Mr. Toncic. The emails stated as follows:

> [Mr. Biard to the grievor and Mr. Toncic, at 16:17:]
>
> …
>
> *Thank you for your follow-up. I will require a note from your doctor certifying your absence from work since December 10, 2014 (day that followed our discussion on December 9, 2014 on the RTW plan). Until I receive this information, I reserve the right to authorize your absence from work. Please indicate when you believe you will be able to send me a note from your doctor. With respect to your compensation request, steps have already been taken, as indicated in my email of December 15, 2014, to stop your pay to minimise the impact of an overpayment on your pay on your return. However, there may be other financial resources to which you could be eligible until you receive a response from the insurer for your disability claim like employment insurance (EI). I would encourage you to contact your compensation advisor to discuss your options.*
>
> *We also need to take steps to regularize your leave status for the period of June 11, 2014 to December 9, 2014. To this end, I have attached the* Leave Application and Absence Report Form *and have provided 2 options below to facilitate completing the form. I would request that you complete the form and record your leave in the manner prescribed below and return the form to me by December 29th. Administrative measures will be taken to recover the days of leave that were overpaid from future payments when you will be ready to return to work.*
>
> *Please note that if you choose not to complete and send the form to me as requested, this could potentially be considered as a form of insubordination and lead to disciplinary action and/or administrative measures. I would prefer not to go down that path.*
>
> …
>
> [The grievor to Mr. Biard and Mr. Toncic, at 16:39:]
>
> …
>
> *I need to confer with Dean with respect to your request for a note from my doctor for sick leave coverage given my inability to return to work as I had attempted, back in September.*
>
> *I believe this leave coverage will ultimately be decided by a third party so I am not sure what to do in the interim given the grievance I signed yesterday. I will get back to you once I have had a chance to discuss.*
>
> …
>
> [The grievor to Mr. Biard and Mr. Toncic, at 16:42:]

…

Me again, can you please address my request for the workforce adjustment letter? As I mentioned, I require a copy given the change in my substantive position.

Please advise soonest [*sic*].

…

[Mr. Biard to the grievor, at 16:50:]

…

I certainly will if and when they are issued but there has been nothing to date.

…

[The grievor to Mr. Biard, at 17:30:]

Thanks for the info. I didn't realize this was the case, based on our meeting December 9th, it was my understanding that my substantive position no longer existed, am still confused on this.

Am I able to use my annual leave and any outstanding time accumulated as an interim measure? I would gladly use any credits I have accumulated if it would delay this sudden financial hardship.

Please let me know, next week is fine if you get the chance.

…

[Mr. Biard to the grievor, at 17:43:]

I don't blame you for being confused. Your substantive position still exists but will likely disappear mid-January when the official re-org is scheduled take place. What I was trying to explain is that you would need to work in the Policy division and you would not be doing the Contracting role you did before as this is now with the Platform Branch.

I agree that using any accumulated leave would help and I'll get that info to you Monday morning once I can access HRMS to determine your leave balance.

…

[78] On Monday, December 22, 2014, at 10:06, Mr. Biard emailed the grievor, telling her that she had 92 hours of vacation leave and a 1-time vacation entitlement of 37.5 hours for a total of 129.5 hours or 17.25days. That same day, at 10:13, the grievor emailed Mr. Biard in reply, asking him to authorize the use of those credits. She also asked to use her personal day and volunteer day. The grievor and Mr. Biard then exchanged the following emails:

[Mr. Biard to the grievor, at 13:22:]

…

You need to get advice on the best way to deal with this issue. If you apply for DI and are accepted, you would be paid retroactively to the period you started to be on LWOP for medical reasons. You need to be 100% sure that you want to use this leave as requested as you could potentially receive DI for that period. Once you use these annual leave credits and other types of leave with pay, we won't be in a position to reimburse or re-credit your leave.

…

[The grievor to Mr. Biard, at 16:11:]

Thanks John, I will do that in the new year.

In the interim, I accept your offer for the advanced 25 days of sick leave, I assume this will be addressed through formal proceedings at the end of the day.

Please advise compensation accordingly and I will discuss with Dean in the new year. I have been unable to reach him.

…

[79] On January 5, 2015, the grievor emailed Mr. Biard that her doctor was completing the DI forms that were provided in December. It is not clear if the forms were provided to the grievor in December of 2014 or by the grievor to the doctor in December of 2014. The email also stated that the grievor met with her doctor immediately after the Dec. 9 meeting and that she was to meet with her doctor again on January 9, 2015. The grievor did not testify about this.

[80] On January 7, 2015, Mr. Toncic emailed Mr. Biard and Ms. Désormeaux-Dufour twice, first indicating that he had a DI application for the employer and second clarifying that what he had was the employer's statement portion of the DI application and that the grievor and her physician would fill out their portion of the application.

[81] On January 8, 2015, Mr. Toncic emailed Mr. Biard and Ms. Désormeaux-Dufour, stating that the grievor was no longer requesting an advance of sick-leave credits.

[82] Entered into evidence was a copy of the claim for DI and the "Employer's Statement" signed by Mr. Biard and dated December 22, 2014.

[83] On January 13, 2015, Mr. Biard forwarded to the grievor Mr. Varriano's email of January 12, 2015, which had been sent to a number of individuals in the SPP, including

the grievor via her work email address. The email was about a PMI town hall meeting scheduled for January 14, 2015, and stated the following:

> …
>
> *I am pleased to invite each of you to the PMI Town Hall scheduled Wednesday, January 14, 2015 (beginning at 9:15 a.m.) in the Rendez Vous Room. We have finally completed all the bits and pieces of the much anticipated re-organization of the contracting function at DFATD. I won't repeat all the background context of how we came to be here as you are already very familiar with this and we will most likely provide this as a part of the overview at the town hall.*
>
> *I would ask that you bring with you any remaining questions or concerns you may still have in this regard as there will be time for Qs and As.*
>
> …

[84] The grievor replied to the invitation to the town hall meeting, to Mr. Biard, on January 13, 2015, advising that she would not be in attendance but asking for a copy of the information deck used at it.

[85] On January 14, 2015, at 11:29, Mr. Biard emailed the grievor the information deck as she had requested. He attached a letter indicating that her position had been declared surplus and that she was receiving a reasonable job offer and a copy of the new generic work description and contact information, should she have any questions. Mr. Biard's letter states as follows:

> …
>
> *I am pleased, on behalf of Department of Foreign Affairs, Trade and Development, to offer you a full-time indeterminate deployment to the position noted in the attached appendix, effective January 14, 2015.*
>
> …
>
> *This letter constitutes a reasonable job offer in accordance with Workforce Adjustment appendix of your Collective Agreement. If you choose to decline this offer and are unable to secure alternate indeterminate employment, you will be laid off on July 14, 2015. You will be notified 30 days prior to this lay-off date.*
>
> …
>
> *This offer of employment is conditional on your signing the enclosed appendix where indicated and satisfying all other requirements set forth in this package. Your signature is an*

> *attestation that you clearly understand and will comply with the terms and conditions of employment.*
>
> …

[86] Entered into evidence was a letter dated January 14, 2015, sent to the grievor by Mr. Varriano, advising her of the PMI and of a WFA that was occurring and stating that employees' positions, including hers, were being made surplus and that new positions were being created, with generic job descriptions. The letter further stated that the attached letter (Mr. Biard's letter of January 14, 2015) was a further letter that the employer considered a reasonable job offer and that upon her acceptance of the offer, her surplus status would be terminated; however, should she not accept the offer, and if no other employment were found, she would be laid off six months from the date of the letter.

[87] On April 2, 2015, Mr. Biard emailed the grievor, stating as follows:

> …
>
> *I would like to follow-up* [*sic*] *on a couple of issues with you. During our last meeting with HSS/Catherine Desormeaux-Dufour and PIPSC/Dejan Toncic, you mentioned you were going to see your doctor and obtain a medical certificate. I sent you a follow-up message on December 19th, 2014, requesting that you send me a copy of the medical certificate from your doctor with an indication on your prognosis of return, but I haven't received any medical information from you since that date. If your doctor is unable at the moment to confirm your date of return to work, we would require an indication on when she expects to reassess your condition and will be in a better position to provide us with more information on your prognosis of return. This information is required in support of your leave of absence and to record the period of your absence appropriately in the system. Therefore, I would request that you send me this information by April 17th, 2015.*
>
> *Secondly, I sent you 2 letters dated January 14, 2015 (see attached). The first was to inform you that your substantive position had been identified as surplus and that you, as a result, were being accorded surplus status. The second was a letter of offer to a newly created PG-04 position in SPP. This offer of employment is considered a reasonable job offer in accordance with the Workforce Adjustment appendix of your Collective Agreement.*
>
> *I have yet to receive a response from you regarding this offer of continued employment. I would request that you confirm your acceptance or refusal of the offer no later than April 17th, 2015. Failure to respond by this date will be considered a refusal on your*

> *part. If you choose to decline the offer, or fail to respond by April 17h, 2015, you may be subject to lay-off as indicated in the letter of offer.*
>
> *Finally, I would request that you inform me of any developments in relation to your health and inform me of any potential return to work as far in advance as possible so we can plan for your return. If your doctor determines that you are fit to return to work, we may request that you participate in a fitness-to-work evaluation before your return to confirm your fitness to work and any potential limitations that would require accommodations.*
>
> …

[88] That same day, the grievor emailed Mr. Biard in reply (and added Mr. Toncic to the chain), stating as follows:

> …
>
> *I apologize for not providing the requested medical certificate, but given that all had been supplied to Jean Francois Landry and Sun Life Assurance in that respect, I thought it was out of your control. To provide clarity, I advised Sunlife* [*sic*] *that my estimated time off would be one year; that is just my estimate and only time will tell for sure.*
>
> *With respect to the job offer, the letter you provided indicates that I have until the 14th of July to either accept, or reject the new position.*
>
> *Please advise if this has changed so I can remain employed during the interim.*
>
> *Dejan,*
>
> *Please advise if I am required to provide John with medical documentation or if this matter is now between Sun Life Assurance and me, also, when is the exact deadline to accept or reject the new job? John sent the letter on the 14th of January.*
>
> …

[89] On April 13, 2015, the grievor emailed a PDF version of an acceptance of the reasonable job offer to someone identified as Sylvie, which was later attached to an email from Mr. Toncic to Mr. Biard and Ms. Désormeaux-Dufour on April 16, 2015.

[90] Also on April 16, 2015, in the same email chain that confirmed the grievor's acceptance of the reasonable job offer, Ms. Désormeaux-Dufour emailed Mr. Toncic in reply, inquiring about a medical certificate. Mr. Toncic in turn emailed Ms. Désormeaux Dufour in reply that same day, indicating to her that the grievor would comply with

providing the requested information but that her next medical appointment was set for May 3, 2015.

C. The period from May 2015 to August 29, 2016

[91] On May 5, 2015, Mr. Biard emailed the grievor, and she responded. The emails state as follows:

> [Mr. Biard to the grievor, at 08:50:]
>
> …
>
> *I received a call from Andrea Campbell from Sun Life. Ms. Campbell informed me that she was going to meet with you this week to discuss a potential return to work plan. As requested, if a potential date of return to work has been identified by your doctor and/or Sun Life, it is important that you inform me of this date as far in advance as possible. We have shared the return to work plan with Ms. Campbell that was proposed prior to your departure and in light of the limitations that were identified by your doctor, but Ms. Campbell informs us that the return to work plan that will be proposed by Sun Life will be based on the duties of your previous position with SPP and not the duties of your new position within the Contracting and Materiel Policy division as a Procurement Advisor.*
>
> *This presents an issue as it is important for me to confirm that you have the capacities to perform the new duties that will be required of you, to clarify your limitations and how they may impact your ability in performing certain tasks associated to this position, so we can determine the accommodations that may be required on your return. As a result and taking into considerations* [*sic*]*the circumstances in which you left on leave, I would request that you participate in a fitness-to-work evaluation with Health Canada prior to your return to obtain clarifications on these questions. This would also be an opportunity for us to confirm with Health Canada if the return to work that was proposed prior to your departure meets your needs.*
>
> *In order to avoid any delays for your return to work, I would request that you discuss this request with your union representative, complete and return to me the consent forms attached above as quickly as possible.*
>
> …
>
> [The grievor to Mr. Biard, at 12:26:]
>
> …
>
> *I am not prepared to return to work and do not see my return under your direction, in my near future.*
>
> *I met with my physician yesterday and will meet again with* [*sic*]*on the 20th of May, I will provide you with a note at that time.*

> *I will meet with Andrea tomorrow to discuss rehabilitation options.*
>
> *I do not believe (but I could be wrong) that I am physically able to work under your direction in any capacity*
>
> *But with the assistance of my Union and Sunlife* [*sic*] *Assurance I am hopeful that I will be able to relocate within DFATD or deploy.*
>
> …

[92] On May 7, 2015, Mr. Biard emailed the grievor in reply, confirming that he would wait for information from her doctor and Sun Life. He also forwarded the email chain to Ms. Désormeaux-Dufour.

[93] Mr. Biard testified that he and Ms. Désormeaux-Dufour spoke with Ms. Campbell (of Sun Life) on April 30, 2015. This discussion is reflected partially in an email sent to Mr. Biard from Ms. Campbell on May 12, 2015, which states as follows:

> …
>
> *Thank-you* [*sic*] *again to you and Catherine for taking the time to speak with me on April 30th. I completed my interview with Michele Remillard on May 6th and have reviewed her file with the Case Manager today. We both feel, prior to moving forward with further planning, that the medical information requested mid-April is required. Michele has an appointment with her doctor on May 20th after which we hope to have the report. Upon receipt/review, we will be able to determine next steps. So you are aware, I reiterated that you also require the medical note from her doctor to substantiate her leave. Michele said she would get one next week.*
>
> …

[94] On May 21, 2015, the grievor sent Messrs. Biard and Toncic a PDF version of a medical note from Dr. Burgess dated May 20, 2015 ("the May 20, 2015 note"), which simply said, "This patient was totally disabled on Friday, June 13, 2014 and I estimate through to Friday, July 31, 2015."

[95] On June 19, 2015, Ms. Campbell emailed Mr. Biard and Ms. Désormeaux-Dufour and advised that she and the grievor's case manager at Sun Life had received updated medical information from the grievor's family doctor. The email goes on to state that there was no timeline identified for the grievor's return to work. It is not clear from the email if that was Sun Life's assessment or that of the grievor's family doctor. There was no medical note attached to the email, and it is not clear on what basis the statement was made. Mr. Biard testified that he did receive this email but also that he

did not see the information referred to in the email from the doctor that Ms. Campbell referred to.

[96] On July 8, 2015, Suzanne Webonga from Sun Life emailed Mr. Biard and Ms. Désormeaux-Dufour. The email was a summary of the status of the grievor's claim and stated that at that time, benefits were being supported to January 3, 2016. It stated that the medical information that was on file at the time did not support any return-to-work planning, that they would follow up with the grievor at the end of July (2015), and that they would provide a written update to the employer on September 15, 2015.

[97] Entered into evidence was a note from Dr. Burgess dated July 29, 2015 ("the July 29, 2015, note"), which simply said, "This patient was totally disabled on Wednesday, July 29, 2015 and I estimate through to Friday, October 30, 2015."

[98] On August 24, 2015, Ms. Campbell from Sun Life emailed Mr. Biard. The email advised him that the grievor had taken part in an assessment with a specialist that had concluded the previous day. The details stating what sort of specialist and what sort of assessment were not set out in the email.

[99] In cross-examination, the grievor was brought to the August 24, 2015, email and the reference to the assessment by a specialist. The grievor said that she did not recall the assessment. She then stated that she had seen many specialists; however, she did not elaborate at all on what kinds of specialists she had seen, who they were, when she saw them, or any information whatsoever about those visits, examinations, or consultations. In her examination-in-chief, the grievor was not asked any questions about any of the specialists or their medical analysis or recommendations, which would have encompassed any of the period of time while she was off work and receiving disability benefits.

[100] On September 17, 2015, Ms. Campbell from Sun Life emailed Mr. Biard and Ms. Cochrane an update on the grievor. It spoke of not receiving a consultation report from August 31 (2015). It was unclear if this consultation report was in reference to the assessment referred to in her August 24, 2015, update to Mr. Biard, as no other information was provided.

[101] Entered into evidence was an email chain between the GAC LR office and Mr. Toncic, the context of which appears to be a hearing for the accommodation grievance.

From the email chain, it appears that the grievance hearing was held on October 23, 2015.

[102] The first email in the chain is dated October 23, 2015, and is a request from LR to be provided with an updated medical certificate for the grievor. On November 2, 2015, Mr. Toncic emailed LR to advise that the grievor would be seeing her doctor on November 9, 2015, and at that time would request an updated medical certificate. On November 17, 2015, LR emailed Mr. Toncic, following up on the request for the medical certificate. Mr. Toncic's reply on November 18, 2015, was that the grievor had indicated to him that she would not be providing any additional information but would not be opposed to the employer writing directly to her doctor.

[103] On December 8, 2015, Ms. Cochrane emailed Mr. Biard and Ms. Désormeaux-Dufour an update. She indicated that this was an update further to their update of October 2, 2015. No written update dated October 2, 2015, was provided to the hearing. Ms. Cochrane further indicated that Sun Life might possibly ask for a further consultant referral in January of 2016. She also said that they had received further information from the grievor's doctor; however, it appeared to be handwritten and was difficult for them to read. The email also indicates that the grievor's disability benefits continued to be approved and that the new date to which the benefits were supported was July 17, 2016.

[104] Entered into evidence was a letter dated December 8, 2015, from Ms. Cochrane to the grievor, the relevant portions of which state as follows:

> …
>
> *We are writing with respect to your claim for Disability Insurance Plan benefits.*
>
> *As advised in our letter dated March 9, 2015, benefits are currently being paid on the basis that you are totally disabled from performing each and every duty of your regular occupation or employment.*
>
> *Effective September 20, 2016, the definition of total disability changes. At that time, in order to continue to be eligible for benefits, your incapacity must prevent you from engaging in any commensurate occupation for which you are or become reasonably qualified by education, training or experience.*
>
> *Based on the information that we have received to date, we are unable to foresee whether you will be eligible for benefits beyond the change of definition date. We will continue to obtain updated*

> *information and will communicate our decision prior to the change of definition date.*
>
> *At this time, we will continue to monitor your eligibility for benefits within the own occupation period.*
>
> *Please understand that payment of Disability Insurance benefits is not guaranteed to the end of the 24 month period. Periodic medical information must provide conclusive evidence that you continue to be totally disabled to the extent that you cannot perform your regular occupation or employment as specified in the terms of the Plan.*
>
> *From time to time, Sun Life may require an update of medical information, or may request that you be examined by a doctor of our choice. We will advise you in advance if and when we need further information.*
>
> *Whether or not you receive payments for the entire 24-month period, we encourage you to prepare for your eventual return to work during the period that you are protected by disability payments.*
>
> *If you are interested in a rehabilitation program or in returning to some form of work, perhaps we can help you. For more information, please send us an outline of any plans you may have in mind.*
>
> …

[105] On March 1, 2016, Ms. Campbell emailed Mr. Biard and Ms. Désormeaux-Dufour, the relevant portion of the email stating as follows:

> …
>
> *It has been a while since we connected regarding Michele Remillard.*
>
> *I have been in touch with her and can confirm that a significant influencing factor affecting her overall medical condition appears to have been resolved toward the end of January/early February. As a result, we are now focusing on further stability of her medical condition and preparing for a return to work; as per the most recent medical update, likely in the Spring 2016.*
>
> *I wanted to advise that I have referred Michele today for an assessment in order to obtain recommendations that will help to prepare Michele for her return to work in the next few months. I expect the assessment to be completed within the next couple of weeks and the report with recommendations to be provided shortly thereafter. Upon receipt & review of the report, we will determine how best to proceed with Michele's rehabilitation plan. I anticipate this form of intervention will help clarify if there are any restrictions or limitations that would affect a return to work and may need to be reviewed for accommodation. I don't anticipate*

> *there to be any significant restrictions or limitations from a physical or cognitive perspective; although this will be confirmed by the treatment providers before engaging in a RTW plan.*
>
> …

[106] On March 8, 2016, Ms. Cochrane emailed Mr. Biard and Ms. Désormeaux-Dufour and advised them that the Sun Life health management consultant had been asked to become re-engaged in the file and that the grievor's benefits from Sun Life were supported until July 17, 2016. She stated that the grievor's restrictions remained unchanged and that those were generically identified as her ability to perform duties that require high cognitive demands and prolonged concentration. She stated that there was no return-to-work plan at that time.

[107] On April 5, 2016, Mr. Varriano emailed Mr. Toncic; the email refers to information provided to the employer directly by Dr. Burgess. It states as follows:

> …
>
> *Following the grievance hearing held on October 23, 2015, we requested information from Ms. Rémillard's doctor, Dr. Burgess. On January 11, 2016, we received a response from Dr. Burgess indicating that the return to work date would possibly be in spring 2016, depending on the assessment done by her specialists. Dr. Burgess further indicated that Ms. Rémillard:*
>
> *--was not able to perform her duties;*
>
> *--is not able to manage stress; and*
>
> *--is not able to work overtime.*
>
> *Since the grievance hearing, I have also consulted internally to try to find another position for Ms. Rémillard at her substantive level (PG-04). Unfortunately, I was not successful in this regard. Therefore, Ms. Rémillard's substantive position remains in SPP. As indicated before, at this time, we are not able to accommodate a full-time telework agreement for Ms. Rémillard.*
>
> *On or about March 31, 2016, management was contacted by SunLife. They indicated that Ms. Rémillard has revolved* [*sic*] *factors influencing her medical condition and that she will probably be fit to work in the Spring of 2016. John Biard, Director of SPP, has been in contact with the SunLife representative to provide information on a potential return to work.*
>
> *At this point, before Ms. Rémillard could return to work, we are requesting that she provides a medical certificate from her doctor with the following information:*
>
> *- The proposed return to work date;*

> *- Her restrictions/limitations, if any (note that were are not looking for the doctor to propose accommodation measures); and*
>
> *- The duration of the restrictions/limitations, if applicable.*
>
> …
>
> [*Sic* throughout]

[108] Entered into evidence was a series of emails exchanged largely between the grievor and Ms. Campbell but at times including Mr. Biard. The following are the relevant portions of those emails, in chronological order:

> [Ms. Campbell to Mr. Biard, copied to the grievor, March 30, 2016, at 11:59:]
>
> …
>
> *Following a conversation which took place between Michele Remillard and myself this morning, she is asking for a written explanation from her employer for why working from home is not possible at this time.*
>
> *I have copied Michele and the Sun Life Case Manager on this email so we are all privy to the same information.*
>
> …
>
> [Mr. Biard to Ms. Campbell, April 4, 2016, at 15:20:]
>
> …
>
> *I briefly discussed this request with my Director General and was informed that Michele has an outstanding grievance which, presumably, involves me since I am not privy to the details. Therefore, it would be inappropriate for me to respond to this request.*
>
> …
>
> [Ms. Campbell to the grievor, April 5, 2016, at 11:49:]
>
> …
>
> *I received your family doctor's response to my request for information; she has deferred any comment on mental health contraindications to your return to work to Dr. Xxx. She confirmed there are no physical health contraindications for work and agrees with the cognitive work hardening program with Adeena. Given Dr. Xxx has deferred comment on work restrictions & limitations to Dr. Xxx, a new request is not required.*
>
> *Once you have your appointment with Dr. Xxx she will provide a response; I have already spoken with her office and approved the fee for her report.*
>
> …

> [The grievor to Ms. Campbell, April 5, 2016, at 13:42:]
>
> …
>
> *My doctor and I discussed at length the employers* [*sic*] *refusal to accommodate my request to work from home, that's why she deferred to dr.* [*sic*] *Xxx, in addition to her counselling me since last August.*
>
> *I do not think Dr Xxx should have this unsubstantiated information and insist it be retracted, it has an impact on the outcome.*
>
> *I will look like a liar if I go into her office next week disputing the claims you put in that letter.*
>
> *I respectfully request that you reconsider.*
>
> …
>
> [Ms. Campbell to the grievor, April 6, 2016, at 12:21:]
>
> …
>
> *I appreciate your position, however, will not be changing the information I provided in the letter to your doctors. Conversations are documented and are considered to be substantiated. I have been told by your employer (John Biard) that working from home is not an option during your initial return to work given you will be learning a new role and have been out of the office for a lengthy period of time; almost 2 years.…*
>
> …
>
> *… I would not recommend working from home for at least the duration of the return to work plan. As mentioned previously, I was told that this can be re-considered once you are back full time and once both you and your Manager feel comfortable with your ability to perform the functions of your new role.…*
>
> …
>
> *I have been advised by Adeena that you will begin the cognitive work hardening program next Tuesday April 12th ….*
>
> …

[109] It was not made clear to me if the reference to "Dr. Xxx" in the email exchanges was the doctor's actual name or an intent by Sun Life to anonymize the doctor's name.

[110] On April 21, 2016, Ms. Campbell emailed Mr. Biard, the relevant portion of the email stating as follows:

> …
>
> *I wanted to provide an update to you regarding return to work planning for Michele Remillard.*

> *I had requested confirmation of any medical restrictions and or limitations that may need to be reviewed for accommodation from both Michele's Family Doctor and Specialist. I requested this information on March 30th. I received a response from the family doctor on April 1st and a response from the specialist April 12th. The following is a brief summary of the information provided by these physicians:*
>
> ***-both physicians agree with the work hardening program that Michele is currently participating in (4-5 week program; was initiated week of April 11th)***
>
> ***-given Michele has been off work for over 2 years, there is reduced cognition, reduced processing ability, reduced manual dexterity; reduced concentration & decision making abilities; expected to improve with participation in the work hardening program and exposure to work activities when back to work (temporary)***
>
> ***-the family doctor deferred comment on working from home to the specialist***
>
> ***-the specialist has confirmed that there are no medical contraindications for Michele to work in the office; the specialist agrees that once Michele is back to work on a full time basis; perhaps the option to work from home can be re-visited; this is to be negotiated directly with her employer***
>
> ***-the specialist has indicated that Michele can return to work in May, once she completes the work hardening program; the specialist has recommended and outlined an 8 week plan which I will translate into the Sun Life return to work document once timing is confirmed (i.e. start date).***
>
> ***-the specialist has identified the following: strict compliance to gradual return to work plan with no overtime, training in the first 2 weeks suggested in order to re-orient Michele; the specialist will see Michele weekly during the return to work process***
>
> *In Sun Life's opinion, given the available medical documentation, Michele is considered work ready and we are prepared to support her through the recommended 8 week return to work plan. Although benefit decisions are at the discretion of the Case Manager (in this Case Celine Cochrane); I expect that Michele will not be eligible for benefits beyond the end of July at the latest.*
>
> …
>
> [Emphasis in the original]

[111] On May 3, 2016, Ms. Campbell emailed Mr. Biard and indicated that based on the information she had at that time, her initial plan was to hold a return-to-work meeting between her, Mr. Biard, the grievor, and whoever else was required to be there and

start an eight-week gradual return-to-work plan for the week of June 6, 2016, which would culminate in the grievor returning to full-time hours by August 1, 2016.

[112] On June 1, 2016, Ms. Campbell emailed Mr. Biard, advising him that the grievor's family doctor had written to Sun Life and had requested a delay in the grievor's return-to-work plan. She indicated that while the grievor had completed the work-hardening program, there was an area that Sun Life felt had to be addressed to better prepare the grievor to return to work. The specifics of what this is was not detailed in the email. Ms. Campbell stated that the grievor was referred to someone. The details of who this person was or what they did were not made known to the hearing and were not contained in the email. Ms. Campbell then stated that she expected that the return-to-work plan should begin the week of July 25 or August 1, 2016. Finally, Ms. Campbell advised that the deadline on which the grievor's benefits from Sun Life would end was September 19, 2016, and that it was unlikely that she would be eligible for benefits beyond this date.

[113] In cross-examination, the grievor was brought to the email dated June 1, 2016, from Ms. Campbell to Mr. Biard, and the reference to the new provider (specialist). When she was shown this, the grievor said that that is what it said but that she had no recollection of the events.

[114] Entered into evidence were two notes written by Dr. Burgess, both dated June 8, 2016. The first one ("the 1st June 8, 2016 note") said, "This patient was seen on Wednesday, June 8, 2016 … Michele requires a telework arrangement to enable a successful return to work". The second one ("the 2nd June 8, 2016 note") said, "Michele will attempt a graduated return to work, end of July-with a CWH program as a boost prior." The acronym "CWH" was not explained. The documentation disclosed that these two notes were provided to Sun Life on July 8, 2016. When this was put to the grievor on cross-examination, she responded by saying: "I guess so." When asked if there was any evidence that suggested that it was sent earlier, the grievor said this: "I can't remember". When it was put to her that she had no evidence to show that Sun Life received the notes earlier than July 8, the grievor said: "No I can't".

[115] At this point in the cross-examination, there was an exchange between counsel for the employer and the grievor with respect to the opinion of Ms. Campbell that she did not agree that telework was required for the grievor's return-to-work plan. In this

exchange, the grievor was asked if Dr. Burgess was doing any of the assessments other than regular physical examinations, to which the grievor answered that Dr. Burgess was her general practitioner. She later said that she had been seeing Dr. Burgess for two years at this juncture and that Dr. Burgess had been prescribing medication; however, she did not see Dr. Burgess as a specialist. When counsel put it to the grievor that she was seeing specialists for a specific health issue, the grievor refused to answer the question. When pushed by counsel, the grievor steadfastly refused to answer.

[116] Counsel for the employer then brought the grievor back to the email sent to her by Ms. Campbell on April 5, 2016, in which Ms. Campbell states that Dr. Burgess "… deferred any comment on [the specific health issue] contraindications … to Dr. Xxx, [and] confirmed [that] there are no physical health contraindications for work …". She then put it to the grievor that her grievance for accommodation was on the basis of a disability, to which the grievor stated that she would not answer any questions about her health. The grievor would agree only that the emails sent and received said what they said.

[117] When the grievor was asked if she provided any of the information from the specialists referred to in the Sun Life correspondence to the employer as part of the grievance hearing, the grievor said that she did not know. Counsel for the employer brought the grievor to the 1st June 8, 2016 note and asked if Dr. Burgess provided any further medical documentation, to which the grievor said: "I wouldn't know; I would have to look through 170 pages of correspondence to confirm that."

[118] Entered into evidence was an email exchange on July 4, 2016, between Ms. Campbell and Mr. Biard. The subject matter was the anticipated start date for the grievor's return-to-work plan and the scheduling of a meeting between the employer, the grievor, and Sun Life with respect to the implementation of the plan. At this juncture, it was anticipated that the grievor's first week of work would be August 1, 2016, and that she would attend work on Wednesday, August 3, and Friday, August 5, each day for four hours.

[119] A pre-return-to-work meeting was agreed upon for July 26, 2016.

[120] Entered into evidence was a letter dated July 19, 2016, from Ms. Cochrane to the grievor, the relevant portions of which state as follows:

…

Your benefits are currently being paid on the basis that you are totally disabled from performing each and every duty of your regular occupation or employment. Effective September 20, 2016, in order to be eligible for continued benefits you must be considered totally disabled from performing any commensurate occupation for which you are or become reasonably qualified by education, training or experience. The availability of work is not a consideration.

You have been involved in a rehabilitation program through Sun Life. You had been cleared for a return to work in May 2016 by your specialist, however you did not return to work. Your attending physician has now cleared you for a return to work in August 2016. You will be starting a gradual return to work program on August 3, 2016, which will be ending on September 25, 2016. We understand that your physician is asking that your employer arrange telework during your return to work. Please note that weather [*sic*] *or not your employer is able to arrange telework in your "own job", you are still considered medically able to return to your "own occupation".*

In order to accommodate your rehabilitation efforts, we are willing to continue your benefits past the change in definition date, to September 25, 2016. We will maintain contact with you through the Health Management Consultant during this time. Benefits will stop on September 25, 2016 or on the date that you stop your return to work program, whichever is earlier. Please note that although we are continuing your claim past the definition change date of September 20, 2016, ***this is not considered an admission of liability nor do we consider you as totally disabled from performing any occupation.***

We wish to advise that we are willing to review any additional medical information that you may wish to submit, should you wish to appeal our decision.…

…

[Emphasis in the original]

[121] Entered into evidence was an email dated July 20, 2016, from Ms. Campbell to Ms. Daoust, which states as follows:

…

Thank-you for confirming the 26th @ 10:30. As for your comments regarding the telework request, I agree with yours and maintain my previous opinion as stated. This is a topic that Ms. Remillard and her Manager can review independently; and in my opinion, after the return to work plan is completed.

The doctor's note did not say that it had to happen now or during the return to work plan, it did not say that is was every day she

> *works, it did not provide any specifics in my opinion which would prevent moving forward with the return to work plan as outlined. Michele is aware of my opinion on this, although she disagrees, my opinion remains unchanged. It is an employer topic to review.*
>
> …
>
> [*Sic* throughout]

[122] On July 20, 2016, Ms. Cochrane emailed Mr. Biard and Ms. Daoust with an update on the grievor that said that there were no medical contraindications for the grievor to start a gradual return-to-work program. It further confirmed that the gradual return-to-work plan would start on August 3 and end on September 25, 2016.

[123] Also on July 20, 2016, Ms. Daoust forwarded to Mr. Biard and Ms. Bristow a copy of the proposed return-to-work plan of the employer, which was set out on a GAC preprinted form ("the GAC RTW plan"). The email stated as follows:

> …
>
> *Please find attached the proposed return to work plan for her return. I included Sun Life's recommendations along with some details on the Compensation process so that everything is made clear to her from the start.*
>
> *I would like you to add detailed tasks that you are planning for her to do during the 8 weeks of her progressive return to work program. Please also review and adapt any other section, if needed.*
>
> *The meeting is now planned to be held on July 26, 2016 with a return to work date of August 3, 2016. Sun Life emailed me back and agrees with our position to not allow telework, at least during the return to work program.*
>
> *One point that will need to be clarified at the meeting to avoid any misunderstanding later on is the hours of work. Other than that I'm confident that everything is captured in the plain.*
>
> …

[124] The relevant portions of the GAC RTW plan state as follows:

> …
>
> *The plan is based on the suggestions and recommendations formulated by Health Management Consultant at Sun Life.*
>
> *The **Annex 1** of the present document represents the details of the return to work program, including the proposed schedule.*
>
> *To ensure that the return to work objectives will be attained, regular meetings will be scheduled during the progressive return*

> *to work to discuss the evolution of the plan and the progress of Ms. Rémillard. Unplanned meetings and discussions are recommended to discuss any issues that may arise in the context of Ms. Rémillard's return to work.*
>
> *A progress report on the return to work plan (**Annex 2**) should be completed after 4 weeks of the return to work.*
>
> *Once the return to work plan is completed (after 8 weeks) or if the plan needs to be terminated early, a Return to work plan closing report should be completed (**Annex 3**)*
>
> …
>
> ***SECTION 4 — Accommodations to be implemented:***
>
> ***Identified Functional Limitations and performance-related difficulties***
>
> *There have been no medical restrictions identified by the treatment team.*
>
> ***Identified Accommodations***
>
> *• Brief weekly meetings/touch points between Ms. Remillard and Ms. Bristow in order to provide feedback on progress as well as to provide additional support and open communication during the transition back to work;*
>
> *• Gradual introduction of duties that require multi-tasking and that make sense given the amount of time Ms. Remillard is in the office on a given day/week;*
>
> *• Gradual introduction of duties that are time sensitive;*
>
> *• Adequate training time in new role and with administrative systems; consideration to be given for shadowing opportunities;*
>
> *• Workspace that is quiet with few distractions in order to maximize work potential;*
>
> *• A telework arrangement is not possible during the return to work plan.*
>
> …
>
> [Emphasis in the original]

[125] Entered into evidence were emails dated July 26, 2016, between Ms. Campbell and Ms. Daoust. The substance of the emails indicates that they were sent after the pre-return-to-work meeting that took place earlier in the day that involved the employer, the grievor, and Sun Life. They indicate that the meeting did not go well. In the email reply to Ms. Campbell, Ms. Daoust refers to leaving a message with the Conflict Management Unit. A separate email, also sent that day, from Ms. Daoust to Ben Gray from the Conflict Management Unit, states as follows:

…

> *I am writing to you with regards to the return to work of one of our employees who has been on sick leave for a few years.*
>
> *We met with her and her union representative this morning, along with her case manager at SunLife* [*sic*] *and it was very clear to everyone around the table that there was a gap between the employee and employer's perspectives.*
>
> *We felt like it would be a good option to reach out to you so that you can assist in a meeting before the employee comes back to ensure the success of the return to work.*

…

[126] In cross-examination, the grievor was brought to the emails of July 26, 2016, and shown the exchanges. She was asked if she recognized Mr. Gray's name and if she recalled a meeting on July 26, 2016. She said that she would not dispute that they met but that she could not recall a meeting that day. She stated this three times.

[127] Counsel for the employer brought the grievor to an email exchange dated August 18 and 19, 2016, between Ms. Daoust and Mr. Toncic that was copied to Mr. Gray and that discussed a mediation session that had taken place the previous day with respect to the grievor's return to work. When it was put to her that there were meetings in the summer of 2016 that involved Mr. Gray and that were about her concerns involving her return to work, the grievor was emphatic not only that she did not just not recall meetings with Mr. Gray but also that she did not have any recollection of meetings in the summer of 2016 and that she had no recollection of Mr. Gray.

[128] Part of the exchange was an email dated August 18, 2016, at 12:09, from Ms. Daoust to Mr. Toncic. The email states as follows:

…

> *I met with Cindy and John this morning.*
>
> *I explained to them the essentials of our discussion from yesterday.*
>
> *Once again, they are more than willing to welcome her back in the office and to facilitate her return to work. Given that the Department has no indication of the medical restrictions/functional limitations, they will not allow telework. They insist that Michele be physically present at work to perform her duties for a few reasons that were already explained to you and Michele, such as the management of her performance, the coaching that will need to be performed to complete her training*

> *and the rebuilt* [*sic*] *of the relationships with her colleagues, clients and supervisors.*
>
> *Given that, there is no reason to delay even further Michele's return to work. Management would be willing to welcome Michele into the workplace next Wednesday, August 24, 2016.*
>
> …
>
> *I will inform Andrea from Sun Life so that she can revisit the return to work schedule and inform us of the new calendar, keeping in mind a return to work on a full-time schedule on September 26, 2016.*
>
> …

[129] The sticking point appears to be that the grievor wanted to return to work via teleworking, which the employer was not prepared to entertain at that time.

[130] The grievor confirmed that she agreed to return to work on Wednesday, August 24, 2016.

[131] Entered into evidence was a letter dated August 23, 2016, from Ms. Cochrane to the grievor, which states as follows:

> …
>
> *We are writing to you regarding your long term disability benefits.*
>
> *Please refer to our letter dated July 19, 2016. This letter is regarding the recent changes made to your gradual return to work plan by Andrea Campbell. This does not change the decision regarding the Change of Definition explained in our July 19, 2016 letter, and the full time date remains unchanged.*
>
> *Please find below the changes made to your original plan:*
>
> *Start date: August 24, 2016, End date: September 26, 2016*
>
> *Week of August 22: 4h/day on Wed and Fri*
>
> *Week of August 29: 5h/day on Mon-Wed-Fri*
>
> *Week of September 5: Holiday Monday, then 6.5 h/day on Tues-Wed-Fri*
>
> *Week of September 12: 6.5h/day on Mon-Tues-Thurs-Fri*
>
> *Week of September 19: 7.5h/day on Mon-Tues-Thurs-Fri*
>
> *Week of September 26: full time*
>
> *As indicated in our letter dated July 19, 2016, in order to accommodate your rehabilitation efforts, we are willing to continue your benefits past the change in definition date, to September 25, 2016. Benefits will stop on September 25, 2016 or on the date that you stop your return to work program, whichever*

> *is earlier, and your file will be closed. Please note that although we are continuing your claim past the definition change date of September 20, 2016,* ***this is not considered an admission of liability nor do we consider you as totally disabled from performing any occupation****.*
>
> …
>
> [Emphasis in the original]

[132] Entered into evidence was a copy of an undated proposed "Gradual Return to Work Plan" prepared by Sun Life ("the Sun Life RTW plan"). It set out the following information:

- With respect to the issue of medical restrictions, it states, "There have been no medical restrictions identified by the treatment team at this time".
- With respect to the issue of suggestions and recommendations, it states as follows:
  - *Regular meetings/touch points between Ms. Remillard & her Manager in order to provide feedback on progress as well as to provide additional support and open communication during the transition back to work*
  - *Gradual introduction of duties that require multi-tasking and that make sense given the amount of time Ms. Remillard is in the office on a given day/week*
  - *Gradual introduction of duties that are time sensitive*
  - *Adequate training time in new role and with administrative systems; consideration to be given for shadowing opportunities*
  - *Workspace that is quiet with few distractions in order to maximize work potential*
- The anticipated return-to-work start date is shown as August 24, 2016, and the expected return to full-time work date is shown as September 26, 2016.
- The gradual return-to-work schedule was shown as follows:

Week	Monday	Tuesday	Wednesday	Thursday	Friday	Total hours
22-Aug			4		4	**8**
29-Aug	5		5		5	**15**
05-Sep	Holiday	6.5	6.5		6.5	**19.5**
12-Sep	6.5	6.5		6.5	6.5	**26**

19-Sep	7.5	7.5		7.5	7.5	**30**
26-Sep	Full Time					**37.5**

- Under the reference "Other", the following is set out:
  - *Vacation is not supported by Sun Life during a return to work plan*
  - *Ms. Remillard is expected to arrange any medical appointments as best she can outside of scheduled work hours; if this is not possible, Sun Life supports time off work to attend; Sun Life will cover the full benefit for missed time up to September 25, 2016*
  - *Sick days: should Ms. Remillard become ill during the gradual return to work process, Sun Life will cover the full benefit for missed time; medical notes will not be required by Sun Life unless illness requires an extended leave or places the success of the plan at risk; the employer's requirement of medical notes may differ from Sun Life's*
  - *Ms. Remillard is not expected to make up time for attending appointments or sick days if they occur; the recommendation is to follow the plan, as outlined*

…

- Under the reference "Follow up", the following is set out:
  - *Health Management Consultant (HMC), Andrea Campbell, will follow-up with Ms. Remillard & her Manager every 2 weeks during the gradual return to work process to ensure the plan remains on track and to address any issues/concerns that may arise*
  - *Ms. Remillard & her Manager are invited to contact Ms. Campbell immediately should any concerns arise prior to touch points*

[133] Counsel for the employer showed the grievor the Sun Life letter dated August 23, 2016, and suggested that the return-to-work plan had changed. The grievor said: "I don't recall it but agree it happened because I have no memory of it." She did agree that the Sun Life RTW plan was accepted by her and that it applied to her return to work in 2016. She also agreed that the schedule set out in it was correct.

[134] On August 23, 2016, at 09:07, Ms. Bristow emailed the grievor with the list of days that she was scheduled to work per the Sun Life RTW plan and asked her to advise what she wished her preferred working hours to be on each day. At 12:41, the

grievor emailed Ms. Bristow in reply and stated that she had pulled her sciatic nerve and doubted that she would be able to attend work that week.

[135] The grievor confirmed that she returned to work on Monday, August 29, 2016. When it was put to her that she did not complete all the hours allotted for her in the Sun Life RTW plan, which was a total of 98.5, and that she actually worked only 28.5 hours, she said, "that is probably right." In this respect, the grievor was shown a chart created by Ms. Bristow (and identified by Ms. Bristow when she testified) that logged all the grievor's attendances and non-attendances from her actual return to work on August 29, 2016, through to November 14, 2016 ("the leave chart"). It contains both typed and handwritten information.

[136] Entered into evidence was an email chain dated August 29 and 30, 2016, between the grievor and Ms. Daoust, some of which was copied to Mr. Biard. The subject line was "Medical forms", and the relevant portions of the emails stated as follows:

> [The grievor to Ms. Daoust, August 29, at 06:11:]
>
> …
>
> *PIPSC has agreed to pay for a revised more robust medical form detailing my limitations and restrictions from my specialist.*
>
> …
>
> [Ms. Daoust to the grievor, August 29, at 10:41:]
>
> …
>
> *If I understand your email correctly, you agree that we send a letter to your specialist asking him to identify/explain the medical restrictions and functional limitations requiring accommodation measures. Am I correct?*
>
> *If so, please find attached the consent form for your signature. I will also be working on the letter to be addressed to your specialist. Once finalized, you will receive a copy of that letter.*
>
> *If I've misunderstood your email, please let me know and I will adjust accordingly.*
>
> …
>
> [The grievor to Ms. Daoust, August 29, at 14:52:]
>
> …
>
> *Yes, you are correct but the letter should go to my General Practioner* [*sic*]*, Dr. Tracy Burgess, she is working with my specialist.*

> *I will sign and scan the requisite authorization, once I am up and running.*
>
> …
>
> [Ms. Daoust to the grievor, August 30, at 08:51:]
>
> …
>
> *To maximize the outcome of this communication with your health specialist, I feel like it would be more beneficial to get the information from your specialist directly. It is also a possibility to send a letter to both of your doctors.*
>
> *Specialists are usually in a better position to provide useful guidance on the limitations/restrictions related to health conditions within their field of expertise.*
>
> *I've also copied Dejan to the email because he might have views on the subject, especially since they are paying for the medical expertise.*
>
> …
>
> [The grievor to Ms. Daoust, August 30, at 09:06:]
>
> *Please forward all necessary documentation directly to Dr Burgess and she can send on to the specialist. To be clear, I consider this information private and confidential and information I am not willing to share with John Biard.*
>
> *I would appreciate that all correspondence directed to my personal physician be copied and sent to my new address, as follows ….*
>
> …

D. The period from September through November 2016

[137] On September 2, 2016, Mr. Biard and the grievor exchanged emails, the relevant portions of which state as follows:

> [Mr. Biard to the grievor, at 16:11:]
>
> …
>
> *Chantal informed me that you only plan to work next Wednesday and Friday since Monday is a holiday. The return to work plan prepared by Sun Life indicates three 6.5-hour days next week. Since you only worked 4-hour days this week, is it you intention to modify the plan?*
>
> …
>
> [The grievor to Mr. Biard, at 16:29:]

> *My Union rep advise that management agreed to extend the plan given the delay due to mediation.*
>
> *I plan to work 5 hrs per day next week as scheduled. Only Difference is that I will arrive at 8 am.*
>
> …
>
> [The grievor to Mr. Biard, at 16:33:]
>
> *I refuse to be penalized further due to MANAGEMENTS delay (not mine) and refusal to comply with the prescribed limitations.*
>
> …
>
> [*Sic* throughout]

[138] These emails were put to the grievor in cross-examination, and she was asked if she recalled telling management that she would work only two days the week of September 5, 2016, when the Sun Life RTW plan set out that she would work three. She said that she did not recall, although she did not doubt that she would have said that. She later agreed that she missed a lot of time and that she did not adhere to the hours set out in the Sun Life RTW plan. When it was put to her that the employer tried to adhere to the schedule, she agreed.

[139] Entered into evidence was an email chain on September 9, 2016, which started between the grievor and Ms. Bristow and later included Mr. Biard, Ms. Campbell, and Mr. Toncic. The relevant emails are as follows:

> [The grievor to Ms. Bristow, at 10:11:]
>
> …
>
> [I] *will be in for 5 hours today, as well as next week. I am following the original schedule as approved by my health care provider as discussed at the July 26th meeting with John Biard, Roselyn Daoust, Andrea Campbell and Dejan Toncic.*
>
> *To be clear, at no time did I agree with any changes to the schedule, I was prepared to report on the 4th of August but was advised not to by my union rep to attend mediation.*
>
> *I thought I had CC'd you on that correspondence to John earlier this week, my apologies for any confusion.*
>
> …
>
> [Ms. Bristow to the grievor and Ms. Campbell, with copies to Messrs. Biard and Toncic, at 11:15:]
>
> …

> *Andrea — could you please provide advice on the gradual return to work schedule as per the document dated August 22nd? For your information Michele has been in the office for 4 hours on Monday, August 29th and 4 hours on Friday, September 2nd. Michele is also in the office today which, as per below, she intends to be here for 5 hours in total.*
>
> *Michele — The below were the dates and respective durations expected per day in accordance with the August 22nd Gradual Return to Work document issued by Sun Life. As per my email of August 23rd, I still require your response to which hours you expect to attend for the remainder of the gradual schedule as well as your full time hours of work and meal break that you prefer as of September 26th onwards on a full time basis. I have attached that original email hereto for your response.*
>
> [Embedded is the schedule set out in the Sun Life RTW plan.]
>
> …
>
> [The grievor to Mses. Bristow and Campbell, with copies to Messrs. Biard and Toncic, at 11:36:]
>
> …
>
> *To clarify my position, I did not agree to the schedule noted below at any time, and neither did my health care provider.*
>
> *I am abiding to the original schedule as approved and agreed to by my health care provider and all in attendance at the July 26th meeting.*
>
> …
>
> [Ms. Campbell to the grievor, with copies to Mses. Bristow and Cochrane and Messrs. Biard and Toncic, at 14:57:]
>
> …
>
> *The revised return to work plan of August 22nd was sent to Michele's family doctor the same day so they were aware of the revisions to the original return to work plan. To date, Sun Life has not received any communication from the doctor identifying any medical contraindications to the revised plan.*
>
> *It was clearly communicated that the end date of the return to work plan and disability benefits through Sun Life will not change. It remains September 25, 2016. As such, whichever plan Michele chooses to participate in, the expectation is for a full time return to work on September 26, 2016. If the employer chooses to accommodate any reduced hours beyond that date, that is their choice and will be done independently of Sun Life.*
>
> …

[140] The leave grievance alleges that the grievor was denied a flexible working arrangement and leave with pay under several entitlements in the collective agreement.

[141] The grievor was what is known as a full-time dayworker who worked Monday to Friday, 7.5 hours per day, for a weekly total of 37.5 hours per week.

[142] In dealing with flexible hours, Article 8 of the collective agreement is titled "Hours of Work", and its clauses that may be relevant to this decision are the following:

…	[…]
8.04 *Except as provided for in clauses 8.05, 8.06 and 8.07:*	***8.04*** *Sauf indication contraire dans les paragraphes 8.05, 8.06 et 8.07,*
(a) the normal work week shall be Monday to Friday inclusive;	*a) la semaine de travail normale s'étend du lundi jusqu'au vendredi;*
(b) an employee shall be granted two (2) consecutive days of rest during each seven (7) day period unless operational requirements do not so permit;	*b) l'employé se voit accorder deux (2) jours de repos consécutifs au cours de chaque période de sept (7) jours, à moins que les nécessités du service ne le permettent pas;*
(c) the scheduled work week shall be thirty-seven decimal five (37.5) hours;	*c) la semaine régulière de travail est de trente-sept virgule cinq (37,5) heures;*
(d) the scheduled work day shall be seven decimal five (7.5) consecutive hours, exclusive of a meal period, between the hours of 7:00 a.m. and 6:00 p.m.;	*d) la journée régulière de travail est de sept virgule cinq (7,5) heures consécutives, excluant la pause-repas, entre sept (7) heures et dix-huit (18) heures;*
And	*et*
**	**
(e) subject to operational requirements as determined from time to time by the Employer, an employee shall have the right to select and request flexible hours between 6 a.m. and 6 p.m. and such request shall not be unreasonably denied.	*e) sous réserve des nécessités du service, tel que déterminé de temps à autre par l'Employeur, l'employé-e a le droit de choisir et de demander des horaires mobiles entre six (6) heures et dix-huit (18) heures et cette demande n'est pas refusée sans motif raisonnable.*
…	[…]

[143] Entered into evidence was an email chain between September 21 and 28 between the grievor and Ms. Bristow and that at times added Messrs. Biard and Toncic and Ms.

Daoust. The subject matter of the emails includes the grievor's attendance at work and requests for and responses to requests for several types of leave. That exchange, which also includes a reference to a flexible work schedule, is as follows:

> [The grievor to Ms. Bristow, September 21, at 15:01:]
>
> *Thank you Cindy, but if necessary, I will have to use whatever leave I have for next Monday and Tuesday.*
>
> *I am hoping that management will accept my request for flexible working arrangements as per my physicians* [*sic*] *response to Roslyn's letter.*
>
> *Until that time, I cannot commit to a schedule. During the interim, please assume my hours are as per yours, same as the agreement previously held prior to your departure for mat leave in the fall of 2014.*
>
> …
>
> [Ms. Bristow to the grievor, September 22, at 07:45:]
>
> *I have not been apprised of any physician's recommendation of flexible hours and this is not a discussion about the year 2014.*
>
> *Since you have not identified hours then I designate 8am to 4pm with a 30 minute lunch break from 12 to 12:30. If these hours do not suit you then you may propose other hours in line with the parameters set forth in the collective agreement.*
>
> …
>
> [The grievor to Ms. Bristow, September 22, at 08:02:]
>
> *I will work the same hours as you, I believe that is 730-330?*
>
> *Please confirm.*
>
> *I met with my physician last week to discuss Roslyn's letter.*
>
> *As you know, I am grieving mgmts* [*sic*] *decision not to accommodate previous and ongoing requests for accommodations.*
>
> …
>
> [Ms. Bristow to the grievor, September 22, at 09:14:]
>
> *Ok, I will note 7:30 to 3:30 with a 30 minute lunch break, thank you.*
>
> …

[144] On October 11, 2016, the grievor emailed Mses. Bristow and Daoust and Mr. Toncic, stating as follows:

> …
>
> *I met with my physician earlier today to finalize the request for flexible working arrangements and she sent me for medical tests which I must complete this afternoon.*
>
> *Roselyne should receive my medical request for flexible working accommodations today or tomorrow.*
>
> …

[145] On October 13, 2016, the grievor emailed Ms. Daoust and copied Messrs. Toncic and Biard and Ms. Bristow. The relevant portion of the email states as follows: "Can you please advise whether you have received the response to the letter you sent my physician last month?"

[146] Entered into evidence was an email dated October 18, 2016, at 08:20, from the grievor to Ms. Daoust, stating that the response and request for accommodation had been faxed to her attention the previous week, on October 12, 2016. Also entered into evidence was an email that same day at 08:30 in reply from Ms. Daoust to the grievor, stating that she had not received anything and that she had reached out to Dr. Burgess's office and spoken with someone who said that they would speak to Dr. Burgess and ask the doctor to fax the letter again. A further email was entered into evidence from Ms. Daoust to the grievor at 08:55, stating that they had received the letter.

[147] Entered into evidence was a handwritten medical information form that appears to have been signed by Dr. Burgess on October 12, 2016 ("the Oct. 12, 2016, note"). The relevant information contained in it states as follows:

> [Note: the text in bold is the statement or question on the form. Text not in bold is what Dr. Burgess stated.]
>
> ***Is Ms. Remillard fit to return to work?*** *Yes.*
>
> ***Expected return to work date (if applicable)*** *as soon as these accommodations are in place*
>
> ***Comments:***
>
> *Michele has a chronic (with occasional acute exacerbations) medical condition. This condition impacts on her work capacity and requires treatment, which in turn impacts on her work schedule. ie: for appointments and possible medical leave. It is*

> *difficult to predict when these episodes might occur and what specific treatment is necessary at that time.*
>
> ***What is the nature of Ms. Remillard's medical condition?***
>
> *Long term*
>
> ***Is he/she able to perform her duties?***
>
> *She is able to perform her duties, however, she requires specific flexible accommodations with specific accommodations that require flexibility*
>
> ***Limitations***
>
> *Yes*
>
> ***If so, could you provide details of the limitations, and whether they are of a permanent or temporary nature***
>
> *As further treatments are determined during medical assessments over time — I recommend the following:*
>
> *1. Allow for flexible working hours/arrangements*
>
> *2. Move her office to a low traffic area*
>
> *3. Provide work/responsibilities to allow Michele to work from home as needed/requested*
>
> ***Treatments***
>
> ***If Ms. Remillard is currently undergoing treatments could you indicate if they could have an impact on her working schedule?***
>
> *Yes*
>
> ***Duration:*** *Ongoing*
>
> ***Number of appointments every week:*** *variable — up to 4x /week +2x/month with occasional increased frequency during exacerbations.*
>
> …

[148] Entered into evidence was a note from Dr. Burgess dated October 27, 2016, which states, "This patient was totally disabled on Monday, October 24, 2016."

E. The grievor's attendance and leave issues from September through November of 2016

[149] All the dates with respect to allegations regarding leave as set out in the leave grievance are in 2016, the relevant time frame being between the date that the grievor returned to work, Monday, August 29, and when she deployed out of GAC, which was shortly after November 11 and before December 1.

[150] Articles 14 through 17 of the collective agreement set out the different types of leave that an employee can request and that the employer can authorize. The clauses that may be relevant to this decision are the following:

ARTICLE 14	***ARTICLE 14***
LEAVE — GENERAL	***CONGÉS — GÉNÉRALITÉS***
…	[…]
14.03 *An employee shall not be granted two (2) different types of leave with pay in respect of the same period of time.*	***14.03*** *L'employé ne bénéficie pas de deux (2) genres de congé payé différents à l'égard de la même période.*
14.04 *An Employee is not entitled to leave with pay during periods the employee is on leave without pay or under suspension.*	***14.04*** *L'employé n'a pas droit à un congé payé pendant les périodes où il est en congé non payé ou sous le coup d'une suspension.*
…	[…]
ARTICLE 16	***ARTICLE 16***
SICK LEAVE	***CONGÉ DE MALADIE***
16.01 Credits	***16.01 Crédits***
An employee shall earn sick leave credits at the rate of nine decimal three seven five (9.375) hours for each calendar month for which the employee receives pay for at least seventy-five (75) hours.	*L'employé acquiert des crédits de congé de maladie à raison neuf virgule trois sept cinq (9,375) heures pour chaque mois civil durant lequel il touche la rémunération d'au moins soixante-quinze (75) heures.*
16.02 *An employee shall be granted sick leave with pay when the employee is unable to perform the employee's duties because of illness or injury provided that:*	***16.02*** *L'employé bénéficie d'un congé de maladie payé lorsque il est incapable d'exécuter ses fonctions en raison d'une maladie ou d'une blessure, à la condition :*
(a) the employee satisfies the Employer of this condition in such a manner and at such a time as may be determined by the Employer,	*a) qu'il puisse convaincre l'Employeur de son état d'une manière et à un moment que ce dernier détermine,*
and	*et*
(b) the employee has the necessary sick leave credits.	*b) qu'il ait les crédits de congé de maladie nécessaires.*

16.03 *Unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness or injury the employee was unable to perform the employee's duties shall, when delivered to the Employer be considered as meeting the requirements of paragraph 16.02(a) above.*

…

16.05 *Where an employee has insufficient or no credits to cover the granting of sick leave with pay under the provision of clause 16.02 above, sick leave with pay may, at the discretion of the Employer, be granted to an employee for a period of up to one hundred eighty-seven decimal five (187.5) hours, subject to the deduction of such advanced leave from any sick leave credits subsequently earned and, in the event of termination of employment for other than death or lay-off, the recovery of the advance from any monies owed the employee.*

…

ARTICLE 17

OTHER LEAVE WITH OR WITHOUT PAY

17.01 Validation

In respect to applications for leave made pursuant to this Article, the employee may be required to provide satisfactory validation of the circumstances necessitating such requests.

…

16.03 *À moins d'une indication contraire de la part de l'Employeur, une déclaration signée par l'employé indiquant qu'il a été incapable d'exécuter ses fonctions en raison d'une maladie ou d'une blessure est jugée, lorsqu'elle est remise à l'Employeur, satisfaire aux exigences de l'alinéa 16.02a) ci-dessus.*

[…]

16.05 *Lorsque l'employé n'a pas de crédits ou que leur nombre est insuffisant pour couvrir l'attribution d'un congé de maladie payé en vertu des dispositions du paragraphe 16.02, un congé de maladie payé peut lui être accordé à la discrétion de l'Employeur pour une période maximale de cent quatre-vingt-sept virgule cinq (187,5) heures, sous réserve de la déduction de ce congé anticipé de tout crédit de congé de maladie acquis par la suite, et en cas de cessation d'emploi pour des raisons autres que le décès ou une mise en disponibilité, sous réserve du recouvrement du congé anticipé sur toute somme d'argent due à l'employé.*

[…]

ARTICLE 17

AUTRES CONGÉS PAYÉS OU NON PAYÉS

17.01 Validation

En ce qui concerne les demandes de congé présentées en vertu du présent article, l'employé peut être tenu de fournir une preuve satisfaisante des circonstances motivant ces demandes.

[…]

17.12 Leave With Pay for Family-Related Responsibilities

(a) For the purpose of this clause, family is defined as spouse (or common-law partner resident with the employee), children (including foster children, children of legal or common-law partner), parents (including stepparents or foster parents), or any relative permanently residing in the employee's household or with whom the employee permanently resides.

(b) The Employer shall grant leave with pay under the following circumstances:

(i) an employee is expected to make every reasonable effort to schedule medical or dental appointments for family members to minimize or preclude his absence from work; however, when alternate arrangements are not possible an employee shall be granted leave for a medical or dental appointment when the family member is incapable of attending the appointment by himself, or for appointments with appropriate authorities in schools or adoption agencies. An employee requesting leave under this provision must notify his supervisor of the appointment as far in advance as possible;

(ii) to provide for the immediate and temporary care of a sick or elderly member of the employee's family and to provide an employee with time to make alternate care arrangements where the illness is of a longer duration;

17.12 Congé payé pour obligations familiales

a) Aux fins de l'application du présent paragraphe, la famille s'entend du conjoint (ou du conjoint de fait qui demeure avec l'employé), des enfants (y compris les enfants nourriciers, les enfants du conjoint légal ou de fait), du père et de la mère (y compris le père et la mère par remariage ou les parents nourriciers) ou de tout autre parent demeurant en permanence au domicile de l'employé ou avec qui l'employés demeure en permanence.

b) L'Employeur accordera un congé payé dans les circonstances suivantes :

(i) un employé doit faire tout effort raisonnable pour fixer les rendez-vous des membres de la famille chez le médecin ou le dentiste de manière à réduire au minimum ou éviter les absences du travail; toutefois, lorsqu'il ne peut en être autrement, un congé payé est accordé à l'employé pour conduire un membre de la famille à un rendez-vous chez le médecin ou le dentiste, lorsque ce membre de la famille est incapable de s'y rendre tout seul, ou pour des rendez-vous avec les autorités appropriées des établissements scolaires ou des organismes d'adoption. L'employé qui demande un congé en vertu de la présente disposition doit prévenir son supérieur du rendez-vous aussi longtemps à l'avance que possible;

(ii) un congé payé pour prodiguer des soins immédiats et temporaires à un membre malade de la famille de l'employé ou à une personne âgée de sa famille et pour permettre à celui-ci de prendre

d'autres dispositions lorsque la maladie est des plus longue durée;

(iii) leave with pay for needs directly related to the birth or to the adoption of the employee's child.

(iii) jours de congé payé pour les besoins se rattachant directement à la naissance ou à l'adoption de l'enfant de l'employé.

(c) The total leave with pay which may be granted under subparagraphs 17.12(b)(i), (ii) and (iii) shall not exceed five (5) days in a fiscal year.

c) Le nombre total de jours de congé payé qui peuvent être accordés en vertu des sous-alinéas 17.12b)(i), (ii) et (iii) ne doit pas dépasser cinq (5) jours au cours d'un exercice financier.

****

****

(d) Seven decimal five (7.5) hours out of the thirty-seven decimal five (37.5) hours stipulated in paragraph 17.12(c) above may be used:

d) sept virgule cinq (7,5) heures des trente-sept virgule cinq (37,5) heures précisées à l'alinéa 17.12c) peuvent être utilisées pour :

(i) to attend school functions, if the supervisor was notified of the functions as far in advance as possible;

(i) assister à une activité scolaire, si le surveillant a été prévenu de l'activité aussi longtemps à l'avance que possible;

(ii) to provide for the employee's child in the case of an unforeseeable closure of the school or daycare facility;

(ii) s'occuper de son enfant en cas de fermeture imprévisible de l'école ou de la garderie;

(iii) to attend an appointment with a legal or paralegal representative for non-employment related matters, or with a financial or other professional representative, if the supervisor was notified of the appointment as far in advance as possible.

(iii) se rendre à un rendez-vous avec un conseiller juridique ou un parajuriste pour des questions non liées à l'emploi ou avec un conseiller financier ou un autre type de représentant professionnel, si le surveillant a été prévenu du rendez-vous aussi longtemps à l'avance que possible.

17.13 Volunteer Leave

17.13 Congé pour bénévolat

Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, seven decimal five (7.5) hours of leave with pay to work as a volunteer for a charitable or

Sous réserve des nécessités du service telles que déterminées par l'Employeur et sur préavis d'au moins cinq (5) jours ouvrables, l'employé se voit accorder, au cours de chaque année financière, sept virgule cinq (7,5) heures de congé payé pour travailler à titre de

community organisation or activity, other than for activities related to the Government of Canada Workplace Charitable Campaign.	*bénévole pour une organisation ou une activité communautaire ou de bienfaisance, autre que les activités liées à la Campagne de charité en milieu de travail du gouvernement du Canada.*
The leave will be scheduled at a time convenient both to the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leave at such time as the employee may request.	*Ce congé est pris à une date qui convient à la fois à l'employé et à l'Employeur. Cependant, l'Employeur fait tout son possible pour accorder le congé à la date demandée par l'employé.*
17.14 Court Leave With Pay	***17.14 Congé payé pour comparution***
The Employer shall grant leave with pay to an employee for the period of time the employee is required:	*L'Employeur accorde un congé payé à l'employé pendant la période de temps où il est tenu :*
(a) to be available for jury selection;	*a) d'être disponible pour la sélection d'un jury;*
(b) to serve on a jury;	*b) de faire partie d'un jury;*
or	*ou*
(c) by subpoena or summons to attend as a witness in any proceeding held:	*c) d'assister, sur assignation ou sur citation, comme témoin à une procédure qui a lieu :*
(i) in or under the authority of a court of justice;	*(i) devant une cour de justice ou sur son autorisation,*
(ii) before a court, judge, justice, magistrate or coroner;	*(ii) devant un tribunal, un juge, un magistrat ou un coroner,*
(iii) before the Senate or House of Commons of Canada or a committee of the Senate or House of Commons otherwise than in the performance of the duties of the employee's position;	*(iii) devant le Sénat ou la Chambre des communes du Canada ou un de leurs comités, dans des circonstances autres que dans l'exercice des fonctions de son poste,*
(iv) before a legislative council, legislative assembly or house of assembly, or any committee thereof that is authorized by law to compel	*(iv) devant un conseil législatif, une assemblée législative ou une chambre d'assemblée, ou un de leurs comités, autorisés par la loi à*

the attendance of witnesses before it;	*obliger des témoins à comparaître devant eux,*
or	*ou*
(v) before an arbitrator or umpire or a person or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it.	*(v) devant un arbitre, une personne ou un groupe de personnes autorisés par la loi à faire une enquête et à obliger des témoins à se présenter devant eux.*
…	[…]
17.21 Leave With or Without Pay for Other Reasons	***17.21 Congés payés ou non payés pour d'autres motifs***
(a) At its discretion, the Employer may grant:	*a) L'Employeur peut, à sa discrétion, accorder :*
(i) leave with pay when circumstances not directly attributable to the employee prevent his reporting for duty; such leave shall not be unreasonably withheld;	*(i)) un congé payé lorsque des circonstances qui ne sont pas directement imputables à l'employé l'empêchant de se rendre au travail; ce congé n'est pas refusé sans motif raisonnable;*
(ii) leave with or without pay for purposes other than those specified in this Agreement.	*(ii) un congé payé ou non payé à des fins autres que celles indiquées dans la présente convention.*
(b) ***Personal Leave***	*b)* ***Congé personnel***
Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.	*Sous réserve des nécessités du service déterminées par l'Employeur et sur préavis d'au moins cinq (5) jours ouvrables, l'employé se voit accorder, au cours de chaque année financières, sept virgule cinq (7,5) heures de congé payé pour des raisons de nature personnelle.*
The leave will be scheduled at a time convenient both to the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leave at such time as the employee may request.	*Ce congé est pris à une date qui convient à la fois à l'employé et à l'Employeur. Cependant, l'Employeur fait tout son possible pour accorder le congé à la date demandée par l'employé.*
…	[…]

[Emphasis in the original]

[151] Article 30 of the collective agreement is entitled "Leave for Labour Relations Matters". While it is not in the leave portion of the collective agreement, it provides for leave to an employee when that employee is engaged in labour relations matters as set out in that article. It states as follows:

30.01 Public Service Labour Relations Board Hearings	***30.01 Audiences de la Commission des relations de travail dans la fonction publique***
Complaints made to the Public Service Labour Relations Board pursuant to subsection 190(1) of the Public Service Labour Relations Act (PSLRA)	*Plaintes déposées devant la Commission des relations de travail dans la fonction publique en vertu du paragraphe 190(1) de la* Loi sur les relations de travail dans la fonction publique (LRTFP)
Where operational requirements permit, in cases of complaints made to the Public Service Labour Relations Board pursuant to section 190(1) of the PSLRA alleging a breach of sections 157, 186(1)(a), 186(1)(b), 186(2)(a)(i), 186(2)(b), 187, 188(a) or 189(1) of the PSLRA, the Employer will grant leave with pay:	*Lorsque les nécessités du service le permettent, lorsqu'une plainte est déposée devant la Commission des relations de travail dans la fonction publique en application du paragraphe 190(1) de la LRTFP alléguant une violation de l'article 157, de l'alinéa 186(1)a) ou 186(1)b), du sous-alinéa 186(2)a)(i), de l'alinéa 186(2)b), de l'article 187, de l'alinéa 188a) ou du paragraphe 189(1) de la LRTFP, l'Employeur accorde un congé payé :*
(a) to an employee who makes a complaint on his own behalf before the Public Service Labour Relations Board,	*a) à l'employé qui dépose une plainte en son propre nom, à la Commission des relations de travail dans la fonction publique,*
and	*et*
(b) to an employee who acts on behalf of an employee making a complaint, or who acts on behalf of the Institute making a complaint.	*b) à l'employé qui intervient au nom d'un employé qui dépose une plainte au nom de l'Institut, si la plainte est déposée par ce dernier.*
30.02 Applications for Certification, Representations and Interventions With Respect to Applications for Certification	***30.02 Demandes d'accréditation, objections et interventions concernant les demandes d'accréditation***

Where operational requirements permit, the Employer will grant leave without pay:	*Lorsque les nécessités du service le permettent, l'Employeur accorde un congé non payé :*
(a) to an employee who represents the Institute in an application for certification or in an intervention,	*a) à l'employé qui représente l'Institut dans une demande d'accréditation ou dans une intervention,*
and	*et*
(b) to an employee who makes personal representations with respect to a certification.	*b) à l'employé qui présente des objections personnelles à une accréditation.*
30.03 Employee Called as a Witness	***30.03 Employé cité comme témoin***
The Employer will grant leave with pay:	*L'Employeur accorde un congé payé :*
(a) to an employee called as a witness by the Public Service Labour Relations Board,	*a) à l'employé cite comme témoin par la Commission des relations de travail dans la fonction publique,*
and	*et*
(b) where operational requirements permit, to an employee called as a witness by an employee or the Institute.	*b) lorsque les nécessités du service le permettent, à l'employés cite comme témoin par un autre employé ou par l'Institut.*
30.04 Arbitration Board, Public Interest Commission Hearings and Alternative Dispute Resolution Process	***30.04 Audiences d'une commission d'arbitrage, ou d'une commission d'intérêt public et lors d'un mode substitutif de Règlement des différends***
Where operational requirements permit, the Employer will grant leave with pay to an employee representing the Institute before an Arbitration Board, Public Interest Commission or an Alternative Dispute Resolution Process.	*Lorsque les nécessités du service le permettent, l'Employeur accorde un congé payé à un nombre raisonnable d'employés qui représentent l'Institut devant une commission d'arbitrage ou une commission d'intérêt public ou lors d'un mode substitutif de règlement des différends.*
30.05 Employee Called as a Witness	***30.05 Employé cité comme témoin***

The Employer will grant leave with pay to an employee called as a witness by an Arbitration Board, Public Interest Commission or an Alternative Dispute Resolution Process and, where operational requirements permit, leave with pay to an employee called as a witness by the Institute.	*L'Employeur accorde un congé payé à l'employé cité comme témoin par une commission d'arbitrage, par une commission d'intérêt public ou lors d'un mode substitutif de règlement des différends et, lorsque les nécessités du service le permettent, un congé payé à l'employé cité comme témoin par l'Institut.*
30.06 Adjudication	***30.06 Arbitrage des griefs***
Where operational requirements permit, the Employer will grant leave with pay to an employee who is:	*Lorsque les nécessités du service le permettent, l'Employeur accorde un congé payé :*
(a) a party to an adjudication,	*a) à un employé constitué partie dans un cause d'arbitrage de grief,*
or	*ou*
(b) the representative of an employee who is a party to an adjudication,	*b) au représentant d'un employé constitué partie dans une cause de ce genre,*
or	*ou*
(c) a witness called by an employee who is a party to an adjudication.	*c) à un témoin cite par un employé constitué partie dans une cause de ce genre.*
30.07 Meetings During the Grievance Process	***30.07 Réunions se tenant dans le cadre de la procédure de Règlement des griefs***
Employee Presenting Grievance	***Employé qui présente un grief***
Where operational requirements permit, the Employer will grant to an employee:	*Lorsque les nécessités du service le permettent, l'Employeur accorde à un employé :*
(a) where the Employer originates a meeting with the employee who has presented the grievance, leave with pay when the meeting is held in the headquarters area of such employee and on duty status when the meeting is held outside the headquarters area of such employee;	*a) lorsque l'Employeur convoque à une réunion l'employé qui a présenté le grief, un congé payé, lorsque la réunion se tient dans la région du lieu d'affectation de l'employé, et le statut de « présent au travail », lorsque la réunion se*

	tient à l'extérieur de la région du lieu d'affectation;
and	*et*
(b) where an employee who has presented a grievance seeks to meet with the Employer, leave with pay to the employee when the meeting is held in the headquarters area of such employee and leave without pay when the meeting is held outside the headquarters area of such employee;	*b) lorsque l'employé qui a présenté un grief cherche à rencontrer l'Employeur, un congé payé, lorsque la réunion se tient dans la région du lieu d'affectation de l'employé et un congé non payé lorsque la réunion se tient à l'extérieur de la région du lieu d'affectation;*
and	*et*
(c) when mutually agreed by the parties, in cases where more than one employee has grieved on the same subject and all grievors are represented by the Institute that one meeting will serve the interests of all grievors.	*c) lorsque plus d'un employé a présenté un grief pour la même raison et que tous les plaignants sont représentés par l'Institut, si toutes les parties y consentent, on tiendra une seule réunion pour étudier simultanément tous les griefs.*
30.08 Employee Who Acts as Representative	***30.08 Employé qui fait fonction de représentant***
Where an employee wishes to represent at a meeting with the Employer, an employee who has presented a grievance, the Employer will, where operational requirements permit, grant leave with pay to the representative when the meeting is held in the headquarters area of such employee and leave without pay when the meeting is held outside the headquarters area of such employee.	*Lorsqu'un employé désire représenter, lors d'une réunion avec l'Employeur, un employé qui a présenté un grief, l'Employeur accorde, lorsque les nécessités du service le permettent, un congé payé au représentant lorsque la réunion se tient dans la région de son lieu d'affectation et un congé non payé lorsque la réunion se tient à l'extérieur de la région de son lieu d'affectation.*
30.09 Grievance Investigations	***30.09 Enquête concernant un grief***
Where an employee has asked or is obliged to be represented by the Institute in relation to the presentation of a grievance and an employee acting on behalf of the Institute wishes to discuss the grievance with that employee, the employee and the representative of	*Lorsqu'un employé a demandé à l'Institut de le représenter ou qu'il est obligé de l'être pour présenter un grief et que l'employé mandaté par l'Institut désire discuter du grief avec cet employé, l'employé et son représentant bénéficient, si les nécessités du service le*

the employee will, where operational requirements permit, be given reasonable leave with pay for this purpose when the discussion takes place in the headquarters area of such employee and leave without pay when it takes place outside the headquarters area of such employee.

30.10 Contract Negotiations Meetings

Where operational requirements permit, the Employer will grant leave without pay to an employee for the purpose of attending contract negotiations meetings on behalf of the Institute.

30.11 Preparatory Contract Negotiations Meetings

Where operational requirements permit, the Employer will grant leave without pay to an employee to attend preparatory contract negotiations meetings.

30.12 Meetings Between the Institute and Management

Where operational requirements permit, the Employer will grant leave with pay to an employee to attend meetings with management on behalf of the Institute.

…

30.14 Employee Representatives' Training Courses

(a) Where operational requirements permit, the Employer will grant leave without pay to employees appointed as Employee Representatives by the Institute, to undertake training sponsored by the Institute related to the duties of an Employee Representative.

permettent, d'une période de congé payé à cette fin si la discussion se tient dans la région du lieu d'affectation de l'employé et d'un congé non payé si elle se tient à l'extérieur de la région du lieu d'affectation de l'employé.

30.10 Séances de négociations contractuelles

Lorsque les nécessités du service le permettent, l'Employeur accorde un congé non payé à l'employé qui assiste aux séances de négociations contractuelles au nom de l'Institut.

30.11 Réunions préparatoires aux négociations contractuelles

Lorsque les nécessités du service le permettent, l'Employeur accorde un congé non payé à l'employé qui assiste aux réunions préparatoires aux négociations contractuelles.

30.12 Réunions entre l'Institut et la direction

Lorsque les nécessités du service le permettent, l'Employeur accorde un congé payé à l'employé qui participe à une réunion avec la direction au nom de l'Institut.

[…]

30.14 Cours de formation des représentants

a) Lorsque les nécessités du service le permettent, l'Employeur accorde un congé non payé aux employés qui ont été nommés représentants par l'Institut, pour suivre un cours de formation dirigé par l'Institut et qui se rapporte aux fonctions d'un représentant.

(b) Where operational requirements permit, the Employer will grant leave with pay to employees appointed as Employee Representatives by the Institute, to attend training sessions concerning Employer-employee relations sponsored by the Employer.	*b) Lorsque les nécessités du service le permettent, l'Employeur accorde un congé payé aux employés nommés représentants par l'Institut, pour assister à des séances de formation concernant les relations entre l'Employeur et les employés, parrainées par l'Employeur.*

[Emphasis in the original]

[152] Leave is requested, approved, and recorded in a computerized electronic human resources management system (HRMS). In general, the way the system works is that the system populates the leave banks for each individual employee when they commence employment based on the terms and conditions of employment of each employee, including the leave that each employee earns or is entitled to by virtue of the collective agreement that may govern them. Requests for leave are submitted and approved electronically, and the system deducts the leave as it is used. The leave banks are updated both when leave is used and when it is earned.

[153] Each type of leave has a separate code associated with it. The following are the types of leave and leave codes associated with the leave that are relevant to this grievance:

Type of Leave	**Associated Leave Code**
Vacation Leave	110
Certified Sick Leave	220
Court Leave with Pay	610
Leave for Union Business	640
Medical or Dental Appointments	698

[154] The HRMS can generate reports. Entered into evidence was a record of the grievor's leave for the period between September and November of 2016 ("the leave record").

[155] Also entered into evidence was the leave chart.

[156] The Sun Life RTW plan covered the period between August 29 and September 23, 2016. During that period, and as part of that plan, the grievor was supposed to work 98.5 hours over 16 working days. The normal full-time hours covered in that time frame totalled 142.50. The evidence disclosed that she worked 28.5 hours.

[157] Between September 26 and November 13, 2016, there were 33 full-time working days, amounting to 247.5 hours of full-time work. According to the leave chart, the grievor was actually at work for 125.25 hours, or just under 51% of the full-time working hours that she should have worked.

[158] The leave chart further shows that on only 9 of the 33 full-time working days did the grievor put in a full 7.5-hour day. On the other 24 days, some form of leave was being used by the grievor.

[159] The leave record recorded 44 total entries between September 21 and November 25, all of which were either approved or denied by Ms. Bristow. Of the 44 leave requests, 9 were denied.

[160] In her examination-in-chief, the grievor said that every time she requested leave to attend an appointment, Ms. Bristow denied it because the grievor did not give her five days' notice. The rest of the grievor's evidence about her leave was quite difficult to follow. She referenced not having a leave code to attend doctor's appointments and then said that she submitted a request but was denied court leave. When asked if any leave was granted, she said that there was lots of back and forth and that the employer did approve leave. She then stated that the employer stated that it approved some leave but that she has no record of it. She then stated that she was never paid and then said: "I wasn't paid a cent!" When her representative asked her if she had been paid for those days (it was unclear if they were specific days or all the days she had claimed leave for), the grievor said that she was never able to reconcile.

[161] During the grievor's cross-examination, she was brought to the leave record, and it was suggested to her that the union had agreed that the leave that was in issue in this grievance were those leave requests that had been denied, to which the grievor said that she could not agree that the statement was accurate. When counsel for the employer suggested to her that she had provided nothing else, she stated that she had

provided an Excel spreadsheet. No Excel spreadsheet was contained in the JBD, and none was produced at the hearing by the grievor.

[162] This prompted an *in camera* discussion to determine if there was any way to find out what leave the grievor said was denied that she was taking issue with. During the *in camera* discussion, it was confirmed between the union and employer that the dates in question were those leaves showing as denied in the leave record. After this, the grievor was required to review the leave that the employer and union had agreed was in issue and confirmed her agreement. The leave that was in issue in the hearing that the grievor stated was not granted is as follows:

Date of leave denied	Type of leave denied	Leave code	Number of hours
September 21	Court Leave	610	7.5
September 26	Medical or Dental	698	3.0
September 27	Court Leave	610	7.5
September 27	Medical or Dental	698	7.5
October 11	Medical or Dental	698	3.75
October 17	Medical or Dental	698	2.0
November 4	Certified Sick Leave	220	3.75
November 9	Court Leave	610	7.5
November 24 and 25	Union Leave	640	15.0
			Total: 57.50

1. Court leave, September 21 and 27 and November 9: 22.5 hours, code 610

[163] Three of the denied leave requests were for court leave for a total of 22.5 hours on September 21 and 27 and November 9.

[164] The only evidence before me of court proceedings that the grievor was involved in were her own family law proceedings with her husband. Counsel for the employer

brought the grievor to an email she sent to Ms. Bristow dated October 31, at 13:39, and in which the grievor informs Ms. Bristow that she has a legal appointment on the Thursday that she must attend. When showed the email by counsel, the grievor would not agree with what was in the email, specifically that she told Ms. Bristow that she had an appointment that was related to a legal matter. She became argumentative with counsel.

[165] Counsel then brought the grievor to a copy of a "Notice of Motion" for a court appearance in the proceedings between herself and her husband that was set for 14:00 on November 9. She agreed that she had a court appearance set for that date. Counsel for the employer then put it to her that this was a case conference in her family matter, to which the grievor then stated that she did not know. She then said that she would have to actually see the court's endorsement. She then said that her husband brought her to court on whatever issue was set out in the motion material three times.

[166] When counsel for the employer put it to the grievor that she was never issued a summons or subpoena to attend as a witness, the grievor said that she disagreed and that the document stated that she had to participate. When it was put to her that she was the respondent in those proceedings, the grievor agreed. Counsel then pointed out that she was granted 7.5 hours of vacation leave for that day; she agreed.

[167] The grievor was brought to the denial of court leave on September 21 and was brought to documentation showing that this was during the period of the Sun Life RTW plan and that she was not scheduled to work that day. The grievor initially responded that she should not have put in that leave request. Then she said that the document that showed that she was not scheduled to work was Ms. Bristow's record and that it "could have been a typo". She then said that she could have planned to take it off and submitted the leave request. She also said that perhaps the employer let her switch. The grievor was clearly just guessing at what might have happened.

2. Union leave, November 24 and 25: 15 hours, code 640

[168] Counsel for the employer put it to the grievor that she had not provided any evidence that she met with her union rep on these days for these times. The grievor agreed with this but then stated that she wanted to be a union shop steward and attend a conference.

[169] Entered into evidence was an email dated November 7 from the union to the grievor confirming that her request to become a union steward had been approved and that the next step in the process was the basic steward training requirements. There was no reference to when this training was held.

[170] When counsel put it to her that she had not provided any evidence of training for the days in question, the grievor agreed, stating that she had not. No documentary evidence was provided that there was any shop steward training offered on these days or that the grievor was registered to attend.

3. Leave for medical or dental appointments, October 17: 2 hours, code 698

[171] With respect to the denied leave for medical or dental appointments of two hours on October 17, counsel for the employer brought the grievor to an email dated October 17, at 09:09, which she sent to Ms. Bristow and that stated simply this: "I will not be in today. I have an urgent family matter that needs my attention. I'll submit accordingly tomorrow." The grievor admitted that that is what the email said. The grievor was then shown the leave record, which disclosed that the grievor had been approved for three hours of leave for family related reasons for that day.

4. Certified sick leave, November 4: 2 hours, code 220

[172] The grievor did not testify about this date in her examination-in-chief. The leave chart discloses that the grievor sent an email on October 31, 2016, about attending a dental appointment on this day at 09:20, for which leave was approved. The email dated Monday, October 31, 2016, was entered into evidence in which the grievor advised Ms. Bristow "FYI… I have a dental appt [*sic*] this Friday." The leave chart then references that a phone call was received indicating that the grievor had phoned and stated that she was at the courthouse and that she did not return to the office.

[173] In cross-examination, the grievor was asked about this date and initially disagreed that she was not paid for leave on this date. She later agreed that she received pay for this day.

III. Summary of the arguments

A. For the grievor

[174] The grievor submitted that the accommodation and leave grievances should be allowed. With respect to the grievance alleging that the employer deployed her without her consent, the grievor seeks a declaration.

[175] The grievor referred me to *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 SCR 489, *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970 ("*Central Okanagan*"), *Chopra v. Canada (Attorney General)*, 2006 FC 9, *Emard v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 66, *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, *Ontario Human Rights Commission v. Impact Interiors Inc.*,1998 CanLII 17685, *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34, and *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536.

B. For the employer

[176] The employer submitted that the grievances should be denied.

[177] The employer also referred me to *Central Okanagan* and to the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), *Moore v. British Columbia (Education)*, 2012 SCC 61, *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, *Bodnar v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 71, *Dorn v. Treasury Board (Department of Employment and Social Development)*, 2017 PSLREB 61, *Douglas v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 51, *Harris v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 55, *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97, *Tarek-Kaminker v. Treasury Board (Public Prosecution Service of Canada)*, 2021 FPSLREB 120, *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12, *Attorney General of Canada v. Duval*, 2019 FCA 290, and *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55.

IV. Reasons

[178] Before I address the specifics of each grievance, I will first address the issue of the grievor's credibility.

A. Credibility

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

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

[180] For the reasons that are set out in this section, it is difficult to accept much of what the grievor testified to without some sort of either oral or documentary corroboration from a different source.

[181] The grievor's testimony was often inconsistent and contradictory, and at times, she was caught in outright lies. Despite facts to the contrary, her testimony would follow a narrative that could and would change to suit achieving the goals in the grievances. What became patently clear during her testimony was that what she was really looking for was the ability to telework.

[182] During the hearing, despite being asked specific questions that were pertinent to the issues in the hearing, she would often answer by making statements that were not responsive to what was asked. When pressed, usually during cross-examination, this would trigger a response of her not being able to recall what had happened or that she had other things going on in her life that were more important for her to deal with.

[183] The grievor specifically lied about her illness in early June of 2014. In an email on June 9, 2014, the grievor told her supervisor at the time that she was sick and that she would not be in. The next day, she emailed him again, stating that she would not be in that day as she needed another day to "shake [off] a bug" that she had caught over the previous weekend. This statement clearly indicates some sort of physical ailment that she had just caught — a virus, cold, or flu that required a couple of days to recover from. Shortly after this, the June 12 note was issued by Dr. Burgess that stated that she was totally disabled as of June 13. The July 22 note then extended this period of total disability to August 31, 2014.

[184] In cross-examination, in response to questions about the June 9 and 10, 2014, emails about being sick with a bug, she stated this: "I took three months off to deal with my legal issues." When it was put to her that she did not have a bug, she admitted that she lied, stating, "yes that was a ruse to buy time." In the next breath, the grievor then made a statement to the employer's counsel changing that statement suggesting that she had a mental health bug and added the words "How's that" to the end of her answer, clearly intimating that she had now fixed her answer sufficiently to fit into the set of facts that suited the disability narrative despite the answers that moments before she had just given suggesting that the time off was a ruse and that it was taken to deal with her legal issues related to her personal family law issues.

[185] Was the grievor lying about her health to her employer? Was she lying to her doctor? Was she lying to both? The information she provided begs the question as to what was really going on with the grievor at this time with her health and whether anything she was saying either to the employer or her doctor at that time was true.

[186] In the fall of 2014, the employer sought input from Dr. Burgess as to whether the grievor was fit to return to work and, if so, what her limitations and restrictions were. This was to enable it to, first, determine if she could in fact return to work and second if she could, what, if any, accommodations might be necessary. Dr. Burgess

completed the Oct. 1 RTW form. For a period after it was produced to the employer, the grievor was steadfast in her refusal to permit her immediate supervisor and Mr. Biard to see what was in the document. In her emails at the time, and during her testimony, she suggested that she did not want personal information shared; yet, nothing in the document disclosed any personal information. It did not disclose any diagnosis or any prognosis. In fact, one is hard-pressed to suggest that it even sets out limitations or restrictions; it largely suggests what Dr. Burgess sees as appropriate accommodation measures.

[187] What is also troubling about this is that Ms. Désormeaux-Dufour and Mr. Toncic emailed one another on October 9, 2014, to try to resolve this refusal of the grievor over the Oct. 1 RTW form, and when a question was put to her about the emails and management not being able to reintegrate her into the workplace without her supervisors knowing what the information was, she said that she had "nothing to do with the correspondence". This directly contradicts what Mr. Toncic said in his email to Ms. Désormeaux-Dufour, where in the first line, he wrote this: "I have spoken to Michele and she confirms that she will consent to having senior management obtain the medical information, that is, Mr. Baird's [*sic*] principals." The statement in Mr. Toncic's email is congruent with the events that occurred that same day, which is that the grievor executed a new consent form, the Oct. 9 consent. The grievor was shown the Oct. 9 consent and confirmed that she had agreed that she would provide it.

[188] A meeting was then held between the grievor, her representative, and representatives of the employer to discuss the Oct. 1 RTW form and the grievor's potential return to work; it was the Nov. 4 meeting. In a short exchange between the grievor and counsel for the employer during her cross-examination, the grievor acknowledged recalling the meeting, but then, when faced with questions about the details of the meeting, she stated that she had no recollection of the discussions and then said that she did not recall the meeting. Counsel then put a question to the grievor about recalling the employer telling her at the meeting that telework was a privilege, and the grievor admitted to recalling this at the meeting.

[189] Another return-to-work meeting was scheduled to take place — the Dec. 9 meeting. Just before it, the employer sent the grievor the Dec. 5 email that had attached the Dec. 5 RTW plan. These were followed up with an email on December 8, 2014, in which Mr. Biard forwarded a copy of a new work description that was

referenced in the Dec. 5 email. In her examination-in-chief, when asked questions on the Dec. 9 meeting, she said that none of the accommodation measures were implemented. Then she said that she never saw the Dec. 5 RTW plan. Then, when asked if she agreed with the plan, she stated that it was a silly conversation and again said that it was never implemented.

[190] In cross-examination, the grievor would not accept that the Dec. 5 RTW plan was attached to the Dec. 5 email at the time it was sent. When asked if she told the employer that this was the case when she received the email, she answered with this: "My father died. I wasn't paying attention to this. I knew I got this, but I didn't pay attention to this; it was at the bottom of my list of things." When counsel for the employer told her that Mr. Biard would testify that the Dec. 5 RTW plan was attached to the Dec. 5 email, the grievor then stated emphatically that it was not but then stated that she would have to see the email. This made no sense, as the email was right in front of her when she made that statement. The grievor then agreed that the Dec. 5 RTW plan was attached to the Dec. 5 email and then again stated that it was not. When counsel for the employer put the question to her again, she then changed her answer again, agreeing that it was attached to the email.

[191] All the grievor's evidence on the subject of the Dec. 5 email, the Dec. 5 RTW plan, and the Dec. 9 meeting, both in her examination-in-chief and cross-examination, was baffling. First, she flip-flopped over whether or not she saw the Dec. 5 RTW plan; in her examination-in-chief, she said that she did not see it, but in cross-examination, her answers changed constantly from she did to she did not see it. Her statement about the Dec. 5 RTW plan never being implemented was perplexing; the implication in her testimony was that somehow, it was the employer's fault that it was not implemented, despite her leaving the meeting within minutes of it starting and then being on long term disability leave and not returning to work for the next 20 plus months.

[192] The whole purpose of providing the Dec. 5 RTW plan and having the Dec. 9 meeting was to see if it was something that could be achieved in getting the grievor back to work; yet, she left the meeting after only seven minutes and after interrupting the employer representatives while they were speaking. She said that the meeting was a waste of time, she was not going to make a decision on her entire future, and she had other, more important, places to be.

[193] The way she testified about this entire return-to-work process suggested that somehow, the employer was at fault for the plan not being implemented. This just is not true as it was the grievor who walked out of the meeting, not to return to the workplace for over 20 months. What makes the grievor's answers to the questions that were put to her on this issue more outlandish is that the Dec. 5 RTW plan appears to have been largely based on her own doctor's (Dr. Burgess's) suggestions set out in the Oct. 1 RTW form.

[194] During her cross-examination with respect to the leave grievance, the grievor was brought to a request by her for seven-and-a-half hours of court leave for September 21, 2016. This was a day that was during the Sun Life RTW plan period and was a day that she was not scheduled to be at work. When this was pointed out to her, she initially said that she should not have put in the leave request, then suggested that the document that showed that she was not supposed to work that day was Ms. Bristow's, then stated that she could have planned to take it off and submitted the leave, and then stated that perhaps the employer had let her change what day she was supposed to be working. It was obvious that the grievor had no actual idea what had happened and that she chose to just throw out possibilities as they came to her in a stream-of-consciousness narrative.

[195] In her examination-in-chief, when being questioned on the leave grievance, the grievor stated that every time she requested leave to attend an appointment, Ms. Bristow denied her the leave because the grievor did not give five days' notice. This is just not true. The leave record discloses that during the period in issue, August 29 to November 25, the employer approved 35 leave requests for the grievor and denied 9.

[196] A review of the leave provisions of the collective agreement discloses that only two leave provisions require an employee to give any notice. Those two are the annual leave allowances for one personal-leave day and one volunteer-leave day. For only those two types of leave and only those two, an employee is required to give notice, and that notice is five days. I note that none of the leave in question, whether it was approved or denied, was either a personal-leave day or volunteer-leave day.

[197] Just before the end of the grievor's examination-in-chief, counsel for the employer interrupted her and asked what specific tab of the JBD the grievor was reading from. The grievor responded that she was not reading from any tab; she then

stated she was not reading from anything. She was pressed on this several times by counsel for the employer, and she outright denied it. It was plainly obvious to me that she was reading from what appeared to be an iPad or tablet as I could see that she was reading from what appeared to be either an iPad or tablet of some sort. When I pointed this out to her, she admitted that in fact, she was looking at emails on her tablet.

[198] Given the above findings and facts, I find that the grievor has put her credibility in issue and has made it difficult for me to accept uncorroborated evidence on her part. As per my earlier citation of *Faryna*, I find that the grievor's memory was, and she herself admitted such in her testimony at times, unreliable. Also, her ability to relate clearly what had happened was equally unreliable. Her story is largely not consistent with the probabilities as disclosed by documentary evidence and the clear oral testimony of others.

B. Board file nos. 566-02-13810 and 13812 — the allegations of a failure to accommodate

[199] The grievor came to the Board seeking a remedy based on an allegation that the employer failed its duty to accommodate her to the point of undue hardship and in a timely manner. This duty is based on the grievor's allegation that she suffered from a disability. The initial burden of proof was on the grievor and largely turned on the facts.

[200] In her submissions, the grievor submitted that the employer discriminated against her at the following three points in time for failing to accommodate her:

- the period of March through September of 2014;
- the period of September through December of 2014; and,
- at the time she returned to work in August of 2016.

[201] For the sake of clarity, I will deal with each of these periods separately, and they will be as follows:

- The period of March through September of 2014 will comprise the period between March 3, 2014, and August 29, 2014 ("the March-August 2014 period").

- The period of September through December of 2014 will comprise the period from September 2, 2014 (the first working day after August 31, 2014), to the end of December 2014 ("the September-December 2014 period").

- The period that she returned to work will comprise August 29, 2016, until she left GAC, sometime in mid- to late-November 2016 ("the August-November 2016 period").

[202] In *Diks v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 3, the Board stated that the test in workplace-discrimination cases is as follows:

> …
>
> ***76*** *In order to demonstrate that an employer engaged in a discriminatory practice, a grievor must first establish a* prima facie *case of discrimination. A* prima facie *case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*")).*
>
> ***77*** *An employer faced with a* prima facie *case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows its actions were in fact not discriminatory; or, by establishing a statutory defence that justifies the discrimination (*A. B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13).*
>
> …

[203] As set out in *Stewart*, to make a case of *prima facie* discrimination, a grievor is required to show that he, she or they, have a characteristic protected from discrimination, that he or she experienced an adverse impact of some type, and that the protected characteristic was a factor in the adverse impact. Discriminatory intent is not required to demonstrate *prima facie* discrimination.

[204] In cases such as these, in which an employee states that they have been discriminated against due to a disability, it is not enough for a grievor to simply state that they have a disability. Many people suffer from disabilities that do not affect their ability to carry out their duties and responsibilities at work. The grievor had to establish a *prima facie* case of discrimination by showing not only that she has a protected characteristic but also that due to that characteristic, she suffered adverse treatment; in short, there must be a nexus between the two.

[205] If a grievor establishes a *prima facie* case, the next questions asked are whether the employer can accommodate the grievor, and, if it can, has it? The Supreme Court of Canada stated in *Central Okanagan*, at 994 and 995, as follows:

> *The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in O'Malley. At page 555, McIntyre J. stated:*
>
> > *Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.*
>
> *To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.*
>
> *This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable [page995] and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.*

[206] For the reasons that follow, I find that the grievor failed to establish a *prima facie* case.

[207] The grievor's case is founded on the protected ground of a disability. The grievor did not disclose her disability to her employer as matters unfolded in 2014; nor did she during the balance of her tenure at GAC. I neither heard nor saw any evidence that identified the grievor's disability. Exactly what that disability was, or is, I do not know, as it was not disclosed at any time.

[208] This is not to say that the grievor does not have a disability or that the disability did not impose upon her restrictions or limitations. However, hearings such as these,

with respect to allegations of discrimination, are decided largely on what facts existed that have driven the dispute to the point that the parties require the intervention of a third party. It is extremely difficult to make findings of fact when evidence is withheld.

[209] When the issue before the Board largely turns on health-specific evidence, a healthcare professional involved in the treatment of that person, more particularly a personal physician involved with that person's health care over an extended period, is often a key witness and can shed considerable light on the issues involved. I will digress for a moment to discuss the role of the healthcare professional in these types of cases.

[210] It is not uncommon to have situations in which an employee produces a note from a healthcare professional such as a family doctor (e.g., the March 3 note) that on its face appears to dictate an accommodation measure that the doctor suggests. That is not the role of the healthcare professional. The healthcare professional, again often the treating family physician or personal physician of an employee, does have a role in the process; it is just not the one that dictates to the employer what it is required to do to accommodate an employee.

[211] When a person goes to see a doctor, it is usually because they are having some sort of health-related problem, be it physical or mental. The doctor is there to help the person with their health. They diagnose what they think is the problem and provide the person with what they think is the best solution based on their assessment of the complaint or complaints presenting to them. Sometimes the solution is simple, such as the prescription of a medication; other times, not so much, and at times, there may be a myriad of options — sometimes, there are referrals for tests, and sometimes, there are referrals to specialists.

[212] When we have complex ailments, those that potentially fall into the realm of the protected characteristic of disability, under human rights legislation, the role of the healthcare professional still relates to the treatment of the employee's health. Their assessment of an ailment, which causes limitations to and restrictions on a person's abilities, is often key in determining a course of action by the employer, employee, and union in the tri-partite process discussed by the Supreme Court of Canada in *Central Okanagan*.

[213] The most simplistic and trite example of this could be an employee who works in a warehouse and is often required as part of their duties and responsibilities to lift and move a host of different things of different shapes, sizes, and weights. This employee suffers a serious break of a bone or bones in their arm and is in a cast for an extended time. After the cast is removed, they need physiotherapy to get the arm back to regular working strength. The employee's doctor provides the employer with information on the restrictions and limitations on the use of the arm, and it is from that information that the employer, employee, and union devise an accommodation plan for the employee.

[214] Dr. Burgess was identified by the grievor as her doctor. She provided a series of notes from March of 2014 through to October of 2016. She did not testify, and none of her clinical notes and records were entered into evidence. Whatever she thought, as well as her assessment of the grievor's health, restrictions, or limitations caused by health issues, which would have been contained in the notes and records were not shared with the Board to assist in its assessment of the grievance and issues that it had to decide.

[215] It also should be noted that this was not for want of trying by the employer. The grievor was requested, as part of the hearing process, to produce this information. She refused. Indeed, during the course of her evidence, she steadfastly refused to speak about her disability and confirmed that she had her medical records in her possession and in fact stated while testifying that they were sitting right behind her. It was clear that documentary evidence existed that was relevant to the issues I had to decide in the hearing. However, the grievor was not prepared to produce it. In addition, the grievor was emphatic that she was not going to answer any questions regarding her health. This makes it extremely difficult, if not impossible to make assessments with respect to the legal issues when relevant facts exist yet are not forthcoming.

1. The March-August 2014 period

[216] During this period, the grievor provided the employer with these three notes: the March 3 note, which stated, "Michele requires accomodation [*sic*] for tele-working for medical reasons for a 3 month trial to be re-assessed in May 2014"; the June 12 note, which stated, "This patient was totally disabled on Friday, June 13, 2014 and I estimate through to Thursday, July 24, 2014"; and the July 22 note, which stated, "This

patient was totally disabled on Tuesday, July 22, 2014 and I estimate through to Sunday, August 31, 2014."

[217] None of these notes provided any indication to the Board of what the grievor's disability was or any limitations or restrictions. Two of them (the June 12 and July 22 notes) state that the grievor is totally disabled, and they cover the entire period from June 13 through to August 31, 2014.

[218] June 13, 2014, was a Friday. This period (March to September) is therefore truncated, given that she was totally disabled during this period, according to Dr. Burgess, and by "totally disabled" I interpret to mean completely unable to work.

[219] I would further truncate this period to remove the entire week of June 9, 2014, as there is absolutely no evidence to disclose that from Monday, June 9, until June 13, 2014, there was any discrimination due to a disability. The evidence disclosed that the grievor emailed her supervisor on the Monday of that week, June 9, simply stating that she was sick. On Tuesday, June 10, 2014, she sent a second email that said that she was still sick and that she had a bug that she had picked up over the weekend. There is no evidence that the grievor was at work at all during the week of June 9, leaving the last day that she was at work as Friday, June 6, 2014. As I have already set out in the earlier section with respect to the issue of credibility, we know that the grievor was off work and that she made several contradictory statements about the reason for her absence.

[220] The March-August 2014 period therefore encompasses only the period between March 3 and June 6, 2014.

[221] The March 3 note states that the grievor, for medical reasons, must be allowed to telework. Had Dr. Burgess testified, she might have shed light on the nature of the grievor's ailment or disability as well the limitations and restrictions as to why she felt that in March of 2014 the grievor had to telework. She did not, so we do not know. The grievor refused to produce her medical records. Perhaps they could have shed some light on the situation, but without them, we have no information. The grievor herself did not say, so I have nothing more than the March 3 note.

[222] The only other evidence that is relevant to address the allegations of the grievor that the employer failed to accommodate her during this period (March through June

of 2014) were the testimonies of the grievor and Mr. Biard. Mr. Biard testified that when he received the March 3 note, he found it vague, and that it was difficult to know what tasks the grievor could or could not do. He said that he asked the grievor for a work plan, but she was reluctant to provide one. There was an email chain entered into evidence referencing a meeting between the grievor and Mr. Biard and the request by Mr. Biard for a plan. The grievor's evidence was that she followed up with Mr. Biard, stating that she provided a plan. There was no written plan in the JBD, and the grievor did not produce any plan. Nothing in this testimony or in the emails referenced provided any information to assist in establishing a disability or an adverse effect in the workplace that had a nexus with the disability.

[223] In short, the vague March 3 note is the only evidence that the grievor brought forward to establish a *prima facie* case of discrimination. There is nothing else. Based on this very limited information, I find that the grievor has therefore not shown that on a balance of probabilities, she has a protected characteristic and that there was a nexus between it and an adverse effect in her workplace. As such, she has not established a *prima facie* case of discrimination, and this portion of her allegation of discrimination and this portion of the accommodation grievance is denied.

2. The September-December 2014 period

[224] In September of 2014, the grievor wished to return to work. Given her lengthy absence (just shy of three months), the employer wanted assurances that she could do so. The grievor said that she had obtained a note from Dr. Burgess in late August of 2014 that indicated that she was fit to return to work. There was no note dated in August of 2014 signed by Dr. Burgess, placed in evidence before me.

[225] The employer wrote to Dr. Burgess on September 12 (the Sept. 12 request) and asked her to complete a return-to-work form. Dr. Burgess provided the Oct. 1 RTW form on Oct. 2. According to it, she saw the grievor on September 19. The Oct. 1 RTW form said that the grievor could return to work on a graduated basis over a seven-week period. Where the form asked when the grievor could return to work, Dr. Burgess wrote, "whenever you are able to accomodate [*sic*] her needs". The Oct. 1 RTW form did not identify a disability.

[226] The health-related information provided to the employer directly from a doctor after the Oct. 1 RTW form and before the grievor returned to work on August 29, 2016,

were four notes from Dr. Burgess: the May 20, 2015 note, the July 29, 2015, note, the 1st June 8, 2016 note, and the 2nd June 8, 2016 note; and a response that is referred to in an email dated April 5, 2016, in which Mr. Varriano refers to a response by Dr. Burgess on January 11, 2016. The only note relevant for this time frame (September through December 2014) is the May 20, 2015 note. All it said was, "This patient was totally disabled on Friday, June 13, 2014 and I estimate through to Friday, July 31, 2015."

[227] Also in evidence was a series of reports from the employer's disability insurer, Sun Life. What the documents from Sun Life disclosed was that it had accepted the grievor's disability claim and that it had accepted and found that she was indeed totally disabled from doing any job (not just her own) as of June 13, 2014.

[228] The grievor has not established a *prima facie* case of discrimination. The June 12 and July 22 notes cover the time frame between June 13 and August 31, 2014, and indicate that the grievor was totally disabled at that time. After being off work for almost three full months, the grievor said that she was able to return to work. She said that she had a note dated August of 2014. No note was entered into evidence. Other than the grievor stating that she had a note, there is no documentary evidence of one.

[229] The documentary evidence covering this period is twofold. First, there is the Oct. 1 RTW form. It does not state that the grievor is disabled and is vague with respect to the specifics of the restrictions and limitations, and it states how Dr. Burgess thinks the employer should accommodate the grievor in the workplace. It also states that the grievor can return to work.

[230] However, Dr. Burgess also wrote the May 20, 2015 note. It contradicts the Oct. 1 RTW form as it states that the grievor was totally disabled throughout the period of June 13, 2014, through to July 31, 2015. This covers 13.5 months and, most importantly, the period in issue in this section, September through December of 2014. The May 20, 2015 note is corroborated by the Sun Life material and the grievor's own testimony that she received disability benefits retroactive to June 13, 2014.

[231] Based on this, I find that the grievor has therefore not shown that on a balance of probabilities, she has a protected characteristic that required accommodation by the employer and that there was a nexus between it and an adverse effect in her workplace. As such, she has not established a *prima facie* case of discrimination, and

this portion of her allegation of discrimination and this portion of the accommodation grievance is denied.

3. The August to November of 2016 period

[232] On August 29, 2016, the grievor returned to work after an extended absence on long-term disability between June 13, 2014, and August 26, 2016. She continued to receive disability benefits during the period she was on the Sun Life RTW plan, which was from August 29 through to September 26, 2016.

[233] This period (August to November of 2016) is long after the original grievance (the accommodation grievance), alleging that the employer failed to accommodate her, was filed. Not only that, but also, it is after the grievor was on an extended absence from work due to being totally disabled from working. I am not prepared to accept that the accommodation grievance, filed some 20 months earlier (Board file no. 566-02-13810), extends and covers this period. I also do not believe that the grievance filed on November 1, 2016 (the leave grievance), and given Board file no. 566-02-13811, is worded such that it could be interpreted as suggesting that the employer discriminated against her and did not accommodate her under article 43 of the collective agreement.

[234] The accommodation grievance, filed on December 18, 2014 (Board file no. 566-02-13810), specifically stated this in its first sentence: "I grieve that the employer has failed to fulfil its duty to accomodate [*sic*] me …". In the leave grievance, filed on November 1, 2016 (Board file no. 566-02-13811), the grievor did not say that she was grieving the employer's failure to accommodate her or that it discriminated against her; she said that she was grieving the employer's failure to provide her with a flexible working arrangement. The term "flexible" is used in clause 8.04 of the collective agreement with respect to working hours.

[235] Despite this clear difference, I will address the allegation in the November 1, 2016, grievance (Board file no. 566-02-13811) and treat it as an allegation of a failure to accommodate and that the employer was discriminating against the grievor during this period.

[236] The documentary evidence from healthcare professionals during this period amounts to the Oct. 12, 2016, note from Dr. Burgess. This note, while it does not

disclose a specific disability, does state that the grievor suffers from a chronic medical condition that has occasional acute exacerbations. It then states that the condition impacts her work capacity and treatment, which in turn impacts her work schedule. The note states that this condition is long-term.

[237] However, the Oct. 12, 2016, note cannot be taken in a vacuum. A considerable amount of documentation was entered into evidence that discussed the grievor's health during the period leading up to her return to work that is clearly relevant.

[238] First and foremost, it is evident that the grievor was seeing specialists during the period she was receiving disability benefits from Sun Life. In an email dated August 24, 2015, Sun Life advised Mr. Biard that the grievor had taken part in an assessment with a specialist. No details of the assessment, who the specialist was, or its results were shared with the hearing. The grievor was cross-examined on this and said that she did not recall the assessment but that she had seen many specialists. She provided no details of any of the specialists she had seen. There was no information about who the specialists were, what their specialties were, or what treatment or treatment plans were undertaken. In short, I know that there were specialists involved in her care during this period on long-term disability, but really nothing else.

[239] By email on March 8, 2016, Sun Life updated the employer, telling it that the grievor's restrictions remained unchanged, and it identified those restrictions as "[unable] to perform duties that require high cognitive demands and prolonged concentration."

[240] On April 5, 2016, Mr. Varriano emailed Mr. Toncic, referring to information provided directly to the employer by Dr. Burgess that said that the grievor was not able to perform her duties and was not able to manage stress. Mr. Varriano told Mr. Toncic that the employer understood that a return-to-work date was likely in the spring and that before the grievor returned to work, the employer wanted a medical certificate with a proposed return-to-work date that set out the restrictions and limitations and the duration of the restrictions and limitations, if applicable.

[241] During this same period, March 30 and April 6, 2016, an exchange of emails took place involving Mr. Biard, Ms. Campbell of Sun Life, and the grievor. The exchange is very telling. It is clear that the grievor wants to telework or work from home upon her return to work. In an April 5 email, Ms. Campbell tells the grievor that she had

received a response from Dr. Burgess (to Sun Life's request for information) and that in that response, Dr. Burgess deferred any comment on a specific health issue contraindications on the grievor's return to work to Dr. Xxx. It then states that the grievor will be seeing Dr. Xxx.

[242] In an email dated April 21, 2016, Ms. Campbell provides an update to Mr. Biard. She tells him that she had requested confirmation of medical restrictions from the grievor's family doctor (Dr. Burgess) and specialist (not named). She states that the specialist confirmed that there were no medical contraindications for the grievor to return to work in the office.

[243] In an email on June 1, 2016, Ms. Campbell advised the employer that Dr. Burgess had written to Sun Life and asked for a delay in the return-to-work plan. The specifics as to why the delay was required was not disclosed; however, it did state that the grievor was referred to someone. Nothing further is provided. When the grievor was questioned on this, she said that she had no recollection.

[244] The 1st June 8, 2016 note states that the grievor requires a telework arrangement to enable a successful return to work. It does not set out a disability or any restrictions or limitations. The 2nd June 8, 2016 note also does not set out a disability or any restrictions or limitations. During cross-examination, after being shown the two June 8 notes, the grievor was asked if Dr. Burgess was doing any assessment other than a regular physical examination. She answered that she had been seeing Dr. Burgess for two years and that Dr. Burgess was her general practitioner and prescribed medication but that she did not see Dr. Burgess as a specialist. It was then put to the grievor that she was seeing specialists for [a specific health issue]; the grievor said that she would not answer the question, and despite being pushed on this, she was steadfast in her refusal. When counsel brought the grievor back to the Sun Life email of April 5, in which Ms. Campbell states that Dr. Burgess deferred any comment on the [specific health issue] contraindications to Dr. Xxx, the grievor said that she would not answer any questions about her health.

[245] As June turned to July, and July to August, there appeared to be a delay in the grievor's return to work. The delay did not appear to be from the employer's end. A return-to-work meeting took place on July 26, 2016. The email correspondence that followed was vague, but as best as I could gather from what limited information was

provided, it appears that the sticking point was the issue of telework or allowing the grievor to work from home upon her return to work. An email from GAC LR to Mr. Toncic states that Mr. Biard and Ms. Bristow are more than willing to welcome the grievor back to the office and facilitate her return to work and then states this:

> …
>
> *… Given that the Department has no indication of the medical restrictions/functional limitations, they will not allow telework. They insist that Michele be physically present at work to perform her duties for a few reasons that were already explained to you and Michele, such as the management of her performance, the coaching that will need to be performed to complete her training and the rebuilt* [*sic*] *of the relationships with her colleagues, clients and supervisors.*
>
> …

[246] The Sun Life RTW plan set out that "[t]here have been no medical restrictions identified by the treatment team at this time".

[247] On the morning of her first day returning to work, August 29, the grievor emailed GAC LR and told it that her union was going to pay for "… a revised more robust medical form detailing my limitations and restrictions from my specialist." The email exchange that followed indicated that LR understood that the employer would send a letter to the grievor's specialist asking them to identify or explain the medical restrictions and functional limitations requiring accommodation measures, and it sent the grievor a consent form to execute. The grievor responded that the employer was correct in its assessment but that it should direct the letter to Dr. Burgess, who she said was working with her specialist. LR wrote back to the grievor, stating that it felt that it would be best to get the information directly from the specialist. The grievor told LR to write to Dr. Burgess and that Dr. Burgess would send it to the specialist.

[248] No report or note of any type came from a specialist. What appears to have been the outcome of the exchange between the grievor and GAC LR in late August of 2016 was the Oct. 12, 2016, note from Dr. Burgess.

[249] After a 26-month absence, the grievor returned to work in a very limited capacity. Her disability insurer put together a return-to-work plan that was originally planned to cover a 5-week period starting on August 22, 2016, totalling 98.5 hours. This was shortened due to the grievor having a medical issue the week of August 22.

The grievor therefore started a week later but was to still work 98.5 hours, albeit over 4 weeks, not 5. The grievor never did work the full hours over the 4-week return-to-work period, instead working only 28.5 hours or approximately 1/3 of what was already a shortened period.

[250] As of September 26, 2016, the grievor had been cleared by Sun Life, from the documentary evidence submitted by the medical specialists who were managing whatever disability caused her to be off work for an extended period, and it would appear by Dr. Burgess to work on a full-time basis, meaning 37.5 hours per week, without any sort of limitation or restriction or required accommodation.

[251] From the evidence produced in the material, it is clear that there is some form of health issue involving the grievor, and it appears that this was assessed, addressed, and documented throughout the period from at least as far back as March of 2014 until sometime in the summer of 2016. None of the information was produced to the employer as part of the production process for the hearing, despite the employer requesting such production, nor was it produced for the hearing. The grievor was adamant during her testimony that she would not produce any of this information; nor would she consent to release it or answer questions about it. I suspect that there would be answers in this material that would have helped this panel of the Board assess what was going on, and the situation.

[252] Dr. Burgess was the grievor's personal physician, and it is clear that she had been seeing and treating the grievor as far back as March of 2014. Her clinical notes and records and her testimony could have shed light on exactly what was going on.

[253] The limited evidence that we do have is that Dr. Burgess stated that the grievor was totally disabled from June 14 to the end of August 2014. According to the grievor's testimony, the grievor received a note from Dr. Burgess that stated that she was fit to work as of the start of September 2014. This note, if it does exist, was not produced. In addition, Dr. Burgess issued the Oct. 1 RTW form stating that the grievor could return to work at that time, yet she also issued the May 20, 2015 note stating that the grievor was totally disabled throughout the entire period that would have covered June 13, 2014, to July 31, 2015. Was the grievor fit for work or totally disabled? According to the limited documentation that the grievor would permit to be produced, she was both at the same time.

[254] Additionally, in an email sent on March 1, 2016, Ms. Campbell from Sun Life told Mr. Biard and Ms. Désormeaux-Dufour that a "… significant influencing factor affecting her overall medical condition appears to have been resolved toward the end of January /early February [2016]", and with respect to the grievor's return to work, she said this: "I don't anticipate there to be any significant restrictions or limitations from a physical or cognitive perspective; although this will be confirmed by the treatment providers before engaging in a RTW plan."

[255] In addition, according to the documentation produced from the Sun Life files, Dr. Burgess deferred any opinion on the grievor's specific health issue and its effect on her ensuing return to work to the specialists (specifically Dr. Xxx) who were involved with the grievor. This was set out in an email dated April 5, 2016, at 11:49, from Ms. Campbell at Sun Life to the grievor. The grievor responded that same day at 13:42, and her opening sentence was this: "My doctor and I discussed at length the employers [*sic*] refusal to accommodate my request to work from home, that's why she deferred to dr. Xxx [*sic*]…."

[256] According to the limited documentary evidence available, whatever ailed the grievor that was either causing or significantly contributing to her total disability appeared to have resolved itself at least as of January or early February of 2016. Also according to the documentary evidence, there were not likely to be, nor were there, any limitations, restrictions, or accommodation measures that were identified by any medical professional involved in the grievor's treatment and return-to-work planning. Yet, all of a sudden, after an extended absence from work, and treatment and assessment, out of the blue, Dr. Burgess penned the Oct. 12, 2016, note that states that the grievor has "… a chronic (with occasional acute exacerbations) medical condition …" that "… impacts on her work capacity and requires treatment, which in turn impacts on her work schedule [and may require] appointments and possible medical leave." It also states that the nature of her medical condition is long-term. What condition? Why is this condition suddenly such that it is chronic in October, yet mere months earlier, there was no indication of it?

[257] In addition, the very limited information about the grievor's attendance once she returned to work indicated that she was off work attending to several different things that did not appear to relate to any sort of ongoing illness, including court

appearances, meetings with her union, and meetings and appointments for her children.

[258] I am also concerned about the grievor misleading the employer about this process involving Dr. Burgess and what became of the Oct. 12, 2016, note. In her email exchange dated August 29 and 30, 2016, the grievor tells Ms. Daoust (GAC LR) this: "PIPSC has agreed to pay for a revised more robust medical form detailing my limitations and restrictions from my specialist." Dr. Burgess was not identified as a specialist. The grievor was cross-examined on this point, and she confirmed this. Indeed, the evidence disclosed that the grievor had likely seen several specialists, none of whom the grievor chose to disclose to the employer or at the hearing.

[259] On being informed that the grievor was going to see a specialist, the employer provided the consent form for the specialist, at which point the grievor then told the employer in an email that the consent should go to Dr. Burgess, who she said "is working with [her] specialist." The employer pushed back and suggested that it would be best to get the information from the specialist directly, stating, "Specialists are usually in a better position to provide useful guidance on the limitations/restrictions related to health conditions within their field of expertise." The grievor replied to Ms. Daoust, telling her to "… forward all necessary documentation directly to Dr Burgess and she can send on to the specialist."

[260] I have no doubt that based on the previous misleading behaviour of the grievor, this was again nothing more than deception on her part that suggested that for whatever reason, a specialist was going to assess her and provide some insight. There is no evidence that there ever was a specialist involved at this point, and indeed, it is clear from the facts that it was Dr. Burgess who wrote the Oct. 12, 2016, note.

[261] It was incumbent on the grievor to come forward with evidence that on a balance of probabilities satisfies the tests set out in the jurisprudence that she has a characteristic protected by the "no discrimination" clause of the collective agreement and that this characteristic somehow had an adverse impact on her at work. During the course of the hearing, it was blatantly evident that there was extensive medical evidence that was available and that was highly likely to be both relevant and probative to the issues that the Board had to decide. This evidence was withheld from the hearing by the grievor. The grievor specifically stated at the hearing that she had Dr.

Burgess's medical files behind her when testifying and that she refused to produce them. Further, when asked about providing any of the information with respect to the specialists identified in the correspondence from Sun Life, the grievor specifically stated that she did not know. When pushed on this in cross-examination about Dr. Burgess providing further information, she stated that she would have to "look through 170 pages of correspondence." Finally, when being cross-examined by counsel for the employer about the time frame in the late spring and early summer of 2016, and specifically if there were contraindications with respect to her return to work and specifically returning to work at the office as well as the position of Sun Life that telework was not required for her return to work, the grievor stated that she would not answer any questions about her health.

[262] The evidence before me with respect to this period is highly contradictory, which is solely due to the grievor refusing to produce medical evidence that was solely under her control to produce. The documentary evidence that was produced for the period of the spring and summer of 2016, largely comprising emails from the disability insurer, reveal that the grievor had seen or was being seen by at least one specialist in addition to Dr. Burgess. The grievor in her testimony admitted to seeing more than one specialist. The documentary evidence before me suggests that at least one medical specialist and Dr. Burgess agreed with respect to a course of action and with respect to limitations and restrictions, of which no restrictions or limitations were identified and telework was not supported.

[263] On August 29, 2016, at 06:11, in the face of what appears to be an extensive assessment over an extended period, even before she returned to work for her first day, the grievor wrote to GAC LR and stated that PIPSC would to pay for a "… revised more robust medical form detailing … limitations and restrictions …". What appeared some eight weeks later was the Oct. 12, 2016, note from Dr. Burgess. This note directly contradicted what appeared to be Dr. Burgess's earlier agreement with respect to the grievor's return to work. This was not the first contradiction from Dr. Burgess about the grievor's health and ability to work.

[264] Based on the evidence that was presented in the documents and the contradictions set out in the documents related to Dr. Burgess, the grievor has not met her burden of convincing me on a balance of probabilities that she was suffering from a disability that affected her work or that had an adverse effect on her work. As such, I

cannot find that the employer failed to accommodate her as she has not established that she had a disability and that it required any sort of accommodation.

The grievor's own actions caused the failure of the accommodation process at the time the grievance (Board file no. 566-02-13810) was filed in December of 2014

[265] As set out by the Supreme Court in *Central Okanagan*, finding an appropriate accommodation is a tri-partite process; the employer, union, and employee (in this case, the grievor) all play an important role. The facts disclose that while both the employer and union appeared to be doing their part, the grievor, as the employee, was not.

[266] The grievor did not consent to providing any information from any of the doctors that were treating her despite the employer having made this request and despite the fact that the alleged failure to accommodate has as its root, a basis of a disability. It is impossible for the grievor to meet her burden of proof if she is not being prepared to disclose what the disability is or was, and with little to no information from a healthcare professional setting out limitations and restrictions.

[267] After the grievor applied for and was approved for full disability benefits, which were retroactive to June 13, 2014, Sun Life reported on a regular basis to the employer by email with respect to the grievor's status. In a number of these reports, which set out that the grievor was totally disabled and unable to do any work, it stated that the restrictions and limitations were not physical but cognitive.

[268] I did not have the benefit of seeing any medical evidence of any significance or hearing any medical professional testify. It is clear that again from the testimony of the grievor and the documents that were admitted into evidence, the grievor was seeing both her family doctor and specialists.

[269] The information put forward by the grievor from her treating physician, Dr. Burgess, was scant and contradictory at best. Dr. Burgess signed the March 3 note, which merely stated that the grievor required accommodation for teleworking for medical reasons. While doctors and family physicians often are instrumental in the accommodation process, their role is to identify limitations. Sometimes their role can be expanded, depending on the situation. The March 3 note does not specify any limitation that the doctor identifies as a problem for the grievor. There is also no

identification of any restriction. I neither heard nor saw any evidence as to upon what the need for telework was based.

[270] The grievor emailed that she was sick on Monday, June 9, 2014, and again the next day, stating on that day that she was having trouble shaking a "bug" that she picked up over the weekend. This was a lie. The grievor stated that she did not know what to do and that she took three months off work to deal with her legal issues. The comment of taking three months off work to deal with her legal issues was made with respect to the three months that she was off work after she produced the June 12 note and that encompass the period that was also set out in the July 22 note — in essence June, July, and August of 2014.

[271] According to the grievor's own testimony, she had a note from Dr. Burgess dated at some point near the end of August of 2014 that stated that she was fit to return to work. No such note was entered into evidence. As Dr. Burgess did not testify, and as the grievor did not produce to the hearing the medical documentation that she said during the hearing she had in her possession and was sitting behind her while she testified, I am not convinced that any such note existed. Despite this lack of note from her doctor, the employer sent the September 12 request. The Sept. 12 request outlined what the employer was looking for, stating that it was not looking for any diagnostic or treatment information but for the grievor's limitations or restrictions. Dr. Burgess was provided with the form and a copy of the grievor's work description and was asked to identify any duties of the grievor that might not be compatible with the limitations or restrictions that the doctor identified.

[272] A copy of the Oct. 1 RTW form was entered into evidence. While it was provided to the GAC HR or LR department on or about October 2, 2014, the grievor had refused to allow the information contained in it to be shared with her managers and supervisors. In her testimony before me, the grievor stated that she refused to share it because she did not want them to know her medical information. This is clear evidence that it is the grievor who did not cooperate in the multi-party process established by the Supreme Court of Canada in *Central Okanagan*.

[273] The grievor did eventually consent to allowing Mr. Biard and whoever was to supervise her upon her return to work to see the Oct. 1 RTW form, which allowed them to devise the RTW plan and coordinate with her union representative a meeting about

her return to work. On December 5, the Dec. 5 RTW plan was sent to the grievor and her union in the Dec. 5 email, and a meeting was scheduled for December 9, 2014. According to the testimonies of both Mr. Biard and the grievor, who were both at the meeting, the meeting was very short. The grievor said that it lasted about seven minutes. The grievor by her own admission interrupted Ms. Désormeaux-Dufour when she reviewed for the meeting the Dec. 5 RTW plan, and the grievor said that she told everyone at the meeting that the plan was not going to work, that she said to Mr. Biard that he could have put the information in an email, and that the meeting was a waste of time and an insult. Both Mr. Biard and the grievor confirmed in their evidence that she walked out of the meeting. This is also confirmed in notes made of the meeting.

[274] When it was put to her in cross-examination that she rejected the Dec. 5 RTW plan, the grievor said that she did not, instead indicating that she walked out of the meeting. There is no evidence that the grievor accepted the Dec. 5 RTW plan; nor did she or her union make any suggested changes. The evidence does disclose that in an email on Monday, December 15, 2014, the grievor told Mr. Biard that she had seen her doctor the previous week. Since the Dec. 9 meeting was the previous Monday, I assume that if it in fact took place, it was sometime between the Dec. 9 meeting and Friday, December 13, 2014. There is no note or report from the grievor's family physician, Dr. Burgess, or any other doctor dated at or about this time or in December of 2014. Indeed, the next note from Dr. Burgess is the May 20, 2015 note that stated simply that the grievor had been totally disabled on Friday, June 13, 2014, and according to the note, Dr. Burgess estimated that it would continue through to Friday, July 31, 2015. Finally, it was disingenuous for the grievor to suggest that somehow, after saying what she did in the Dec. 9 meeting, while interrupting the preliminary discussion on the topic of accommodation and then walking out before a discussion took place, was anything but rejecting the Dec. 5 RTW plan.

[275] Based on the grievor's own statements and actions, the failure of the accommodation process appears to have been due to her own action or inaction. Very little information was provided by the grievor or provided in a timely manner. In the end, when the employer was provided with information that allowed it to put together the Dec. 5 RTW plan, the grievor scuttled the meeting and did not return to work or provide any alternative. The evidence disclosed that she applied for long-term disability benefits and that those benefits were approved and retroactively applied to June 13, 2014.

The grievor could not have been accommodated in any manner because she was totally disabled

[276] This covers the period from June 6, 2014, to August 29, 2016.

[277] While I have already set out why the grievance failed due to her own actions or inaction in the previous sections, it should also fail simply because according to the grievor's own doctor, and as accepted by the employer's disability insurer, the grievor was totally disabled from June 14, 2014, until she returned to work August 29, 2016.

[278] The evidence before me disclosed that for almost the entire time frame in which the grievor said that she was discriminated against and not accommodated in the workplace, she was totally disabled from doing any type of work, let alone her own job. She could not work; therefore, there was no accommodation. She applied for and received disability benefits.

[279] I have included the period between Friday, June 6, and Saturday, June 14, 2014, because of the evidence that the grievor called in sick the first two days of the week and then provided contradictory and misleading evidence about what was going on at that time. The grievor appears to have been away from work that week on sick leave, albeit that she might have lied about that. Perhaps her total disability covered that period as well, as she was away that week (June 9 to 13, 2014) and did not return to work until August 29, 2016. Given the facts that are before me in this respect, I find that she was not able to work at all that week, and as such, she could not have been accommodated.

C. Board file no. 566-02-13811 — the grievance alleging deployment without consent

[280] On January 9, 2015, the grievor filed what I have identified as the deployment grievance.

[281] This grievance fails for these two reasons:

1) when she filed the grievance on January 9, 2015, the grievor had not been deployed; and
2) when the grievor was deployed, she consented.

[282] The evidence disclosed that sometime in 2014, GAC undertook the PMI. The PMI being a reorganization of the way GAC undertook procurement. The evidence was that it was a large reorganization, that it involved consultations with the union, and that a

WFA took place. It was not an instance of one employee, the grievor, being deployed. The entire process and procurement portion of the organization changed.

[283] A WFA is a process that is negotiated by the parties, and an entire appendix of the collective agreement is dedicated to it. It sets out the duties and responsibilities of the parties to the collective agreement as well as what employees are required to do as part of the process.

[284] I heard no evidence to suggest that the WFA provisions of the collective agreement were not engaged or that they were not followed.

[285] In short, when the grievor filed the grievance, the WFA process was ongoing, and she had not been deployed.

[286] In fact, eventually, on January 14, 2015, the grievor was offered a new position at her same group and level and in the same unit. The grievor accepted the offer on April 13, 2015. There is no indication that the grievor's acceptance was somehow not voluntary or that her consent was somehow vitiated by either duress or not being competent. There is absolutely nothing that suggests that the grievor was deployed without her consent.

D. Board file no. 566-02-13812 — the grievance alleging the denial of a flexible work arrangement and certain leave requests

Alleged denial of a flexible work arrangement

[287] The wording of this grievance would suggest that the grievor was seeking some sort of flexibility in completing her hours of work during the workday; however, from the little evidence I heard and saw, it would appear that what is really being suggested is that the grievor was entitled to a flexible work arrangement due to a disability; in other words, that the flexible work arrangement was an accommodation that she was entitled to.

[288] What exactly the grievor sought in this respect is not clear. The wording of this grievance is clearly different from the wording of the accommodation grievance, in which the grievor clearly states that she grieves that the employer failed its duty to accommodate her up to the point of undue hardship, contrary to the no-discrimination clause of the collective agreement.

[289] In her submissions, the grievor did not speak about the flexible work arrangement; however, in her submissions, she did allege that she was denied accommodation during the period that the employer failed to accommodate her. As I have already dealt with the argument or allegation that the denial of a flexible work arrangement was a failure to accommodate, this section will address only a flexible work arrangement as set out in article 8 of the collective agreement.

[290] Article 8 of the collective agreement is titled "Hours of Work". Clause 8.04 sets out what the normal work hours are, 7.5 per day and 37.5 per week, Monday through Friday. Clause 8.04(d) states that the scheduled 7.5 hours per day shall be worked between the hours of 07:00 and 18:00, and clause 8.04(e) states that subject to operational requirements, an employee shall have the right to select and request flexible work hours between 06:00 and 18:00 to complete their 7.5-hour workday, and any such request shall not be unreasonably denied.

[291] There is no evidence to suggest that the grievor was denied a flexible work arrangement as contemplated in clause 8.04(e) of the collective agreement. The evidence that was brought forward suggests that she did appear to be working the hours she requested in this allegation. In an email exchange between the grievor and Ms. Bristow on September 22, 2016, Ms. Bristow asked the grievor what hours she wanted to work, telling her that if she did not propose any, Ms. Bristow would designate 08:00 to 16:00 with a half-hour lunch break between noon and 12:30. The grievor proposed working from 07:30 to 15:30, which Ms. Bristow accepted.

[292] There is nothing to suggest that the flexible hours as requested by the grievor were not honoured by the employer. As such, the grievance as it possibly relates to the breach of clause 8.04(e) of the collective agreement is denied.

Alleged denial of certain leave requests

[293] The parties agreed that nine leave requests were in issue at the hearing that in the grievor's view should have been granted under the collective agreement, as follows:

- one instance of sick leave under article 16 totaling 3.75 hours on November 4;
- three instances of court leave under clause 17.14 totaling 22.5 hours on September 21 and 27 and November 9;
- three instances of medical or dental leave under clause 17.21 totaling 16.25 hours on September 26 and 27 and November 9; and

- two instances of leave for labour relations matters under article 30 totaling 15 hours on November 24 and 25.

[294] As set out earlier in this decision, in matters of alleged collective agreement breaches, the burden of proof lays with the union and grievor. In the case of these allegations, the grievor had to prove that on a balance of probabilities, she was entitled to the leave as requested and that it was denied by the employer. I will address each of the leave requests by the type of leave requested.

A. Alleged denial of sick leave (article 16 of the collective agreement): 3.75 hours for November 4

[295] An employee is entitled to paid sick leave under the collective agreement if they satisfy the employer that they were legitimately ill and provided that they have sick leave credits in their leave bank to use.

[296] In her examination-in-chief, the grievor did not provide the hearing with any evidence that she was sick on November 4. Indeed, the leave record disclosed that on November 4, the grievor was granted 4.0 hours of leave for medical and dental appointments.

[297] The leave chart compiled by Ms. Bristow recorded that the grievor had previously requested leave for the morning of November 4 for a dental appointment, for which four hours of leave for medical or dental appointments was approved. It further recorded that the grievor was not in at all that day and that at 12:06, Ms. Bristow received a phone call that recorded that the grievor told her that she was at the courthouse and that she might not make it in at all that day. The leave chart further recorded that in fact, the grievor was not at work at all on November 4.

[298] Ms. Bristow testified to the facts that were contained in the leave record and the leave chart with respect to November 4. There was absolutely no evidence that the grievor was ill on November 4.

[299] As there was no evidence that the grievor was ill on November 4, and the only evidence before me was that she was at a dental appointment in the morning and at the courthouse in the afternoon, she is not entitled to sick leave under the collective agreement, and this claim is denied.

B. Alleged denial of court leave (clause 17.14 of the collective agreement): 22.5 hours for September 21 and 27 and November 9

[300] The evidence disclosed that the grievor was engaged in matrimonial litigation with her spouse. It also disclosed that the three requests for court-related leave were all with respect to this litigation, in which she was a party to the proceedings.

[301] Clause 17.14 of the collective agreement provides for paid leave for an employee if they are required to be available for jury selection, required to serve on a jury, or required by subpoena or summons to attend as a witness in any proceeding held as follows:

- in or under the authority of a court of justice;
- before a court, judge, justice, magistrate, or coroner;
- before the Senate or House of Commons or a committee of the Senate or House of Commons;
- before a legislative council, legislative assembly, or house of assembly or any committee of one that is authorized by law to compel the attendance of witnesses; or
- before an arbitrator, umpire, person, or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it.

[302] It has been long established in the jurisprudence of this Board and its predecessors as well as the greater labour law community that the intention of the parties to a collective agreement must be gathered from the written instrument. *Canadian Labour Arbitration*, *5th ed,* by authors Brown and Beatty ("Brown and Beatty"), at paragraph 4:2100, states this and states that the function of courts or administrative tribunals, such as this one, is to ascertain what the parties meant by the words they used and to declare the meaning of what is written in the instrument, not of what was intended to have been written. Accordingly, when determining the parties' intention, the cardinal presumption is that they are assumed to have intended what they have said and that the meaning of the collective agreement is to be sought in its express provisions.

[303] Paragraph 4:2120 of Brown and Beatty provides that it should be presumed that all the words used were intended to have some meaning.

[304] The clause for court leave is very specific. It does not cover all potential court appearances or requirements to attend before a court or tribunal. It speaks of either being required to attend for jury selection or jury duty or being summonsed or subpoenaed to be a witness.

[305] If we compare that to the wording in article 30, which is titled “Leave for Labour Relations Matters”, this article speaks of not only attending as a witness but also of attending as a complainant, acting on behalf of a complainant, or representing the union in different proceedings as well as when the employee is a party to a proceeding or an adjudication, such as this one, as a grievor or is acting as the representative of a grievor.

[306] It is clear from the simple wording of the collective agreement that the parties provided for much more expanded leave for employees under the clauses for leave for labour relations matters, including if an employee was a party to a proceeding such as a grievance adjudication or complaint or even was representing another employee in such proceedings. The court-leave provisions do not provide for leave for someone who is a party. If the parties to the collective agreement had chosen to do that, they could have added those provisions, as they did when an employee was entitled to leave under the leave for labour relations matters clause. They did not.

[307] Therefore, to be entitled to leave under the court leave provisions of article 17 of the collective agreement, the grievor had to establish either that she was required for jury selection or jury duty or that she had been summonsed or subpoenaed as a witness. The grievor provided no such evidence. The only documentary evidence with respect to any of the attendances on the dates in issue was a copy of part of an application record for a family court proceeding in which the grievor is identified as the respondent. The only other evidence is that the court appearances were with respect to the proceedings that were ongoing between herself and her spouse at the time, in which she was a party. As these do not satisfy the provisions of the collective agreement for granting court leave under article 17, this part of the grievance is denied.

C. Alleged denial of medical or dental leave (clause 17.21 of the collective agreement): 16.25 hours for September 26 and 27 and November 9

[308] The testimony of Ms. Bristow was that for a medical or dental appointment, the employee was to submit the leave under code 698. She further testified that the instruction that they (GAC managers) had from the TB was that this was to be used for routine medical and dental appointments. She said that if you are sick and see a doctor because you are sick, you are to use sick leave.

[309] Although no one testified to it, I am assuming that the leave is covered as paid leave under clause 17.21(a)(ii), under which the employer has the authority to grant leave with or without pay, at its discretion, for purposes other than those specified in the collective agreement.

[310] There are three dates on which this leave was denied by Ms. Bristow: September 26 and 27 and November 9. I will deal with all three individually.

September 26

[311] I neither heard nor saw anything from the grievor that the leave for this day was with respect to a medical or dental appointment. Entered into evidence was the Sept. 21 email, in which the grievor merely tells Ms. Bristow that she has an appointment in the morning of Monday, September 26. The email did not state what the appointment was for.

[312] Ms. Bristow testified that the grievor was three hours late on this day and said that leave for medical or dental appointments was not the appropriate leave for that day.

[313] As set out at the start of my reasons for this particular grievance, the burden of proof was on the grievor and union to satisfy me that on a balance of probabilities, the employer breached the collective agreement. Based on the little evidence provided, I am not satisfied that the grievor was to attend a medical or dental appointment on this day. As such, the portion of the grievance that relates to this date for this type of leave is denied.

September 27

[314] I neither heard nor saw any evidence from the grievor that the leave for this day was with respect to a medical or dental appointment.

[315] The Sept. 21 email from the grievor to Ms. Bristow merely indicates that she must attend an appointment all day on September 27. The email does not say what the appointment is for. The leave chart has a reference to denying this leave, and there is a written reference to the grievor having subsequently applied for court leave for this day. Indeed, the leave record shows 7.5 hours of court leave requested for that day that was denied.

[316] The parties agreed that one of the leave applications that was denied that was in issue in this grievance was an application for court leave for this day as well. If the grievor applied for court leave for the entire day, and it was denied, it is difficult to comprehend how it could possibly have been leave for a medical or dental appointment.

[317] I am not satisfied based on the little evidence provided that the grievor was to attend a medical or dental appointment on this day, and as such, the portion of the grievance that relates to this date for this type of leave is denied.

November 9

[318] Like the instance discussed immediately before this one, I heard no evidence from the grievor that she had a medical or dental appointment on this day. There is no documentary evidence that the grievor had a medical or dental appointment on this day.

[319] The leave chart indicates that Ms. Bristow recorded that the grievor had requested court leave for this day. The leave record also has recorded an application for court leave, code 610, for this day, for 7.5 hours, which was denied by Ms. Bristow. The parties agreed that one of the leave applications that was denied and that was in issue in this grievance was an application for court leave for this day as well. If the grievor applied for court leave for the entire day, and it was denied, it is difficult to comprehend how it could possibly have been leave for a medical or dental appointment.

[320] I am not satisfied based on the little evidence provided that the grievor was to attend a medical or dental appointment on this day, and as such, the portion of the grievance that relates to this date for this type of leave is denied.

D. Alleged denial of leave for labour relations matters (article 30 of the collective agreement): 15 hours for November 24 and 25

[321] Article 30 of the collective agreement provides for employees to take leave for different things related to labour relations matters involving themselves as a complainant or grievor or, if they are in a position in a union or in a position acting for another employee, with respect to labour relations matters involving the employer.

[322] In her examination-in-chief, the grievor provided no evidence about the leave for these two days. In cross-examination, counsel asked her whether she had a meeting with her union representative that day, to which she stated that she had not. The grievor then stated that she had wanted to be a union shop steward and to attend training on these days.

[323] While there is documentary evidence that the grievor had both applied for and been accepted as a shop steward and that she would have been required to attend training to be a shop steward, there was no documentary evidence of when or where this training was to take place.

[324] As set out at the start of my reasons for this grievance, the burden of proof was on the grievor and union to satisfy me that on a balance of probabilities, the employer breached the collective agreement. Given that the only evidence of this training was the grievor's last-minute recollection during cross-examination, and given my findings on the grievor's credibility, I am not inclined to give her the benefit of the doubt that there was indeed shop-steward training on these days. By the time this matter came before me and the grievor gave her evidence, these events were close to six years old. Surely, some documents would exist that would have been retained or a witness could have been produced who could have testified to the training on those days. Failing more, I am not satisfied on a balance of probabilities, based only on the grievor's last-minute recollection, there was shop steward training on these days.

[325] As such, the portion of the grievance that relates to this date for this type of leave is denied.

V. Conclusion

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

(The Order appears on the next page)

VI. Order

[327] The grievances are denied.

February 15, 2024.

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