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**Files:** 566-02-11333, 42768, 42769, 43632, 43633, 43634, and 43636 and  
560-02-00134

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*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

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BETWEEN

**JO-AN MUNDAY**

Grievor and Complainant

and

**TREASURY BOARD  
(Department of National Defence)**

Employer and Respondent

and

**DEPUTY HEAD  
(Department of National Defence)**

Respondent

Indexed as

*Munday v. Treasury Board (Department of National Defence)*

In the matter of individual grievances referred to adjudication and a complaint under  
s. 133 of the *Canada Labour Code*

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

**For the Grievor and Complainant:** Michael Fisher, counsel

**For the Employer and Respondent:** Chris Hutchison, counsel

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Heard via videoconference,  
January 19 to 22, March 23 to 26, April 26 to 30, July 5 to 8,

and October 12 and 13, 2021, and written submissions,  
filed November 10 and December 3 and 17, 2021.

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## REASONS FOR DECISION

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### I. Overview of the grievances

[1] Jo-An Munday (“the grievor”) is a civilian employee with the Department of National Defence (DND or “the employer”). She currently occupies a position different from the one she occupied throughout the period in which these grievances and complaint arose.

[2] The grievor suffers from a heightened sensitivity to scented products and to chemical irritants and has been diagnosed. She disclosed this to the employer early in the employment relationship, in 2011, and all the parties accept that her sensitivity is a medical disability that requires accommodation.

[3] The employer made continuing efforts to accommodate the grievor’s disability by raising awareness among its staff, by instituting scent-free-workplace guidelines, and by investigating incidents of exposure to chemical irritants or scented products as the incidents arose. It also tried to change her work environment, but she continually found herself being exposed to some contaminant or other.

[4] The grievor found the employer’s efforts to accommodate her insufficient, and she filed several grievances along those lines. She felt that the scent-free guidelines were not being respected and were not enforced when infractions occurred.

[5] The women’s washroom and shower facility in the grievor’s workplace was a focal point of her distress. Members of the military staff, who are required to maintain a physical fitness standard as part of the terms and conditions of their service, used a scented shampoo and body wash in their post-workout showers that was problematic for the grievor. Cleaners used products in the washroom that impacted the grievor so severely even hours or days after the cleaning took place that it necessitated that she take lengthy sick-leave absences. At one point, she found it impossible to enter the washroom. She began driving home a couple of times per day to use her own washroom. The employer’s efforts to regulate the cleaning staff’s activities did not achieve a level of success suitable to the grievor.

[6] Ultimately, the employer decided that the workplace was simply unsafe for the grievor, who was told not to return to work. She continued to be paid. The nature of her work made it impossible for her to work remotely, so an alternate position was

secured for her. She grieved the decision to assign her to the new position. She also made the complaint under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*) (“the *CLC* complaint”), in which she alleged that the decision to remove her from the workplace constituted a reprisal.

[7] The employer secured an alternate position for the grievor classified at the AS-01 group and level, which she occupies to this day. She filed more grievances pertaining to the alternate position, carrying Federal Public Sector Labour Relations and Employment Board (“the Board”) file numbers 566-02-43632, 43633, 43634, and 43636, which all characterized her move to the alternate position as a disciplinary measure (a demotion). On October 28, 2021, on the parties’ consent and with the Board’s approval, the grievances were joined with those in file numbers 566-02-11333, 42768, and 42769. All the grievances and the *CLC* complaint were heard concurrently.

[8] The grievor seeks reinstatement to her original substantive position and damages under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). She also seeks a blanket order from the Board imposing a strict scent-free policy across the entire federal public service.

[9] I find that the employer’s efforts to accommodate the grievor were, and continue to be, reasonable. For the reasons that follow, all the grievances and the *CLC* complaint are dismissed.

[10] The grievance in Board file number 566-02-11333 was referred to adjudication before the Public Service Labour Relations and Employment Board (PSLREB). On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*), and the *Public Service Labour Relations Regulations* (SOR/2005-79) to, respectively, the Board, the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* (“the Act”), and the *Federal Public Sector Labour Relations Regulations*.

**II. Evidence, including the testimony of witnesses**

[11] The grievor is an engineering technologist specialising in technical documentation and electromechanical design. Before the period relevant to these grievances and complaint, she held positions with Communications Canada and Industry Canada. Earlier in her career, she also worked in British Columbia with the Canadian Coast Guard, and for family reasons, she decided to transfer to Ottawa, Ontario.

[12] Throughout the period encompassed by these grievances, the grievor worked with DND's Land Engineering Support Centre (LESC) at its Uplands location in Ottawa ("LESC Uplands"). Her substantive position is that of a designer/illustrator classified at group and level DD-04.

[13] LESC Uplands was created in 2009 to respond to situations that Canadian Forces troops encounter on the battlefield that necessitate timely (i.e., immediate) adaptations or modifications to existing battlefield equipment or the creation of new equipment. The nature of the grievor's work was discussed in detail at the hearing. For national security reasons, the details will not be described in this decision, and generalizations will suffice.

[14] The grievor's work consisted of the hands-on physical analysis of military equipment and its related specifications and technical drawings. The physical analysis can be conducted only in a secure environment, which can occur only onsite at a DND facility. Similarly, the computers used to store data and perform the technical drafting projects are closed units with no external access and can be used only onsite in very specific DND facilities. Even throughout the global COVID-19 pandemic, none of the technicians, including those contracted to perform the grievor's DD-04 work, received authorization to work from home.

[15] The grievor testified to a history of asthma and related respiratory issues beginning with a cross-Canada road trip in the 1980s, during which a low-flying crop duster apparently released some crop-dusting chemicals onto her vehicle. According to her, it seemed to trigger an acute sensitivity in her to certain chemicals. Since then, she has suffered greatly in both her personal and professional lives from exposure to a wide variety of chemicals, including scented personal-hygiene products, cleaning products, and construction materials. Her allergies have also been triggered by

external phenomena such as pollution and car exhaust, especially when the weather is humid.

[16] Anything alcohol-based will generally trigger a reaction. The grievor testified to a rigorous screening of products used in her home. All family members must comply. Since 2014, she testified, cosmetic companies began listing ingredients, but the lists are unreliable guides because they do not reveal the quantities of ingredients used in the products. Therefore, any product must be tested first. She exposes herself to a product outside, and if there is no reaction, it is tested on a limited basis until she accepts it for use in the home.

[17] The grievor testified to issues in other workplaces before the events at LESC Uplands. For example, when she was with the Coast Guard, and for the time she was with DND in Esquimalt, British Columbia, her allergies were not really an issue. On the rare occasion when her allergies were triggered by a scented product, she raised the issue with the person who was using it, and all was well.

[18] The grievor testified to enjoying a very supportive environment generally at her previous workplaces, where people always seemed to be willing to accommodate her sensitivities. This is why she did not immediately raise this issue when she began working at the Quality Engineering Test Establishment (QETE) at LESC Uplands in September of 2011.

[19] The grievor's letter of offer was dated August 24, 2011, and has a paragraph entitled "Duty to Accommodate" in the section marked "Terms and Conditions of Employment" that reads as follows:

*The Department of National Defence is committed to accommodating the employment related needs of its employees. Should you have an employment related need that may require Workplace Accommodation you are responsible for informing your direct supervisor so that the appropriate steps can be taken.*

[20] The grievor testified to occasional friction and animosity in previous workplace environments when she raised the issue of her sensitivity to scented products. LESC Uplands was her third DND workplace, and she did not want, in her words, to "start things off on the wrong foot". She acknowledged that when she began working at LESC Uplands in September of 2011, her employer had no knowledge of her sensitivities.

[21] But within a month of starting her work at LESC Uplands, the grievor testified to having a severe reaction to scented products that she felt her supervisor, John McBeath, was wearing. She asked him to stop wearing these products, but she testified that he did not stop, and to her, it seemed that he stood closer to her than he ever had before she told him of her sensitivities.

[22] Mr. McBeath testified to discontinuing his use of scented products as soon as the grievor asked him to. He testified to being aware of the potential impact of scented products because his wife had developed some of the same sensitivities.

[23] As a result of her reaction to scented products in the workplace, the grievor sought a referral from her family doctor to a specialist, Dr. John Molot, whose letter, dated November 17, 2011, reads, in part, as follows:

...

*This letter is to certify that Jo-Ann [sic] Munday has been diagnosed with environmental sensitivity disorder manifest as multiple chemical sensitivities. Most significant is her sensitivity to scented products.*

*Environmental sensitivity disorder is a disability recognized by the Canadian and Ontario Human Rights Commissions and therefore she has a right to accommodation in the workplace. The only treatment for this disorder is avoidance of chemical pollutants which are known to trigger reactions. There is no standard testing available which could help to identify specific agents.*

*Given the nature of her job description, she is unable to work from her own home and therefore telework is not an option. Therefore, a scent-free policy should be implemented and all employees should be encouraged to follow this policy.*

*Other recommendations which may be of benefit include providing a work station away from high traffic areas such as restrooms, boardrooms, conference rooms and reception areas. The work station should be away from photocopying, printing and fax equipment. She should be provided an enclosed office if available, not recently renovated and with no carpet if possible. Furthermore, Ms. Munday should be provided with an alternative work location whenever there are ongoing renovations, construction or cleaning of carpets.*

*Information to aid in the implementation of a scent-free policy in the workplace is available on the website of the Canadian Centre for Occupational Health and Safety.*

...

[24] The grievor testified to giving Dr. Molot's letter to Mr. McBeath. She could not testify to a specific date, but in an email, she mentioned that she gave it to him on January 6, 2012, and she testified that that date seemed, in her words, "about right".

[25] Mr. McBeath testified to forwarding Dr. Molot's letter immediately up the chain of command. During the events that gave rise to these grievances, Dan Rolfe was a sustainability engineer, the LESC Uplands facility manager, and its director. Mr. McBeath was one of the approximately 20 to 25 people at LESC Uplands who reported to Mr. Rolfe. René Provencher was Mr. Rolfe's direct supervisor. Mr. Provencher was the overall director of the LESC facilities, and LESC Uplands was one of those facilities under his governance, so Mr. Rolfe reported directly to him.

[26] Mr. Rolfe hired the grievor and conducted her hiring interview. He confirmed that she did not raise any workplace accommodation issues or even discuss the issue of her sensitivities with him as of her hiring. When he saw Dr. Molot's letter, he advised Brian Ramsay, the unit's occupational health and safety coordinator, of the need to address the issue of a scent-free environment in their workplace.

[27] Mr. McBeath, Mr. Rolfe, and Mr. Provencher all testified to their inability to make a policy on a scent-free workplace that would apply to all DND work environments. The best they could do was implement a guideline for LESC Uplands to address issues that the grievor raised in that specific work environment.

[28] Mr. McBeath, Mr. Rolfe, and Mr. Provencher all testified to their discussions about how to respond to the grievor's situation. They did not specify dates, only that their discussions began right after she supplied Dr. Molot's letter on January 6, 2012.

[29] The first thing that Mr. McBeath did was hold a general meeting with his staff on the issue. He requested that his staff refrain from using scented products in the workplace. He testified to his impression that his staff seemed amenable to the suggestion of a scent-free workplace. His feeling was that it was not a novel concept or a major issue with his staff, who told him they were prepared to comply.

[30] Mr. Provencher and Mr. Rolfe testified to engaging Mr. Ramsay's services, who met with the grievor to discuss the matter. In an email dated January 20, 2012, at 1:47 p.m., she wrote:

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...



*I didn't want to speak to you on the phone just now because my supervisor, John McBeath, is in the cubicle just beside mine.*

*He came to me on Tuesday and explained that he had switched to an unscented deodorant. And indeed on Tuesday there were no issues with scents from that direction. However, over the week, even though it's no where near as bad as before you spoke with him, there have been increasing amounts of something scented that's being used. In addition, there are others who use scents as well, although they aren't people I am in close proximity with constantly.*

*I'm saying this because even though the situation has improved there are still enough scents being used to cause me health problems. The effect is cumulative. One way to think of it may be like when you scrape your skin. The scraped area is tender. If you continue to scrape the area then you continue to irritate the site and it doesn't heal. Eventually, the constant irritation leads to infection, etc. Just because you aren't hitting the scraped area with a cheese grater doesn't mean that something less drastic isn't going to lead to infection or other health problems.*

*The other point is that even though you have spoken with Mr McBeath, it seems he may be trying to get away with a little of this or that. And in my experience, this is the case with many people. They seem to feel that just a little bit won't hurt. I want to impress on you that it does. We all share the air and the more people using scents the more polluted the air is for everyone. The more often I'm exposed, the worse my health is. No one needs to use scented products to do their jobs here. However, if they choose to use those products it means that I cannot do my job.*

*This problem affects my ability to breath, hear, concentrate, makes me irritable, etc. An asthma attack can put me in hospital with life threatening conditions. I understand the process takes a bit of time but I want to impress upon you that the longer it takes to resolve the more chance for serious complications.*

*All that being said, I really do appreciate your efforts on my behalf and I appreciate your keeping me in the loop....*

...

[Sic throughout]

[31] Mr. Ramsay responded at 3:01 p.m. that same day:

...

*Thanks for the feedback.*

*My hope is that once we have requested personnel to go scent free it will only take a little tweak here and there to ensure everyone complies. I firmly believe that the vast majority of people want to do what's right and only need a slight reminder should they go astray. When I spoke to John last week he was very sympathetic to*

*your situation and wanted to do what was right to protect your health. It might just be a matter of communicating with him to try and determine where this additional scent may be emanating from.*

*I'm optimistic that we can provide you with a workplace in which you can "breath [sic] easy".*

...

[32] The grievor wrote another email on February 3, 2012, inquiring about progress on implementing a scent-free policy. Mr. Ramsay replied on February 8, 2012, and set up a meeting with her for February 15, 2012. Mr. Rolfe testified that he did not have the authority to order a scent-free policy but that he could issue a guideline. He did so, after speaking to Mr. McBeath, Mr. Ramsay, and the grievor.

[33] On March 9, 2012, Mr. Rolfe saw to it that a notice was posted in several places at LESC Uplands that was entitled "Working Towards a Scent Free Environment" and that read, in part, as follows:

...

*Due to health concerns arising from exposure to scented products, LESC has instituted this guideline to work towards a scent free environment for all employees.*

*In consideration of the difficulties that exposure to these products causes to affected individuals, we encourage all employees to avoid the use of scented products. This includes perfume, cologne, hairspray, body spray and any other personal product which may be scented.*

*LESC supports the creation of a scent free environment to minimize to the extent possible the barriers and difficulties experienced in the workplace by both employees and clients subject to chemical/fragrance sensitivities.*

*This direction is to be posted on all notice boards and at all entrances.*

...

[34] Mr. Rolfe testified that the grievor brought no issues to his attention about the notice's wording. He also testified to monitoring personnel on his own, to see if he could detect the use of scented products, since the grievor had complained about Mr. McBeath. Mr. Rolfe testified to detecting no scented products on any person at any time, including Mr. McBeath. He disagreed with the grievor's claim that many people were using scented products.

[35] Mr. McBeath testified to adding the following to his email signature block in March of 2012, as a result of the grievor's sensitivities: "Land Engineering Support Centre Is a Scent-Free Workplace While visiting, refrain from wearing scented products such as Perfume, Cologne, Deodorants, Fabric Softeners, etc."

[36] The grievor and Mr. Ramsay worked together to create a poster entitled "No Scents is Good Sense", which was posted at LESC Uplands.

[37] The grievor testified to experiencing adverse reactions while at work, due to what she testified was a series of incidents involving people in the workplace wearing scented products.

[38] The grievor testified to episodes of animosity on the part of her co-workers toward her sensitivities. As an example, she submitted the following email chain that began on April 26, 2012, when she complained to a co-worker, a technician, about a lingering scent on his laboratory smock. The technician copied his supervisor on his response, which was this: "I do not wash my lab smock, it is exchanged for a clean one and then sent out ... for cleaning." The supervisor then emailed Mr. Provencher, stating this: "And it begins, is there any way we can put her in an office by herself, there is nothing I can do about when she has to work side by side with the technicians ...".

[39] Mr. McBeath testified to his concern that the grievor was frequently absent from work due to illness apparently caused by her reactions to products in the workplace. He testified that he was not aware of any possible source. On June 26, 2012, they had a conversation about her absences, which he documented in his notes dated the same day.

[40] Following that conversation, Mr. McBeath prepared a letter of expectations dated July 11, 2012, which contained, among many other things, these observations:

...

*When I approached you about the days that you are not coming to work for sick reasons and the fact that you needed to contact me each time you are not coming to work, you mentioned that "it was none of my business what you did on your own time and that if you are off sick, you are not going to get up every morning to call". It is expected that if you should you not [sic] be able to report to work, you are required to contact me prior to your scheduled start time. Sending an email saying that you will be off sick "until further notice" is not acceptable....*

...

[41] In this letter, Mr. McBeath also mentioned some performance deficiencies, such as being unnecessarily defensive and upset with changes made to some of her work.

[42] Mr. McBeath emailed the grievor on July 16, 2012, advising her that the letter of expectations was not a disciplinary measure.

[43] The grievor testified to being blindsided by the letter of expectations because she did not feel that it was warranted. She testified to being continually adversely affected by products in the workplace. On August 26 and 27, 2012, she saw a doctor, who wrote the following: "This patient was seen on Wednesday, August 29, 2012. This patient was totally disabled on Tuesday, August 28, 2012 and I estimate through to Monday, September 3, 2012. Return to regular work on Tuesday, September 4, 2012."

[44] When she returned on September 4, 2012, she wrote a letter that accompanied a Workplace Safety Insurance Board (WSIB) claim. In it, she documented the events that led to that most recent absence from work, stating, in part, as follows:

...

*I returned from work after vacation on August 21st, 2012 feeling great. Breathing normally. During that week I had increasing difficulty breathing, pressure in chest, eyes watery, nose running, irritability, etc. while at work. I did notice a whiff of scent here and there but didn't know where it was coming from. Going home at the end of the day helped relieve the symptoms but with each day at work I felt a bit worse and a bit worse.*

*Monday Aug 26th I got to work. When I entered the washroom some time later I was hit with a wall of scent that made me eyes water and my lungs clench. I noticed the shower had been used. I approached the new WO [Warrant Officer] here and she was a little put out when I challenged her use of the scented products. She claimed that the Pert shampoo she had used "didn't smell very much." I let her know that it didn't matter how much something smelled but that it smelled at all. I advised John McBeath of the incident. However, for the rest of the day, the washroom was too polluted for me to use safely. I had no other choice as there is only the one washroom at this location. In addition to having to use the washroom, my workstation is right beside the door of the washroom and each time one of the other women used it, a waft of scent would exhaust from the washroom right in my direction. By the end of the day I was exhausted with the effort of breathing, my ears were plugged with fluid, eyes sore and itchy, etc.*

*On Tuesday, Aug 27th, on arrival to work I found the washroom was still causing irritation to my breathing and other respiratory functions. I was very uncomfortable but decided to carry on. At some short time later, one of the other new military fellows approached me to say he was sorry about wearing something scented as he "didn't know I was at work." I immediately had the beginning signs of an asthma attack and went into panic mode. As I tried to leave the building to go out into the fresh air, I was approached by a visitor, who was wearing a great deal of scented product, about direction to the washroom. I could not get any air into my lungs, they had seized completely. I was panicking. I sat outdoors for a few minutes but with the high humidity I wasn't able to return to normal breathing. No one had accompanied me outdoors so I was faced with the prospect of returning into the building to speak with John McBeath. As I was requesting alternate work arrangements so I could continue to work that day in an area free of scents, Dan Rolfe advised me that I should go home instead. I was gasping for breath.*

*I called my son to come for me and waited outdoors for him to arrive.*

*After returning home, I immediately made an appointment with my doctor. The appointment was on Wed Aug 28th at which time I was put on two additional medications and the three I already take to control the asthma day to day were doubled in dosage. The doctor advised I not return to work until today (Sep 04, 2012).*

*I have returned to work today but my hearing is still impaired due to fluid build-up as a result of the allergic reaction to the scents, I feel drowsy due to the added medication load, and my respiratory system is hyper-sensitive to any chemicals in the air.*

...

[Sic throughout]

[45] On Thursday, September 13, 2012, the grievor advised that she had learned that a Warrant Officer (WO) was using the Pert shampoo in the washroom and shower facility because she required it for a certain scalp condition. Mr. Rolfe spoke to the WO, who did not testify at the hearing, about the incident. Mr. Rolfe acknowledged that the WO, a member of the military, was obliged to maintain a certain standard of fitness, which meant regular workouts and the need to shower before returning to work. Mr. Rolfe advised the WO of the grievor's sensitivity and attempted to find her some other shower facilities, without success. The use of Pert shampoo in the women's shower facility and washroom did not become an issue again until the spring of 2013.

[46] Mr. Rolfe testified to moving the grievor's workstation to a location near a window she could open for fresh air. Neither of them could pinpoint the precise date on which this change was made.

[47] On September 14, 2012, the grievor raised the issue of visitors to LESC Uplands wearing scented products. Mr. Rolfe and Mr. Provencher both testified to instructing visitors to refrain from wearing scented products when visiting LESC Uplands. They also testified to their inability to do anything other than simply make that request of visitors because they were unable to control who was permitted to attend the facility and under what circumstances. Visitors arrived fairly regularly due to the types of services offered there.

[48] In late September of 2012, a luncheon was planned for a large number of military and civilian personnel, including all LESC Uplands employees. The grievor expressed her concern about being able to attend because of the potential of exposure to scented products. In response, a message was sent to attendees to "... kindly restrict their use of colognes or perfumes for this function", and the grievor expressed her thanks for the gesture but said it was insufficient to guarantee a scent-free environment and that what was required was a strictly enforced scent-free policy across not only all DND but also the entire public service.

[49] Mr. McBeath testified to his decision, at about that time, to attach to his emails a trailing message that read, "Land Engineering Support Centre is a Scent-Free Workplace: While visiting, refrain from wearing scented products such as perfume, cologne, deodorants, fabric softeners, etc.".

[50] An information session was scheduled for personnel, including LESC Uplands employees, on December 18, 2012. The grievor asked if the session would be scent-free. Mr. Rolfe replied that he could not guarantee it, and as a result, she did not attend.

[51] The grievor testified to a deterioration in her relationships with fellow employees, including one incident in particular in which a DND driver drove a van to the door of a facility at which a luncheon was being held but saw that there was no parking nearby. Instead of letting the grievor out at the door, the driver expressed impatience with her and parked a few blocks away. She testified to her asthma being adversely affected by the cold and humid air that day. When she returned to the

vehicle with her fellow employees after the luncheon had ended, she noticed that the driver had pulled away from the curb, with the result that she was "... subconsciously hurried and by the time [she] got there [she] was gasping and having chest pains". In the same message, the grievor wrote, "It's this kind of attitude toward disability that not only makes it difficult to participate in the culture of my workplace, but I'm also put in a position where my health is endangered when I do try to participate."

[52] The grievor testified to suffering another adverse reaction on the morning of March 13, 2013. In an email, she complained as follows to Mr. McBeath:

...

*I just used the women's washroom and there was definitely something scented used in there. I spoke with [the WO] and she advised that she had taken a shower and used scented products. She commented that these are the same scented products she always uses when she has her shower at work except that today she showered later than she usually does.*

*The scents in the washroom have caused an especially bad reaction for me this morning. I have taken more medication and I will see how things go from here but I may have to leave if this doesn't clear up since my only option is to use that washroom. I feel dizzy, breathless, and very shakey [sic] at the moment which is affecting my ability to concentrate on my work properly.*

*While I haven't said anything about it, I do have a milder reaction to whatever [the WO] is using for her showers most of the time (I just didn't know what was causing it). Because the scent is gone by the time I get to work, it hasn't been possible to pinpoint what is causing the reaction so I haven't mentioned it. Even though the smell is usually gone by the time I get to work, the chemicals, which are what I react to, are still present in the washroom. Putting the fan on probably helps somewhat but the stuff ends up on everything in there creating an unhealthy place for me to be.*

...

[53] A doctor authorized the grievor's absence from work from the date of the incident, March 13, 2013, in the following fashion: "This patient was seen on Wednesday, March 13, 2013. This patient was totally disabled on Thursday, March 14, 2013 and I estimate through to Sunday, March 17, 2013. Return to regular work on Monday, March 18, 2013."

[54] The grievor entered into evidence her handwritten notes of the incident. Beside the handwritten date of "March 15/2013", she wrote:

*Yesterday [the WO] let me know that she had been told to change what she's using for her shower. I gave her suggestions all of which she rejected. Today I brought her a bar of soap, Emu oil, & gave it to her. This morning the washroom smelled of Pert shampoo again.& it caused me breathing difficulties when I used the washroom, also when she was working with L.S. in my work area. She says she has a shampoo prescribed by a doctor for scalp conditions but she doesn't use it all the time.*

...

[55] On March 30, 2013, Mr. McBeath met with the grievor to discuss his performance appraisal of her for the previous 12 months. He noted:

...

*Jo-An's interpersonal skills needs [sic] improving when dealing with co-workers and her supervisor. Jo-An has become rude, aggressive and loud when there are changes to drawings, in drafting procedures or feels her work has been criticized.*

*Jo-An has a bit of difficulty dealing with the many changes that can happen in the prototype design environment.*

...

[56] In response to this assessment, the grievor wrote:

...

*1. Lack of adequate accommodation of disability continues to aggravate health difficulties that interfere with interpersonal relations.*

*2. Strict heirarchial [sic] management style stifles rather than fosters my ability to innovate or take initiative.*

*3. Lack of information from leadership, and demeaning comments made during discussions and critique of work, have resulted in my feeling demoralized [sic] and frustrated which I have occasionally expressed in a defensive manner.*

*4. Tasks assigned have not allowed opportunities to contribute significantly to project success and personal development.*

*5. I disagree with this evaluation. These comments are a reflection of this.*

[57] In her testimony about the March 30, 2013, performance appraisal meeting, the grievor referred to her handwritten notes of her conviction that Mr. McBeath wore scented products just to spite her. She testified that at the meeting, he said that her



performance issues were a result of her problems controlling her emotions when dealing with people wearing scents.

[58] Mr. McBeath testified to having completely abstained from the use of scented products. He said that he was well aware of the issues of a scent-free work environment because his wife suffered from the same sensitivities. Mr. McBeath testified to actively investigating whether any of the individuals in the LESC Uplands facility used scented products and that he did not find a single instance of non-compliance, at any time. He unequivocally denied the suggestion that he wore scented products “just to teach her a lesson”.

[59] Mr. McBeath took offence to the grievor’s comments and testimony about the March 30, 2013, performance meeting and denied ever having said that her performance issues arose from her difficulty dealing with scented products. He testified that her performance difficulties were due to her inability to adapt to workplace changes and her difficulty accepting constructive criticism.

[60] Mr. McBeath and Mr. Rolfe testified to their ongoing efforts to accommodate the grievor’s sensitivities by trying to find her a different place to work in the LESC Uplands office.

[61] The grievor, as well as Mr. McBeath and Mr. Rolfe, all testified that she was moved from her location near the washroom to an office further away. In an email dated April 30, 2013, the grievor wrote, in part, the following:

...

*... the office I will be moved to will not have a window and is very very dark. I mentioned to Dan Rolfe that this likely won't help improve my breathing as when I sat at that end of the building before I had a lot of difficulties. The vent in the office moves air around but doesn't provide fresh air. Moving polluted air around doesn't make it any less polluted.*

*Sitting near the window where I am now was working very well until a group of people who sit near the entrance to the building decided that it was fine for them to used [sic] scented products in spite of the scent free policy....*

*Since we last spoke, the commissionaire has taken to storing clothing with perfumes on it in her locker in the washroom and then wearing that clothing through the building when she leaves ... There is something scented stored in one of the other lockers as well. Dan Rolfe suggested I use a rear entrance to enter the*

*building to avoid all this but when I tried doing that the commissionaire refused to allow it as I wasn't showing my building pass. She also explained to me that she must let delivery personnel and other workers into the building wearing scented products because they wouldn't know about the policy here and she feels sorry for them.*

*It is beyond me to deal with it. And the stress of it is just adding to my breathing problems and feelings of depression.*

[62] On the same day, Tuesday, April 30, 2013, Dr. Edwin Spence wrote a note removing the grievor from the workplace that reads as follows: "This patient was seen on Tuesday, April 30, 2013. This patient was totally disabled on Tuesday, April 30, 2013 and I estimate through to Tuesday, May 14, 2013. Estimated time until return to work: 4 Weeks."

[63] The grievor did not return to work as anticipated, and Dr. Spence wrote again, on May 16, 2013, "This patient was seen on Thursday, May 16, 2013. This patient was totally disabled on Thursday, May 16, 2013 and I estimate through to Sunday, May 26, 2013. Return to regular work on Monday, May 27, 2013."

[64] Shortly after her return to work, on June 5, 2013, the grievor completed a WSIB report of a workplace injury. She reported the injury as having occurred on April 26, 2013, and she noted that she reported it to Mr. McBeath on May 2, 2013. She described the nature of the injury as "Aggravated Scent Sensitivities, Depression & Anxiety."

[65] In an attachment to the WSIB complaint form, the grievor wrote, in part, as follows:

...

*I am an engineering draftsman working for the Department of National Defence....*

*I have a disability called Environmental Sensitivities primarily aggravated by scented products. I have asthma which is aggravated by scented products.*

*I have asked my employer ... to accommodate my disability by providing a scent free work environment and ensuring that co-workers and visitors do not wear/use scented products in the workplace.*

*Many steps have been taken to this end — signs have been posted, personnel have been advised not to wear scents, my workstation was moved to a location near a window, etc. However, some co-workers have not fully complied with the scent free policy and this*

*has aggravated my asthma resulting in difficulty breathing properly and thus difficulty in expressing myself verbally which in turn has led to further interpersonal problems and misunderstandings.*

...

[66] In the remainder of the attachment to the June 5, 2013, WSIB report, the grievor described the impact of the workplace environment on her.

[67] That same day, Mr. McBeath sent an occupational fitness assessment form through Mr. Rolfe to Dr. Spence. Mr. McBeath wrote, in part, as follows:

...

*Our employee has reported that a medical condition is limiting his/her ability to perform the normal range of activities related to his/her work. As you examine this patient, who is a valued Department of National Defence employee, we would like to inform you of our commitment to working with you, in order to assist our employee in planning a safe and timely return to pre-injury/illness duties.*

...

[68] On June 17, 2013, Mr. McBeath noted a visitor apparently wearing a strong scented product, so he sent the grievor home.

[69] Mr. McBeath received additional complaints about scents in the workplace on June 27, 2013, which he forwarded to Mr. Rolfe on the following day. He repeated his testimony about making inquiries in the office to see if he could substantiate the grievor's claim about a scented product. He never successfully identified a specific source.

[70] On July 18, 2013, Dr. Spence completed his analysis as required by the occupational fitness assessment form submitted to him on June 5, 2013. He noted a need for limitations or restrictions pertaining to certain non-physical work-related capacities, namely, schedule demands, social or emotional demands, and mental demands. In the following narrative section of the form, Dr. Spence wrote as follows:

*Through discussions with employee, restrict duties to those that require less mental dexterity + concentration, i.e. correct drawings or prepare drawings from existing models or preparing models from existing drawings*

*Provide clear instructions and assistance as needed to complete paperwork + forms, reports + learn new tasks*

*Restrict exposure to emotionally charged discussions or situations*

*Provide support as needed*

*Allow time away from office for appointments with medical professionals*

*Continue to provide scent free work environment*

[71] Mr. McBeath testified to receiving orders from Mr. Rolfe to implement the doctor's recommendations and testified to doing so. He repeated in his testimony that whenever the grievor suspected someone of wearing a scented product, he investigated and did not detect any scent. Mr. McBeath repeated his testimony about discovering no instances of non-compliance with the scent-free policy at LESC Uplands.

[72] Mr. McBeath also testified to his inability, beyond repeatedly requesting that visitors refrain from using scented products, to prevent visitors from wearing scents when they arrived at LESC Uplands. The nature of their duties at LESC Uplands required continual interaction with other units and with members of private enterprises, over whom Mr. McBeath had no control and little influence. He testified to the protocol that he and Mr. Rolfe imposed when a visitor arrived under such circumstances. The visitor would be asked to go back outside; then Mr. McBeath would advise Mr. Rolfe of the situation, who would take it from there. Once, in particular, Mr. McBeath encountered a training presenter who was unaware of the scent-free policy. Mr. McBeath had the training presenter take a shower before resuming his duties inside the Uplands facility.

[73] By July of 2013, the grievor was in a different work location at LESC Uplands in an office with a window. A building technician had observed problems with bringing in humid air from outside when the window was open. On July 16, 2013, at 11:40 a.m., the grievor emailed Mr. McBeath:

...

*Have you had a chance to speak with Harry about his request that I keep my office window closed to avoid intake of humid air from outside?*

*As you know, I was moved to an office with a window because the open window allows me fresh air intake that helps my breathing.*

*Does our air conditioning system bring air in from outside or does it just circulate air already in the building? Is humid air entering*

*the building only through my open window or are there other places outside air enters? If there are other places outside air enters can they be closed off instead of my window?*

*I will close the window if necessary, however, I'm worried this might result in difficulty breathing that might lead to an asthma attack from scents used in the building. Should this happen, I don't have sick leave to cover an absence that might result as I now owe sick leave due to the stress leave I had to take in May. Have you heard back on whether management would be willing to advance me further sick leave in such an event?*

...

[74] A couple of hours later that same day, at 1:39 p.m., Mr. McBeath replied:

*Jo-An I talked to Dan about the AC and sick leave situation, these are the answers I have received so far.*

*AC System; The AC system takes in outside air and recalculates inside air. On a humid day, an additional source of outside air will increase the humidity inside. We are going to have a technician look at the system and see if any adjustments can be made to reduce the humidity level.*

*Sick leave advancement is still being looked into.*

...

[75] On July 24, 2013, the grievor forwarded to Mr. McBeath a follow-up from Dr. Spence on the occupational fitness assessment form that indicated a continuing program of restricted duties. Dr. Spence repeated the restrictions he had articulated on July 18, 2013, and advised of another follow-up set for August 30, 2013.

[76] On August 8, 2013, the grievor sent this message to Mr. Rolfe: "... something scented just past the commissionaire's desk as I approached the cubicles that caused me to wheeze and cough. I have taken medication to relieve the breathing difficulty."

[77] On August 30, 2013, Dr. Spence submitted another follow-up report, in which he specified no restrictions or limitations.

[78] On September 3, 2013, the grievor emailed this to Mr. McBeath: "John, [t]here is something scented being used/worn in the office today that is causing me breathing difficulties. Please let me know what will be done to resolve the problem." The next day, September 4, 2013, the grievor wrote to Mr. Rolfe, as follows:

*Dan,*

*As we discussed a few minutes ago, we both agree there is someone using something scented in the office again today that is causing me further breathing difficulties. Also, I understand from our discussion about this issue yesterday, that you spoke with everyone individually. Unfortunately, this doesn't seem to have had the desired results. Would you be able to send out an email to everyone stressing that this is a scent-free workplace? Would you include me in the email as well?*

...

[79] Two hours later, Mr. Rolfe distributed this email to the entire staff:

*All,*

*A reminder that LESC is a scent-free workplace and we ask that all employees refrain from using scented products.*

*Please take a moment to ensure that if you have changed the products that you use, that they are scent-free.*

*For new employees, note that as well as avoiding the use of perfumes, colognes, aftershaves, and other such products, deodorants, fabric softeners and other products that could manifest themselves in the workplace should be scent-free as well. (Note that "natural" or "all-natural" products are not necessarily scent-free.)*

*If you have any questions regarding this, I would be happy to assist.*

*Thank you for your co-operation,*

...

[80] On September 5, the grievor emailed the following to Mr. Rolfe, copying Mr. McBeath:

...

*Again today there is someone wearing something scented at work. On my way into the building, as I walked past the first set of cubicles closest to the door I had problems breathing because of it. It's the same thing as yesterday and the day before. Again, I've taken more of my rescue inhaler and last night I had to cancel dinner with friends because of problems breathing. Not only is this affecting my ability to concentrate on work, it's also affecting my personal life as well.*

*I'm pretty sure if you walk over there now you will notice which person is wearing it. Please advise as to what will be done to solve the problem.*

...

[81] The grievor filed her first grievance the next day, September 6, 2013. She articulated the details of her grievance in the following manner (verbatim):

*I grieve on the grounds that my employer has discriminated against me by not accommodating my disability as per the Canadian Human Rights Act & the Canadian Charter of Rights and Freedoms.*

*Technical Services (TC) Group collective agreement Article 22 Health & Safety and any other related article.*

[82] In September of 2013, the grievor missed some training sessions because there was no guarantee they could be held in scent-free environments.

[83] On September 12, 2013, the grievor met with Mr. Rolfe and others to discuss the grievance that she filed on September 6, 2013. She provided the following additional information:

...

*I grieve that my employer at all levels has not accommodated my needs to the fullest by creating a completely scent-free environment in all areas of the work site. They have not formally established a scent free environment or the appropriate directives, policies, or regulations relating to a scent free environment that are enforceable. In addition to any other remedies that may be determined by this grievance process, the following corrective actions must be taken by the employer as outlined below:*

*(a) an enforced global scent-free policy in place on a systemic level that would allow those with scent sensitivities to freely do their jobs without exposure to scented products by co-workers or visitors, etc.*

*(b) an enforced global scent-free policy in place on a systemic level that would allow those with scent sensitivities access to training throughout the public service in an inclusive way.*

*(c) an enforced global scent-free policy in place on a systemic level that would allow those with scent sensitivities access to career progression opportunities throughout the public service in an inclusive way without exposure to scented products by co-workers or visitors, etc.*

*(d) an enforced scent-free policy in place on a systemic level that would allow those with scent sensitivities to participate freely in workplace team-building and networking without exposure to scented products by co-workers or visitors, etc.*

...

[84] Mr. Rolfe noted that at the hearing, the grievor clarified the term “global scent-free policy” by including her “... immediate workplace, the Department of National Defence and the whole Public Service.”

[85] At the September 12, 2013, meeting, and in his testimony at the hearing, Mr. Rolfe repeated that he did not have the authority to govern affairs for the entire DND or the entire public service.

[86] Mr. Rolfe testified to the steps he took to accommodate the grievor. In his testimony, he referred to his first-level grievance response, dated September 27, 2013, in which he repeated the terms of the notice that was posted on March 9, 2012, which was referred to earlier in this decision.

[87] Mr. Rolfe went on to itemize the measures taken to date at LESC Uplands as follows:

...

- *All employees have been encourage [sic] to refrain from wearing or using scented products that may adversely impact fellow colleagues;*
- *Signs are posted on all entrances to work stations occupied by Quality Engineering Test Establishment employees designating the area as a scent free environment;*
- *All employees are requested to ensure that visitors be made aware of the requirement to refrain from wearing or using scented products before entering the workplace;*
- *Your work station was moved to a location near a window then to a separate close [sic] office with a window.*

...

[88] Mr. Rolfe repeated in his testimony this passage, which he wrote in the first-level grievance response:

...

*... You raised a number of other issues relating to the handling of visitors that you consider as outstanding. I believe that our current procedures already address these issues. I will continue to ensure that the directives relating to visitors are well understood and re-enforced by management at LESC. In regards to planned visits this includes ensuring a consistent message is sent to all visitors advising them to refrain from wearing scented products. We will*



*continue to make every effort to minimize exposure to products to which you are sensitive.*

*The other outstanding issues you raised are out of scope of my authority, however, that is not to degrade their importance. I would encourage you to employ other mechanisms to pursue these initiatives.*

...

[89] The steps that the employer took to address the grievor's concerns were repeated in the second-level response.

[90] The grievor testified to her dissatisfaction with the steps that had been taken to date, indicating that they had been insufficient to protect her and that what was truly required was an enforceable ban on scented products across not only DND but also the entire public service. She repeated this at several junctures in her testimony and frequently added that strict disciplinary action must be taken against anyone who does not comply.

[91] Mr. Rolfe testified to the difficulty he had preventing visitors who might have worn scented products from arriving at the LESC Uplands building. The nature of their work involved interacting with a number of different agencies, both within DND and outside it, over which he had no authority. The best he could do was what he had already done, namely, instruct those who might be expecting visitors to remind them of the scent-free policy and to instruct the commissionaires stationed at LESC Uplands' front entrance to advise him if people arrived who might not be in compliance. Mr. Rolfe expressed sympathy with the grievor's situation but stated there were aspects of her recourse measures over which he simply had no control.

[92] On September 26, 2013, in response to a staff-wide poll seeking input on possible locations for a staff Christmas gathering, the grievor expressed concern about not being able to attend because there could be no guarantee it would be held in a scent-free environment.

[93] On October 9, 2013, Serge Carignan, who apparently coordinated that event, replied as follows:

*Jo-An, since the QETE Christmas party is a voluntary event being held in a private establishment, it is not possible to force everyone attending to refrain from using scented products nor is it possible*

*to enforce such an order as this is not a DND facility nor is it a work related environment. In any case, I believe we have a much better chance of compliance if we ask as oppose to force staff that could react negatively to this order.*

*We can reserve a chair(s) at the edge of the group in an attempt to minimize any effect to you in the event that someone attending does wear a scented product that would adversely affect you. Unfortunately, if this occurs and your health becomes affected then there will be no choice but for you to leave the party. Hopefully, this will not be the case.*

*Therefore, I will ask Capt [O] to send the following statement along with the invitation:*

*“Please refrain from wearing scented products such as colognes, perfumes and body sprays, etc as a number of personnel have severe reactions to these which can affect their health”.*

*We believe that we have put in place all that we can in order to accommodate your disability and will continue to work with you to ensure we minimize any adverse affects on your health within your work environment.”*

...

[94] In an email dated October 9, 2013, the grievor expressed her displeasure with Mr. Carignan’s approach to the problem and invoked the CLC and Treasury Board and DND policies. She requested that guests arriving at the Christmas party wearing scented products be physically removed.

[95] Mr. Carignan, who did not testify at the hearing, replied two days later, expressing regret at “... not [being] able to accommodate you to the extend [sic] you desire.”

[96] The grievor complained several times, including on November 8, 2013, about the chemical content of the cleaning products that cleaners used in the bathroom. Mr. Rolfe testified to the difficulty he had controlling the cleaners’ activities. They had been engaged under a separate contract over which he had no control, but he did communicate his concern about the grievor’s situation with the contractor.

[97] The grievor testified to a continuing problem with the washroom. There seemed to be no consistency, she said, because some days, she would experience a violent reaction, and on other days, she would not. She wrote in an email, copied to Mr. McBeath, on November 8, 2013, “As per below, would you copy me when you contact the cleaning company to remind them to use scent-free products please?”

[98] Mr. McBeath tasked Master Warrant Officer (MWO) Richard Desjardins with following up with the cleaners. MWO Desjardins wrote in an email dated November 12, 2013, copying the grievor as requested, "Could you please remind the Cleaning Agency that provided service at 720 Bluenose Upland, not to use scented products for cleaning. The Cleaning Agency must provide are [sic] Cleaner with unscented alternatives for cleaning supplies."

[99] The grievor wrote an email dated November 12, 2013, in which she declined to attend the office Christmas party because it would not be a scent-free environment.

[100] In response to an invitation sent to all staff about a 44th anniversary celebration for the QETE, the grievor wrote, "As always, will this be a scent free event?". The facilitator, Mr. Carignan, who did not testify at the hearing, replied on January 22, 2014 as follows:

*You do realise that the NPB is a PWGSC building rented out to 20 different organisations. I do not control the common rooms. (The hallways, the cafeteria, the washrooms, etc)*

*I will do my possible as always to make this a scent free environment. It will be mentioned to QETE members.*

*In the future please use the chain of command for your queries.*

[101] On February 7, 2014, the grievor wrote to Mr. McBeath once again about the washroom, stating:

...

*As just discussed, I was exposed to a strongly scented cleaner used in the lunchroom this morning. I already spoke with the individual about this and it was an honest mistake because the table hadn't been cleaned in several days. However, the chemicals have affected both my breathing and my sinuses. I don't feel I am able to work in this condition. I recommended that a bit of dish soap and vinegar be used to clean the table in the lunchroom in future as it's my understanding that the vinegar will cut any grease and act as a disinfectant.*

...

[102] Mr. Rolfe repeated his testimony about the limited extent to which he could control the cleaners' activities. He said he did his best to see they were advised not to use scented cleaning products or to wear scented grooming products.

[103] The grievor testified to continuing discussions with the WO about her use of Pert shampoo and took a picture of a sign in the washroom and shower area that the WO had posted that read, “Exhaust fan must be turned on before use of the shower or the toilet...”. The grievor testified that despite the sign, she continued to experience discomfort near the washroom.

[104] On May 16, 2014, the grievor sent a complaint to Mr. Rolfe about the temperature in her office. She followed up on June 3, 2014, with a lengthy email about the effects of the high temperature, as follows (quoted in part):

...  
*Since I've been experiencing headaches from the high heat,  
difficulty catching my breath, I'm finding it hard to concentrate  
(feeling sleepy and light headed) and there isn't really anywhere  
else I can work, I'd appreciate if you would get back to me with a  
timeframe for rectifying the situation as it's been more than 2  
weeks since I brought this to your attention ....*  
...

[105] The grievor testified to having a great deal of difficulty breathing when the weather is hot and humid, even when scented products or chemicals are absent.

[106] Mr. Rolfe testified to including Harry McEachern (who did not testify) in the conversation because Mr. McEachern would have been responsible for the maintenance of the heating, ventilation, and air conditioning in the LESC Uplands office. Mr. Rolfe sent a message to Mr. McEachern approximately 30 minutes after receiving the grievor's complaint, stating, “Harry - has this been reported to PW? If not, please do so ASAP. If so, when will they respond?”

[107] Mr. McEachern wrote an email approximately 30 minutes later to both Mr. Rolfe and to the grievor, stating, “... it is not unreasonable to leave the office door open for ventilation.”

[108] The grievor responded as follows:

*Hi Harry,  
I understand your point and I agree, it would help if I could leave  
the door open.  
However, as you are aware, I have a disability that requires  
accommodation. And, as you are also aware, the door is closed*

*because there are many people working here who do not respect the “no scents” policy either in their personal use of scented products nor in the admittance of visitors wearing scented products. Even though there isn’t anyone right outside my door right now wearing something scented, I have no control over who might walk by or what substance might be in the air from across the room. Scents aren’t designed to stay right next to the person wearing them. They disperse throughout the air. And, unfortunately, I am hyper-sensitive to them. Keeping the door closed is an insurance policy that prevents serious medical consequences for me – much worse than those caused by the heat.*

*If you would like to learn more about MCS there is an excellent book called 12,000 Canaries Can’t be Wrong by Dr John Molot that would help you understand this condition.*

*I understand this is frustrating for you and I’m sorry for the inconvenience but I hope there’s a way to resolve the situation so that my office is comfortable enough to work in and so you can take a shower in the men’s washroom without freezing.*

*I do appreciate your efforts.*

...

[109] On Thursday, June 18, 2014, the grievor asked about the third-level response to her September 6, 2013, grievance. She complained again about the cleaning company:

...

*Today, one of the [Warrant Officers] came to ask me if it was OK if a cleaning company may use Sunlight dish soap (a scented cleaning solution) to clean the windows in our building. She advised that since my door is closed that this would be OK if they didn’t clean my windows. I politely told her there was unscented dish soap in the lunchroom, that I objected to contracting work to cleaners using scented products in a workplace with a scent free policy, and that if windows in the building needed cleaning then so did mine. She responded that we weren’t in the business of providing cleaning solutions to the cleaning company. My final comment was that it’s not OK to use scented products in a scent free workplace. From past experience I’m now worried this is going to set off a whole new round of harassment from the management team because I’m not being “co-operative.” Why on earth do they still after almost three years “forget” to work out contracts that stipulate scent-free products in this workplace then look for my “approval” to go ahead with using the scented products?*

*Secondly, for the last several weeks my office temperature was reaching temperatures of over 30 degrees celsius [sic]. I complained about this, waited for over 2 weeks for them to address it, then when it looked like nothing was going to be done, I sent an email ot [sic] the office manager with links to all the usual laws and regulations on office temperature asking that they deal with*

*the issue. Last week, in response to my email, I was subjected to door pounding, angry, rude comments both to me and to others about my special situation, and I was ignored when I tried to discuss the issue with one of our management team. Part of my accommodation is to leave the office door shut and my window open to allow fresh air because management here can't seem to deal with the many individuals who do not respect the scent free policy. This management team member postulated loudly, to everyone within earshot in our open concept office, that since I don't leave my office door open and my window shut then there was nothing they could do about the temperature in my office. The hvac expert Public Works eventually sent over disagreed stating the thermostat should be relocated to the main part of the building rather than in the men's washroom, and that additional return air vents should be installed as there weren't enough to balance the temperature in the building (most people in this building have issues with too hot or too cold conditions). I was told the recommended work wouldn't be done as it costs too much money. They have provided me with a portable air conditioner now that vents out the window, however, the angry comments made by the management team member regarding the accommodation of my disability were disturbing and bring back all the stress and disruptions from a year ago.*

*Is there any way to speed the process up or is there anything else that can be done about the latest round of harassment.*

*Thanks very much for your consideration and for allowing me to vent.*

...

[110] On July 2, 2014, the grievor emailed this to Mr. Rolfe:

...

*It just came to my attention that there is lemon scented dish soap being used in the lunchroom. Would it be possible to remove it and replace with an unscented product as we had before? Also, would you send an email out to staff to remind them about the scent free policy in place at this worksite and that this includes scented dish soap. If possible, I would like to be copied on it.*

...

[111] On July 15, 2014, the grievor wrote as follows to Mr. Ramsay and Mr. Rolfe about new flooring for the LESC Uplands office building:

*Hi Brian,*

*I don't know if Dan Rolfe contacted you to ask about off-gassing of new flooring for our workplace here at Uplands. Dan brought a sample of some vinyl flooring to me this morning that they*

*propose to use in this workplace. Because of my MCS I have a concern about any chemicals the new flooring will release into the atmosphere once installed (the small sample didn't cause me any discomfort but a large area might). Dan assures me that the installation won't require the use of adhesives which is good news for me, however, I wonder if you might know of any way we can obtain manufacturing data on the chosen product to ensure any off-gassing will be minimal and short term.*

*I think when this issue came up awhile back the recommendation was not to use vinyl but rather linoleum instead. If a [sic] remember correctly, linoleum is a "natural" product and it acts as an antibacterial agent as well as not being a sink for other chemicals used in the workplace (ie photocopier toners, cleaners, etc).*

*As it happens I have an appointment with my specialist next Monday and I will ask him if he is aware of any issues with vinyl flooring as regards MCS as well.*

*Any suggestions or ideas you have on how to find out what chemicals are used in the product, etc would be most welcome.*

*Thanks very much for your consideration.,*

...

[112] On July 22, 2014, the grievor followed up with this email:

...

*This is an update regarding my visit with my Environmental Medicine specialist yesterday. He repeated what he said in his letter that carpet is definitely not recommended and he doesn't have a positive recommendation for any particular flooring as there are too many products on the market and they are continually changing. He agreed that obtaining a Material Safety Data Sheet on any product or adhesive chosen is a good idea so you know what substances you're dealing with.*

*The doctor's recommendations are to increase rescue medication as needed and to take several breaks outdoors throughout the day for several months to counter adverse reactions to off-gassing when spending extended periods around new renovations. If needed, I am to contact his office for oxygen therapy.*

*I also spoke with an interior air quality expert at the Lung Association and he recommended looking at the website for the Air Resources Board in California as they've done the most research on indoor air quality. The Lung Association doesn't have any recommendations on particular flooring as they aren't aware of any independent research into off-gassing of various flooring products. However, there are guidelines regarding the removal of existing flooring which might present problems if existing adhesives must be ground off before installing new flooring.*

...

[113] Ultimately, the grievor testified, the employer refrained from installing new flooring to avoid triggering a reaction on the grievor's part.

[114] On October 17, 2014, the grievor emailed this to Mr. Rolfe:

*Hi Dan,*

*[The Commissionaire] just came to me to let me know that a guest has been allowed to wait in the kitchen even though she is wearing scented products. Event though I protested, [the Commissionaire] has explained that the person doesn't want to wait in her vehicle and she is welcome to wait in the lunchroom. End of discussion. This isn't acceptable.*

*Who would be the person who would authorize this? It's my understanding that [the Commissionaire] is to turn people wearing scented products away at the door.*

*Also, I have noticed the last few weeks that more and more people are wearing scented products at work. I'm sure I don't need to remind you that such exposures generally leave me exhausted by the end of the day, limit my ability to focus at work, and limit my ability to participate in activities in my personal life. If overwhelmed I will have breathing problems and other respiratory reactions that have in the past put me in hospital.*

*I would appreciate if you would look into who authorized this person to enter the building. I'm disappointed that I can't count on the management team here to lead by example by respecting the scent free policy. I would also appreciate if you would send an email to all staff reminding them that there is a scent free policy that must be respected in this workplace.*

*I greatly appreciate your assistance in this matter.*

...

[115] In his testimony, Mr. Rolfe repeated that whenever the grievor complained about a reaction to something, he would either investigate it himself or would have Mr. McBeath do it. As of April of 2014, Mr. McBeath was no longer at the Uplands facility, so he would frequently task Mr. Ramsay with this and ask Mr. Ramsay to report back to him. Mr. Rolfe testified that never did he come across any employee at LESC Uplands in violation of the scent-free policy. Visitors would be dealt with as the occasion arose, but his problem was that he could not control who would show up at the door, and there was little he could do other than to react to a situation, for example, by having the person wearing scented products wait outside.



[116] In response to the grievor's October 17, 2014, email about the visitor, Mr. Rolfe responded on October 20, 2014:

*Jo-An,*

*From now on, the commissionaire will report any visitor wearing scent to one of us (Harry, the MWOs or myself) and we will determine what to do.*

*If the person has legitimate business here, he or she will be either be [sic] escorted into the conference room and the doors closed, sent outside or to the shelter(s). We will notify you that someone with scent is in the building. When the person has left, we will air out the conference room and notify you.*

*If the person does not have a legitimate reason to be here, they will be asked to leave or wait in their vehicle.*

*We will continue to make every effort to inform anyone invited here of our scent-free workplace, but there can arise instances where persons who do not have experience with scent-free environments or third or fourth party persons (for instance service technicians) inadvertently bring scents into the building, and the above instructions will accommodate both parties.*

*I have not noticed any of our staff with scents, but I'll ask the managers to remind their staff about our scent-free workplace.*

[117] The same day, on October 17, 2014, an hour or so later, the grievor responded:

*Dan,*

*Thanks for getting back to me.*

*For clarification, I understand what you say below to be that when visitors with legitimate business come to the building wearing scented products they will be admitted to the building in spite of the scent free policy. They will be escorted from the entrance through the main part of the building to the conference room unless they can conduct their business outside or in the shelters.*

*If this is correct then it's something different than what I was lead [sic] to believe was in place before. I was lead [sic] to believe that visitors wearing scented products would not be admitted into the main building.*

*Given this new situation, I have some concerns and would appreciate, if possible, if you could provide clarification.*

*- Opening the doors of the conference room to the rest of the building when people are entering and leaving will dump chemicals from scented products into the main area of the building. What is meant by "airing out" the conference room?*

*- If the conference room isn't on a separate air circulation system to that of the rest of the building, then the chemicals in the*

*conference room will be spread throughout the entire building whether it is “aired out” after the fact or not. Is the conference room on a separate air circulation system to that in the rest of the building?*

*- If a visitor wearing scented products on their hands or hair touches a surface or leans back in a chair, the chemicals will not be dissipated by simply opening the windows for a few minutes. Those chemicals will remain on surfaces where they will risk transferring to others and will continue to affect air quality in the room for a long while. What will be done to address this?*

*- What happens if a visitor wearing scented products requires the use of a washroom while visiting? Or a cup of coffee or water? A visitor wearing scented products would have to walk through almost the entire length of the main part of the building wearing scents to get to the washroom. How will this be addressed?*

*- The situation that occurred last week involved someone who was a driver for someone attending a meeting here. Would this driver be considered as having legitimate business here?*

*I appreciate the offer to let me know when someone is wearing scented products in the building, however, admitting someone wearing scented products to the building at all means I don't have access to the washroom while they are here and for a good period after should they use the women's washroom; it means I cannot use the main entrance to the building; and it means I will be affected by the chemicals being circulated throughout the building for days, including in my immediate work area. I've already outlined the effects on my health under these circumstances ad nauseam.*

*I'm disappointed as I feel this decision doesn't accommodate my disability and adversely affects my ability to do my job.*

...

[118] On October 22, 2014, Mr. Rolfe sent the following message to all Uplands facility staff: “All, This is a reminder that if you are going to requisition services (ie labour) for inside the office building, please ensure that the vendors are notified that this is a scent free environment and that their personnel should refrain from wearing scented products.”

[119] Mr. Rolfe followed up with the grievor about her concerns with visitors to the Uplands facility on October 27, 2014, with the following email:

*Jo-an,*

*There will be occasions when, despite our best efforts, clients will arrive with scents and refusing entry would have a negative effect on our business. More specifically, admittance would not be*

*refused if it is going to damage our reputation, as clients have alternatives for the services we offer. It is possible that you could encounter scents, but you will have been alerted beforehand, and there are still the options of using your mask or sending you home.*

*Regarding the heating and air conditioning systems for the building, there are four separate systems. The conference room, the commissionaire's area and the supply tech's office are on one system, and you are on another system at the other end of the building, so air from the conference room is not circulated throughout the building. And, what I meant by airing out the conference room was to open the windows to the outside with the doors closed.*

*We have made changes to restrict the discretion of the commissionaire based on this recent experience, and we will continue to make every effort to keep scents out of this workplace, but an unconditional ban has the potential to have a negative effect on our reputation.*

[120] There followed a series of emails between the grievor and Mr. Rolfe about what constituted "legitimate business" at the Uplands facility. The grievor testified to her disgust with Mr. Rolfe's response, stating that it was a wholly inadequate response to her accommodation needs. She testified to running into a person once and then, hours later, being told that the person in question was still in the building. She also testified to having been supplied with N-95 masks, but she claimed that they exacerbated her asthmatic condition.

[121] On November 6, 2014, the grievor filed a grievance about her treatment at a luncheon event for the unit on November 4, 2014, stating:

*Failure to Accommodate Disability Nov 04, 2014*

*On Nov 04 there was a Section Lunch held at the NDHQ WO's & Sgts' Mess at 4 Queen Elizabeth Drive. My workplace is located near the airport at Uplands. I was advised that a DND van would be providing transportation for people who opted to attend the lunch. I was of the understanding that this lunch was an activity that was supported by the unit management team as a team building exercise.*

*I requested that I have a seat in the van but that because symptoms of my disability (asthma related environmental sensitivities that result in shortness of breath, etc) were severe that day, I would like to be accommodated by having the driver let me off and pick me up at the door of the Mess. Parking in that area downtown is difficult to find and that, if the van was to be parked more than a block away, I didn't feel I could walk the distance without extreme difficulty, if at all.*

*I was told by [the WO], who was to drive the van, that she would not accommodate my disability as her position was that everyone should be treated the same — everyone would walk the distance between where ever [sic] parking was found and the Mess. I thanked her for her explanation and then spoke with the building senior, Mr Dan Rolfe. Mr Rolfe told me to leave it with him.*

*When Mr Rolfe spoke with me a short time later he explained that the driver had now agreed to let me off at the door on the way there, however, I would have to walk to where ever the van was parked on the way back. I explained to him that I didn't feel I could do that. I explained that it would either take me an extraordinarily long time as there would likely be nowhere for me to sit and rest along the way, or that I would not be able to make it to the van and would be left behind without a way back to work. He was sympathetic but the decision was made.*

*I had already purchased a ticket to the lunch, I had my own vehicle at work, and I knew I could park at the nearby City Hall parking lot and that there were places along the way to the Mess where I could sit and rest as needed. I asked Mr Rolfe if I could take a bit longer for traveling time and he agreed.*

*A short while later, I asked Mr Rolfe if I would be reimbursed for travel and parking costs but he refused saying the lunch was not a work related event.*

*I believe this lunch, and others like it, was a work related [sic] event. I also believe I should have been accommodated by dropping me off and picking me up at the door given the symptoms of my disability and the fact that all staff at my workplace are well aware of my issues. Aside from the equality rights issues involved, it's just plain human decency.*

*This incident is indicative of the general attitude toward accommodation of my disability at my workplace.*

*I request that at any future events of a similar nature I be accommodated if necessary by having the driver drop me off and pick me up at the destination.*

[122] In that grievance, the grievor also included the October 17, 2014, narrative surrounding the arrival of visitors wearing scented products at the Uplands facility.

[123] After filing her second grievance, the grievor began to take a stronger stance on the enforcement of the scent-free policy at her workplace. She emailed Mr. Provencher. She drew his attention to a human resources website with questions and answers on accommodation issues pertaining to environmental sensitivities. In particular, she reproduced the following in her email:

...

... *“If the problem persists, managers can **direct** employees not to wear perfume or other scented products in order to accommodate the needs of others. **Failure to follow this direction can lead to administrative, including disciplinary, action.**”*

*My point – The terminology used is: if “reminding” doesn’t work, then move on to “directing” employees as the next step. And if they still don’t cooperate, then disciplinary action can be taken....*

...

[Emphasis in the original]

[124] In his testimony, Mr. Provencher repeated what Mr. McBeath and Mr. Rolfe had already testified to. Their investigations into the grievor’s complaints that individuals wore scented products did not result in the discovery of any individual wearing one, so disciplinary action was never warranted.

[125] Mr. Provencher also testified to taking the grievor’s medical situation seriously and to doing whatever he could to minimize her risk of exposure to substances that could possibly trigger a reaction. One of the major problems, he said, was that it was impossible to determine the triggers, since some chemicals have no odour. The only thing management could do was to attempt to be proactive when it came to providing warnings to visitors and to those responsible for contracting the cleaning services to avoid the use of scented products. Mr. Provencher said this was done.

[126] Another problem, according to Mr. Provencher, was management’s inability to control who might show up at the LESC Uplands facility at any given moment. Visitors might not necessarily be aware of the scent-free policy, or the Commissionaire on duty at the front entrance might not be able to detect a scent with the same degree of sensitivity as the grievor. Mr. Provencher testified that as time went on, it became apparent to him that it was becoming impossible to provide a completely risk-free work environment for the grievor.

[127] Mr. Provencher testified that he did not have the authority to create a blanket policy across DND or the entire public service. The best he could do was make LESC Uplands as safe a place as possible. He supported moving the grievor’s workspace, providing her with an office with a window, and allowing her to leave when necessary. Due to the nature of her work, working from home or any form of remote working was not an option. In fact, testified Mr. Provencher, throughout the COVID-19 pandemic, none of the LESC Uplands staff who were engaged in the same work as was the grievor

were permitted to work anywhere but at the LESC Uplands facility, owing to security concerns.

[128] Mr. Provencher testified to the grievor's reaction to atmospheric conditions as a new development and sent a letter dated January 29, 2015, requesting an update on her medical condition. He wrote:

...  
*... she stated that the cold and humid air triggered her asthma and she could not walk the entire distance to the vehicle. This trigger to her asthma was not known by management. This has raised concerns that management does not have sufficient information concerning her condition which could lead us to asking her to perform certain tasks that may be too difficult or could aggravate her medical condition. In effect, we require knowing if her medical condition has changed and are there any new limitations that we are not aware of.*  
...

[129] Accordingly, a fitness-to-work (FTW) assessment with Health Canada was scheduled.

[130] Meanwhile, the grievor continued to signal that she was being excluded from events because management could not guarantee a scent-free environment. A pay-consolidation briefing session was scheduled for April 7, 2015. Geneviève Dubé, who did not testify at the hearing, responded to the grievor's concerns on March 23, 2015:

*Bonjour,*  
*Please note that an employee with a medical condition will be attending the pay consolidation session on 7 April at 11:00. Therefore that would be necessary that the following warning be sent to all participants and facilitators before the session.*  
*"Please refrain from wearing scented products such as colognes, perfumes and body sprays, etc. as a number of personnel have severe reactions to these which can affect their health."*  
...

[131] The grievor attended the offices of Health Canada's Occupational Health Clinic on April 9, 2015, for a FTW assessment. She reported that when the attending physician asked her to undergo a breathing test in the onsite laboratory, the technician administering the test was heavily scented with perfume, so the grievor could not undergo the tests. Nevertheless, an evaluation was conducted. In a report dated May 5,

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

2015, Dr. Yolaine Trottier, Medical Officer in Charge at Health Canada's National Capital Region Occupational Health Clinic, wrote this:

...

*Ms. Munday was seen at Health Canada on April 09, 2015 at the request of her department for a medical assessment with respect to her fitness to work. Documentation from Ms. Munday's treating health care providers was also reviewed, and her assessment is now complete.*

*Ms. Munday has a chronic medical condition for which she is receiving treatment and is followed regularly by her health care professionals. Ms. Munday is considered medically fit to perform the duties of her position, in the workplace, with the limitations and restrictions outlined below:*

- *Avoid exposure to scented products.*

*Some of the possible accommodations that can be considered are:*

- *Continuing the use of a closed office space*
- *Ensuring good Air Quality / Air Exchange*
- *Encouraging scent free work environment (scent-free policy)*
- *Using environmentally friendly cleaning products (more natural products and avoidance of synthetic / highly scented cleaning materials)*
- *Avoiding or minimizing the time spent in an environment where ongoing renovations / construction are present.*

*Other possible options for preventing / limiting exposure to trigger agents are:*

- *Having the workplace away from high traffic area such as restrooms, boardrooms, conference rooms and reception areas, as well as photocopier / printing / fax equipment.*
- *Limited in her ability to walk for more than approximatively 2 - 3 blocks (750 - 1000 feet) in cold weather.*

*With regard to your other questions:*

*There is no indication that the sensitivity disorder has worsened since 2011.*

*In the absence of sensitivity reaction the performance should not be affected.*

*The use of a mask is not recommended at this time.*

...

[132] Mr. Provencher testified to the receipt of the doctor's note and to his conviction that all the doctor's points had been addressed. He repeated the factors that were beyond management's control, such as visitors arriving and the cleaning staff's habits.

[133] On September 23, 2015, an information session was offered on service delivery changes, including a training session on a new database. The grievor expressed interest on September 24, 2015, indicating that she required a scent-free environment and asking, "Will the session be scent-free?".

[134] Mr. Rolfe replied the following day, stating, "This session is being held in the QETE conference room, and the response to your request for a scent-free session is as per previous occasions. We will request that attendees refrain from wearing scents, but we cannot guarantee a scent-free environment." He added this: "... [the instructor] has also offered a one on one [...] demonstration. Let me know which you prefer."

[135] The grievor responded with this: "I really appreciate the offer but, while it's a solution to the safety concern, it doesn't address the discrimination side of things." In subsequent emails to Mr. Rolfe, she claimed that she was being discriminated against because she was effectively excluded from the group session since there could be no guarantee of a scent-free environment.

[136] On October 27, 2015, the grievor complained as follows: "The new supply clerk is wearing scented products at work which are adversely affecting me."

[137] On November 18, 2015, the grievor made a complaint about the bad faith of members of management for not including a scent-free note in their email signature blocks. She wrote, "The reason for the Scent Free note was to ensure visitors to our location were aware that this workplace is a scent free environment BEFORE they arrive. So, even this small accommodation is being ignored by the management team here."

[138] On January 22, 2016, the grievor expressed interest in attending a workshop on mental health in the workplace, stating this: "I'm interested if it's scent free." Mr. Rolfe responded the following day with this: "I will ask that the organizers request that participants refrain from wearing scents, but as per previous discussions, we cannot guarantee a scent-free environment".

[139] On July 13, 2016, the grievor wrote to Mr. Rolfe, stating this: "I understand with the hot weather that many people really want to pile on the deodorant. But I'm really struggling with the level of scented products used at work lately".



[140] On November 28, 2016, the grievor complained of "... some kind of apple smelling soap or something" in the women's washroom. She added: "I asked Dan Ferland (our Health & Safety officer?) for the form to fill out when refusing unsafe conditions but he has directed me to you. You are not here. I'm leaving work now because I need somewhere to use a safe washroom".

[141] On November 30, 2016, the grievor wrote the following to Christopher Hemming and Paul Ohrt, who were the two representatives on the Occupational Health and Safety Committee, copying Mr. Ramsay and Mr. Rolfe:

...

*I would like to file a Health & Safety complaint about an incident (and ongoing incidents) that occurred in my workplace on Monday Nov 28.*

*I work at 720 Bluenose Priv at Uplands in Ottawa. The organization is called LESC.*

*To begin, I have a disability which is accommodated with a scent free policy in my workplace. This scent free policy is not respected by many of my co-workers and I am continually exposed to scented products which in turn means I am constantly being injured by them.*

*The incident that occurred on the 28<sup>th</sup> of Nov is as follows:*

*I entered the women's washroom at about 2pm and was immediately assaulted by a very strong smell of something scented about 2 ft into the room. This exposure caused immediate injuries in that my eyes started to water and become itchy, I immediately had trouble breathing in the form of a great deal of pressure in my chest, I got a sharp pain in my head just over my eyes and on the left side near my ear, and I had a strong sense of panic. I continue, two days later, to feel many of these effects to a lesser degree but with the addition of muffled hearing.*

*I immediately left the washroom and sought out WO Dan Ferland, who is one of my co-workers listed as a Health & Safety rep in our workplace (the other rep listed was not available). He entered the washroom but said he could not smell anything. (It's not unusual that others are unable to detect chemicals in the environment at levels that I am sensitive to.) He got another fellow, WO Luc Sevigny, to enter the washroom and Luc said he could smell something in the washroom so there was definitely something there.*

*The point is, I had nowhere to go to the bathroom in my workplace. I sent an email to Mr Rolfe (our office manager), who was not in his office at the time, because I had to leave the workplace to use a safe bathroom elsewhere.*

*In addition to that critical incident, there are military members working here who use the shower after workouts. Scented products are often used during these showers even though they are not supposed to be. I have complained but the scents continue so I have had to delay any use of the washroom for several hours most days until a fan (if turned on) can clear the room enough for me to enter with minimal adverse effects. This means I do not have access to a washroom for the periods of time anyone uses scented products in there.*

*And I'm being injured at other times when I simply must use the washroom.*

*It can take days for a room that has been exposed to scents to clear out — if it does. (I have had clothing given to me that has been exposed to fabric softeners that I've had to throw out because even after weeks of airing outdoors the scent chemicals are still present at sufficient levels to cause me injury.) Depending on what else I've been exposed to (fabric softener in the main area of the building, deodorant on hot days, etc), I can be sick for weeks from exposures in this workplace and the washroom in particular.*

*Finally, there is a woman, [L.S.], who works here who uses a special soap to wash her hands because of a skin condition. This is an off-the-shelf soap, not doctor prescribed. It has scent chemicals that adversely affect me. However, I tried to be accommodating of her condition and use of a scented soap by not going into the washroom after she had been in there, or leaving and waiting awhile if the scent was obvious in the room. However, I started having more and more effects from the soap as if she was using it more frequently. About a week and a half ago I found out it wasn't only her using it — she and another woman, [a WO], were both now using it even though there is unscented soap provided.*

*As I mentioned above I have an accommodation in place in the form of a scent free workplace. It's been in place for a number of years and during that time compliance has not been good (maybe 50% of my co-workers are compliant all the time). Trying to deal with the situation has created a poisonous workplace for me. I am isolated, people who continue to use scents avoid me, talk about me behind my back, cause me injury when I have to work with or around them, use my disability against me if they are upset with me, and I'm seen as a trouble maker. I have complained to Mr Rolfe about the problems as they become critical but I don't always get positive feedback; measures taken are only temporarily effective, and the end result is usually an increase in coldness or outright hostility from my coworkers and a resumption of use of scents after they feel they are no longer under scrutiny. In any case, the problems continue to exist. And when I try to do anything about it there are repercussions which further affect my health and my ability to do my job.*

*Yesterday, Nov 29, Mr Rolfe told me he would speak with all the women who work here to determine if anyone would own up to using scented products in the washroom the day before. I*

*expressed concern to him that there would be retaliation as there had been in the past. Sure enough, a short time after Mr Rolfe spoke with them I came around a corner only to hear L.S. and [the WO] in angry conversation about me, saying that there is no way anyone can tell who has used something scented. Some nasty comments were made before they realized I was standing there and then directly to me once L.S. saw me. This conversation was taking place in an open cubicle area where many of my coworkers could overhear and with WO Luc Sevigny sitting there in the cubicle with them.*

*This kind of behaviour is damaging to my ability to effectively do my job and to my mental health. Using scents in this workplace is damaging to my physical health. And, I, on a daily basis, don't have access to a safe washroom. I'm at a loss as to what to do next. I'm hoping your investigation will result in solutions that haven't been thought of before.*

*I will be off work for the next several days and return on Tuesday December 6<sup>th</sup>.*

...

[142] On December 8, 2016, the grievor wrote to Mr. Ramsay and Mr. Hemming: "For over a week now I have been working without a safe washroom in my workplace... I really need some help from someone otherwise I can't stay in the workplace."

[143] The grievor wrote to Mr. Rolfe:

...

*Thanks for allowing me to use an outside washroom facility due to scented products being used again today in the washroom here at work. Because commercial establishments use scented products in their washrooms and because there are no other scent free workplaces nearby that I know of, I ended up going home (12 km round trip).*

*If this situation continues, may I put in an expense claim for milage [sic]?*

...

[144] Mr. Ohrt, who did not testify, was one of the individuals from the Joint Occupational Health and Safety Committee (referred to as "JOSH" in the correspondence) conducting the investigation into the grievor's unsafe-workplace complaint. On December 8, 2016, the grievor wrote to him as follows:

*Paul,*

*Thanks very much for your reply. I'm not sure what to do. I have not been able to get anyone's attention on this — not even a union rep at my workplace or my Local president. Everyone here is sick of hearing me complain about scent related issues. So am I, but I can't live with the lack of respect for and enforcement of the scent free policy.*

*I have not refused to work as yet because I was hoping that someone would investigate and it wouldn't come to that. However, my coworkers have escalated the use of scented products because they understand I cannot prove who is using them and if the products are hidden behind locked locker doors I can't even prove that something has been used. They just deny everything. Management here seems to be at a loss as to how to enforce the policy and keep me safe in the workplace.*

*After another dose of scented stuff this morning (I'm not yet well from last week's blast) my manager agreed that I could leave the building to find a safe washroom elsewhere. So that's what I've done today — three trips worth. However, the closest safe washroom is at my home, a 12km round trip and this eats up a lot of time and gas and is not sustainable.*

*My manager said he would speak with one of the main culprits today and get back to me. However, as usual, I have heard nothing on that. His position seemed to be that the scented hand soap could stay and his facial expressions seemed to indicate that I am being unnecessarily difficult. Since I haven't heard back from him and there is still scented soap being used in the washroom as I write this, I have decided that if it's not removed and banned from the building by tomorrow then I will be refusing to work. I'll let you know what happens if I don't hear back from you in the meantime.*

...

[145] Mr. Ohrt responded to the grievor the next day:

*Good Day Jo-An*

*An internal complaints resolution team from the JOSH Committee is being formed to look into your complaint. Mr Michel Montambeault will be the management rep and we are waiting to hear who the employee rep will be. They should be contacting you early next week on this process.*

*I have spoken to Mr Rene Provencher and he has assured me that your Chain of Command is engaged in this issue.*

...

[146] Mr. Rolfe and Mr. Provencher both testified that this arrangement was far from ideal, but they were running out of options. The issue of the washroom, testified Mr.

Provencher, was the turning point when he began to realize that there was no way he could provide a safe workplace for the grievor.

[147] The following day, the grievor emailed this to Mr. Ohrt about a McGill University article that in her words "...explains the whole unscented/ fragrance free illusion":

...

*You can see that just because the bottle says scent-free doesn't mean there isn't a scent or chemicals that can cause people who are hyper-sensitive like I am to react badly to them.*

*For instance, the soap that is provided by the cleaner in our washroom does NOT have a scent or chemicals that I react badly to. However, the soap placed in the washroom & shower by some of my co-workers DOES indeed say it's unscented but I DO react badly to it.*

*I just spoke with my manager and was advised that he will be arranging to place products in the washroom / shower that I use daily at home. He did not give me a timeframe when I asked him for one. He also advised that should there be other problems in future, I am to wear a mask in the washroom until the issue is resolved.*

*I have agreed to this compromise for a maximum of 1 day only while issues are resolved. Wearing a mask is not a solution for any longer than 1 day because, as Health Canada advised when I had an assessment done about a year ago, use of a mask further restricts my breathing which is already compromised when exposed to scented products....*

*... If the soap that is causing me problems is still in the washroom on Monday may I remove it?*

...

[148] Mr. Ohrt replied that the washroom products were "... a chain of command issue and the JOSH Committee cannot grant [the grievor] the rights to remove the personal products of other staff members".

[149] On December 16, 2016, the grievor emailed Mr. Rolfe: "Today I found 10 bottles of Dove soap in a locker in the women's washroom. Linda says she was asked to purchase it a few months ago. Were you aware of this?"

[150] Mr. Rolfe testified to not having a specific recollection of Dove Unscented Body Wash but he agreed that he authorized the purchase of unscented soap for the washroom because of the grievor's sensitivity to scented products.

[151] The grievor repeated her earlier testimony about unscented products. Just because the product label indicates “unscented” does not mean she will not react to it because of the presence of other chemicals.

[152] On December 16, 2016, the grievor wrote a seven-page, single-spaced email to Mr. Montambeault about her workplace issues, including the Dove unscented soap.

[153] On February 1, 2017, the Occupational Health and Safety Committee issued its report on the grievor’s unsafe-workplace complaint. The report is lengthy and contains, on page 5, the list of Dr. Molot’s 2011 recommendations and the investigation committee’s findings, as follows:

...

- Scent free policy should be implemented. *Done, the policy is in place and posters could be seen all over the unit starting with the entrance doors as well as canteen areas and washrooms. See photo 3;*

[The “No Scents is Good Sense” poster appeared next.]

- All employees should be encouraged to follow this policy. *Management encouraged this policy and numerous staff met during the interviews clearly stated that they have been briefed (many times) and that they are supporting this policy since its implementation;*

- Have a work station away from high traffic areas such as restrooms, boardrooms, conference rooms and reception area. *Done, Mme Munday has a private office away from those areas.*

- She should be provided with an enclosed office. *Done, Mme Munday has been provided with an enclosed office with her own air conditioning. See photo 4.*

[A photo of the grievor’s office appeared next.]

...

[154] Page 6 of the report lists Health Canada’s recommendations from 2015, along with the investigation committee’s findings, as follows:

- Continuing the use of a closed office space. *Done;*
- Ensuring good air quality/air exchange. *Done;*
- Encouraging scent free work environment. *Done;*
- Using environmentally friendly cleaning products. *As far as the investigation team is concerned, LESC is really trying hard to use*

*products that does not affect Mme Munday' [sic] condition (she may be too sensitive for some of these products);*

- *Avoiding/minimising the time spent in an environment where ongoing renovation/construction is present. Done, there is no construction/renovation that is taking place close to her office;*
- *Having the work place away from high traffic areas such as restrooms, boardrooms, conference rooms and reception areas as well as photocopier/printer/fax equipment. Mme Munday [sic] office is located away from heavy traffic areas.*

[155] Page 6 also noted that “[f]unctional ventilation system is in place in the washroom and seems adequate to support normal requirements. See photos 5 & 6”.

[156] The report concludes:

...

*... The past history dictates that the possibility of a recurring incident of the same nature is real and should not be taken lightly. Considering that:*

- *All the recommendations/accommodations from his [sic] Doctor and Health Canada have been put in place by Management;*
- *The only treatment for this disorder is avoidance of chemical pollutants which are known to trigger reactions;*
- *It is not known what precisely triggered the most recent incident;*
- *There is no standard testing available which could help identify which specific chemical agents trigger reactions;*

*DND may not be in a position to provide Mme Munday with the safe working conditions/environment requires [sic] for her to perform her duties in her current job. Mme Munday particular health condition combines with LESC facilities configuration (washroom + ventilation + shower) may potentially expose Mme Munday to future Health and Safety risk despite the fact that all recommended accommodations from experts have been put in place.*

...

[157] In her testimony, the grievor expressed her dissatisfaction with this report, saying that the “JOSH Committee had no standing” and that the report was biased.

[158] On February 2, 2017, in an email at 12:08 p.m., the grievor complained to Mr. Rolfe: “The new cleaner was just in my office. He has used something scented that has given me a headache, sensitivity to light, and tightness in my lungs.”

[159] Mr. Rolfe testified to considering some options that had been suggested after the JOSH report was released, including modifications to the washroom. He emailed the following to Gilles Drouin (who did not testify), an occupational health and safety representative, on February 7, 2017:

*Gilles,*

*My concern with this change is that even if we could entirely seal off the shower area, scents will still be present on the person as they exit the shower area. We have seen that Jo-An can react to quantities of scents that we cannot detect, so it is likely that there would be enough scents remaining to cause her a problem.*

*I don't believe that this modification would be effective in removing enough scents for Jo-An not to react.*

...

[160] On February 6, 2017, the grievor complained to Mr. Rolfe:

...

*Again today sometime between 7:10 and 7:40am something scented was used in the women's washroom.*

*Also, about 20 minutes ago, the new cleaner was in my office to pick up garbage and there was a scent of some kind when he left. It wasn't apparent when he first came in to retrieve the trash basket but was there after he returned it.*

*I was feeling great when I came into work this morning after spending most of the weekend in my home recovering from last week's exposures. Now, my eyes are itchy and sensitive to light, nose running, sneezing, a headache, and pressure in my chest while breathing. I've had to take additional medication which shouldn't be necessary and which has recently been causing me to bruise easily in addition to usual side-effects such as ringing in my ears. In addition to the health implications, this in turn is an added expense for me.*

*Was the Nature Clean shampoo and conditioner purchased for use by military personnel showering at work as we discussed before Christmas? Was the soap you asked me to recommend purchased?*

*Has the Dove body wash, that was supplied by management but which caused me adverse reactions, been removed from the lockers in the women's washroom and from the premises?*



*Are military personnel using the shower still bringing and using other personal care products that may be problematic?*

*Since the JOSH Investigation Report dated Jan 12, 2017 what progress has been made towards addressing my concerns with continuing use of scented products in this workplace?*

...

[161] Further emails about military personnel showering with Dove Unscented Body Wash ensued between Mr. Rolfe and the grievor.

[162] On February 8, 2017, the grievor emailed Mr. Rolfe as follows:

...

*To follow up with what I just told you, I just had to use the washroom and was exposed to something that I have reacted to that was being used in the shower. I have an instant headache, pressure in my breathing, I feel dizzy, and my nose is plugged. I will not be able to concentrate on my work until this passes.*

...

[163] On February 10, 2017, the grievor filed a “Refusal to Work Registration” with Employment and Social Development Canada over her sensitivity to scented products. She stated: “Because scented products are used in the washroom I am injured when using it. I am refusing to use the washroom.” Over the course of the next few weeks, Mr. Rolfe and the grievor continued their dialogue over the use of a washroom elsewhere.

[164] In a series of emails from March 9 to 14, 2017, the grievor and Mr. Rolfe discussed problems with the cleaning products and soaps used in the women’s washroom.

[165] On March 13, 2017, Mr. Rolfe emailed all LESC Uplands personnel, reminding them not to “... bring in or use any personal care products in the women’s washroom other than those supplied (Nature Clean shampoo and conditioner, and Safeblend liquid soap in the dispenser)”.

[166] The grievor emailed Mr. Rolfe on March 14, 2017:

...

*... thank you for addressing the Dove body wash again found in a locker in the washroom, however as noted numerous times, I have*

concerns about products being held in locked lockers in that washroom. The lockers have been used on many occasions to house harmful scented products which are then used in the washroom and in the main area of the building. When I've made complaints, the fact that the lockers have locks on them frustrates an immediate investigation due to breach of privacy concerns on the part of investigators. Is there a bona fide occupational requirement for the lockers? If lockers are necessary, what bona fide occupational requirement is there to keep them locked? What expectation of privacy do employees have when using those lockers?

In addition, the email you sent out (see attached) states:

"If you need to use something different, please discuss with your supervisor or myself."

Under what conditions would something different be used in the washroom? Would alternatives be explored if I should have a bad reaction to something different? Would I be advised of the use of something different beforehand so I can prepare myself? It is unbelievably stressful using a washroom when I never know what I'll encounter in there or for how long the adverse effects will last. Adverse effects don't go away at quitting time — they have a negative impact on my personal life as well, which, aside from very serious health impacts, is extremely frustrating and damaging to my personal relationships as well when I have to cancel activities at the last minute or get people to help me do chores I am unable to do when incapacitated.

With regard to Para 2, to the hand soap provided by the new cleaner, I appreciate the gesture, however a list of ingredients in a given product is not particularly helpful in determining whether or not I will have an adverse reaction. Formulas for commercial products are trade secrets and do not have to be made public in part or in whole. In addition, those formulas change constantly so what is published on a website may or may not be accurate or complete. I wonder why we can't continue to use the hand soap provided by the previous cleaner as it had not caused me problems for a lengthy period of time?

...

[167] In an email dated March 15, 2017, the grievor advised Mr. Rolfe: "I don't feel many of the concerns I've raised will be addressed with the corrective action you will be taking. I will be continuing my refusal to work as I feel the washroom is not safe for me to use".

[168] On March 21, 2017, the grievor emailed Mr. Rolfe: "Today's new cleaner was in here a few minutes ago wearing something scented that's now causing me breathing problems and irritated eyes".

[169] Meanwhile, Mr. Rolfe learned that the investigation into the refusal to work due to an unsafe workplace had not yet commenced. In an email he received on March 23, 2017, he learned, “As yet, the Alliance has not been able to get a H & S Rep for LSEC. In the meantime, Mr. Chuck Whittaker ... will conduct the Union portion of the Investigation.”

[170] On April 11, 2017, the grievor emailed Mr. Rolfe again, documenting her concerns with using an off-site washroom.

[171] On May 4, 2017, the grievor filed a grievance pertaining to “... management’s refusal to pay my expenses to drive to a safe washroom”.

[172] On July 12, 2017, the grievor emailed Mr. Whittaker complaining, as follows:

...

*Just an update — I wrote the email below because when I reported the scented chemicals the cleaner was wearing in my personal office to Dan he didn’t seem to be interested in doing anything. I waited by my office door and watched while the cleaner went into the men’s washroom then out and down the corridor towards the entrance door (where cleaning supplies are kept). Because Dan didn’t leave his office during that time and because he didn’t ask me if I was OK or needed anything as you’d expect someone to do when presented with someone with difficulty breathing, I decided to expand my refusal to work.*

*After sending the email below, I left the building and sat in my car. After about 5 minutes Dan came out and told me he was going to ask the cleaner to leave and advise the cleaning company that he’s not to return. We’ll see what happens. Dan advised that once the cleaner left I should re-enter the building, see if things were OK, then if yes continue to work, if no go home. I have chosen to stay at work however I am not completely OK.*

*When I got to work this morning my breathing was about an 8 on a scale from 1 – 10, I was alert, I was in a good mood, and I was able to focus on my work. The chemicals the cleaner exposed me to have compromised my breathing (now about a 5), has given me a headache, and has irritated my eyes. While I feel I can continue to function at a decreased level I am now groggy, feeling shaky, and having difficulty concentrating. I had a meeting with a co-worker at 10 this morning which I had to postpone until tomorrow.*

...

[173] On July 17, 2017, Mr. Rolfe advised the grievor: “I’ve directed that no cleaners are to be admitted to the building until I receive a plan from PSPC (our property

managers) as to how they will prevent cleaners from wearing or having scents from entering our building.” She replied, “OK, thanks. I’ll be into [sic] work tomorrow.”

[174] On July 20, 2017, the grievor complained about having found Purell hand sanitizer bottles on a desk and provided photos. Mr. Rolfe replied, “The Purelle [sic] was bought in response to the SARS incident many years ago ... It has been in the building since then”, and directed WO Papineau to remove them. The same day, WO Papineau advised Mr. Rolfe that he had done as directed.

[175] On August 16, 2017, Mr. Rolfe sent this message to LESC Uplands personnel:

*All,*

*If anyone is thought to be wearing scents, it is important not to sniff them as this can be considered as harassment. You should be able to tell if they are wearing scents without encroaching their personal space.*

*In the case of cleaners, management will ask them to leave and it will be reported to PSPC. For other visitors, see the extract below ...:*

[Extract from the October 30, 2017, email about visitors with legitimate business versus those without a legitimate reason to attend LESC Uplands.]

...

[176] The same day, the grievor repeated her earlier concerns:

...

*My concern with this note is that the instruction doesn't accommodate my need for a scent free workplace. This instruction seems to indicate that people who present at the building wearing scents who do NOT have legitimate business in this workplace will be asked to leave but those arriving wearing scents and who DO have legitimate business here will be admitted. How is that providing a scent free workplace?*

...

[177] The following day, August 17, 2017, the grievor advised Mr. Rolfe: “I had a car accident today while I was on my way home to use the washroom (at about 1:45 pm). I’m advising you because I was technically at work when it happened and I’m not sure what the implications are from a work perspective.”

[178] Dr. Spence issued a note dated August 22, 2017, and stating. “This patient was totally disabled on Friday, August 18, 2017 and I estimate through to Wednesday, August 23, 2017”.

[179] On August 24, 2017, the grievor had a meeting with Mr. Rolfe, after which she emailed him this, in part:

...

*... I have been made aware from others that the cleaners have been presenting here having used personal care scented products and have been allowed entry for the last several weeks after I leave the building. I also reminded you again that the chemicals in scented products do not clear the building just because the person bringing them in has left. The chemicals remain in the air and on anything they have touched accumulating and causing me injury. I advised that I have been experiencing adverse effects over the last few weeks from something I'm in contact with at work.*

*While I didn't think to mention this during our conversation I feel it's important to note, I did not have symptoms of chemical exposure while I was on leave the last several days but they have returned with my return to work.*

...

[180] On August 29 and 30, 2017, Mr. Rolfe and the grievor exchanged additional emails about the washroom-cleaning products.

[181] On September 8, 2017, the grievor presented a doctor's note stating, “This patient was seen on Friday, September 8, 2017... The above person should be on half days for 2 weeks due to a medical condition.”

[182] Mr. Rolfe and Mr. Provencher both testified that by then, they were convinced that the workplace could never be made safe enough for the grievor. Mr. Provencher gave her the following letter on September 15, 2017:

*Jo-An,*

*We appreciate the work you are doing for us and your efforts to continue working in the LESC Uplands environment despite the accidental exposures to scents you are experiencing. However, a number of recent incidents have forced us to come to the realization that our accommodation efforts for your disability are insufficient to ensure your safety. We have examined your situation at length and have concluded that your presence at LESC Uplands is putting your health and safety at risk and that this will, in all*

*likelihood, continue despite our best efforts to accommodate your disability.*

*Your condition is such that it has become impossible for management to enforce a scent-free policy to the degree necessary to safely accommodate your disability. Whether it is visitors wearing scents or even the LESC Uplands staff carrying into the building scents on their person or their clothing, management has no adequate means of detecting the scents that will be hazardous to you. Without a means of detecting these scents, management cannot determine which persons present a hazard to you. As you stated to us in your emails dated 3 Apr 2017 and 14 June 2017, you described that freshly laundered clothing using scented soaps or fabric softeners, residual scents deposited on coats at home, at the restaurant or by contact with others, the wearing of certain sunscreen lotions, etc. will affect you. Despite our continued and best efforts, we must conclude that we cannot effectively implement or enforce such a detailed series of remedies that would remove all scents affecting you within the LESC Uplands workplace.*

*We recommend that you agree to once again go to Health Canada for an assessment of your condition. Perhaps they can provide further guidance and/or procedures that may be useful in determining a way forward in terms of accommodating your disability.*

*For the above-stated reasons, we consider your presence at LESC Uplands hazardous to your health and safety and are asking you to go home by close of business today. As you are aware, we cannot give you work to perform at home because of security related issues, of the heavy data requirements of our Computer Aided Design (CAD) system and of the need to interact with other team members. You will therefore take the remainder of your paid sick leave and then you will be on sick leave without pay. You can apply for disability and unemployment insurance. We will help you establish your case with Sun Life concerning your claim for disability. In order to prevent your accidental exposure to scents at the workplace, you will not be permitted to access your office or a DND computer at the LESC Uplands facility while on sick leave without pay and until further notice. You will need to return both the building keys and pass. You may attend your scheduled ADR councilor [sic] meeting this afternoon if you wish concerning your grievance about travel expenses. Our health and safety representatives will continue to investigate your request to create a DND 663 Hazardous Incident report for your car accident and we will advise you of the outcome.*

...

[183] The grievor testified to panicking upon receiving the letter, and then becoming very angry. She felt she was being fired in retribution for making the unsafe-workplace complaint. She said that she became depressed and had difficulty sleeping and waking

up. She testified that it was a stressful time for her, and that she was devastated by losing her job.

[184] On October 2, 2017, Charles Whittaker completed his report, entitled “Right to Refuse Work Investigation Report”. The report was highly critical of the accommodation measures that had been put into place, and one of its many conclusions was the following:

...  
*... Ms. Munday has been singled out, vilified, and the victim of repeated cases of harassment by co-workers and management itself. Not one co-worker has been counselled or disciplined by management for inappropriate actions or statements made towards Ms. Munday. Had Ms. Munday been giving [sic] the opportunity to speak to her co-workers about her condition and the effects that various chemicals have on her, the animosity shown toward her would have likely decreased. Had the proper training that was recommended/required and verbally promised been carried out this issue would not have escalated to where it is today.*  
...

[185] Mr. Rolfe testified to disagreeing with Mr. Whittaker’s conclusions, noting in particular that management was not aware of any inappropriate statements or actions toward the grievor. The report, which arrived weeks after the September 15, 2017, letter, had no impact on the decision to remove the grievor from the workplace.

[186] On October 3, 2017, the employer sent a letter to Health Canada, requesting a re-evaluation of the grievor’s fitness to work, noting “... we are concerned that the medical condition of Ms. Munday has deteriorated or that the level of sensitivity has increased.”

[187] Ms. Munday filed her grievance pertaining to what she termed her “constructive dismissal” on October 10, 2017. A parallel grievance under the no-discrimination clause of the collective agreement between the Treasury Board and the Public Service Alliance of Canada was filed the same day, as was a grievance under article 22, pertaining to health and safety. A fourth grievance, claiming that she was terminated, was filed the same day.

[188] Another grievance was filed on October 22, 2017, pertaining to the “Joint Occupational Health and Safety Incident Investigation Report” issued on January 12, 2017.

[189] On November 15, 2017, she made the *CLC* complaint, in which she alleged that she had been placed on medical leave without pay in retaliation for making an unsafe-workplace complaint.

[190] On January 23, 2018, Mr. Provencher sent a letter to the grievor entitled “Notice to Jo-An Munday concerning employment at LESC Uplands” that read in part as follows:

*Jo-An,*

*This letter is sent to you to clarify your current status relative to your employment with the Department of National Defence (DND). Further to our letter dated 15 September 2017 notifying you to go home and as per your union representative’s notification in October 2017, you will remain on “other paid leave” until the Department of National Defence (DND) receives the final results of the Health Canada Fitness To Work Evaluation (HC FTWE).*

*The only condition is that you agree to undergo and fully cooperate and complete the medical assessment.*

...

[191] In a report dated July 6, 2018, Dr. Michel L’Ecuyer, Occupational Health Medical Officer at Health Canada’s National Capital Region Occupational Health Clinic, wrote this:

...

***Please note that Ms. Munday is fit to carry out all aspects of her work related tasks on a full time basis (37.5 hours a week, 7.5 hours a day) in her substantive position as long as she is not exposed to triggering agents of her symptoms ....***

*Although Ms. Munday has, over the years, been able to identify several agents and has taken steps to avoid them ... it is not possible, at this time, to identify through standardised testing and in a proactive manner, all the potential triggering agents that lead to Ms. Munday’s symptomatology.*

*Air quality testing, though important, is often unsatisfying in this type of condition, as the triggering agents may be present in amounts that remain beneath the levels of recognised industrial norms. The search for the causative agents in any particular incident of potential exposure leading to a flare of symptoms is*



*often laborious and must rely on a certain element of trial and error, which is not optimal from the point of view of the patient and often unsatisfying to the employer.*

*Ms. Munday has confirmed that her symptomatology is much better controlled when she is away from the workplace, as is currently the case while she is on payed [sic] leave. This would also be the case if a telework accommodation was to be considered, however; you have advised Ms. Munday that this accommodation consideration was not possible for security and operational reasons.*

*Hence, Ms. Munday is limited in her ability to function in an environment (at work or otherwise) wherein she is exposed to the specific (though not currently fully identified) triggering agents that lead to her symptoms. It is therefore recommended that Ms. Munday and her employer, for medically justified reasons, strive to ensure that she has access to a work environment that is as free as possible (taking into account the above noted considerations) of said triggering agents. This limitation (and any resulting accommodations) is, at this time, to be considered permanent....*

...

[Emphasis in the original]

[192] The assessment then provides a list of possible accommodations for ventilation and indoor air quality (e.g., office with working windows, use of High Efficiency Particulate Air (HEPA) filters, air quality test, air purification systems throughout the building or in workstations, an enforced scent-free policy, standing rate of fresh air intake, consult industrial hygiene experts) and construction, remodeling, and cleaning issues.

[193] Meanwhile, the grievor continued to receive her salary but was not at work. Telework was still not possible for work performed at the DD-04 group and level. Discussions were taking place at the management level on where and how to place her. Mr. Provencher enlisted the services of Martine Poirier, Human Resources, in August of 2018. Mr. Rolfe wanted a list of all positions in Canada for the possible placement of the grievor in a position classified at the DD-04 group and level.

[194] To try to find a position for the grievor, Mr. Rolfe solicited a number of DND establishments in Borden, Trenton, Petawawa, and Ottawa, Ontario; Esquimalt; Shilo, Manitoba; Halifax and Greenwood, Nova Scotia; and Suffield and Cold Lake, Alberta, with no success.

[195] In April of 2019, the grievor also began to work with Ms. Poirier to try to find a suitable placement. A meeting took place on April 16, 2019, involving Ms. Poirier, Mr. Provencher, the grievor, and others. The grievor summarized the meeting in an email:

...

*I'm sending this note to confirm the main points discussed today.*

*1. A work from home alternative was proposed which would mean a different job/different work unit yet to be determined. I indicated I'm open to exploring the idea of a work at home arrangement subject to review of the conditions of any proposed position and exhaustion of other options.*

*2. Recognizing that no accommodation will be perfect for my disability and that I will, and have always, accepted a certain level of risk in the workplace, alternative options were proposed to allow me to stay in my current workplace doing my current job such as:*

- extending the hours I work per day and reducing the number of working days per week to reduce the time I'm in the workplace along with other workers;*
- reviewing the reporting process of exposures so both sides satisfy CLC requirements but reduce irritation of constant reporting;*
- training for co-workers on MCS/asthma and Duty to Accommodate to encourage buy-in as well as requiring a signed letter of compliance from them;*
- maximizing the air exchange rate on all building HVAC systems to improve air quality;*
- remediation of the washroom as per the Labour Health & Safety Report of Oct 2017 or whatever is recommended by a CLC Labour Program H&S Officer.*
- working from a separate self contained portable office space located on site;*
- working from home at my current job using discs to transfer files to a stand alone work station.*
- a one year trial period was proposed to determine if any new accommodation arrangements are working in my current workplace.*

*3. We agreed to engage and meet together with SME from organizations such as the DND Office of Disability Management, the ESDC Labour Program, the Canadian Centre for Occupational Health and Safety (CCOHS), Occupational Health Clinics for Ontario Workers (OHCOW), and any others as applicable to determine options not yet tried. A timeframe of 2 months was agreed to prepare for this next meeting.*

...

[196] Two days later, on April 18, 2019, Mr. Provencher replied:

*Martine,*

*We agree with what is stated below. I would add the following:*

*- Jo-An will provide a copy of her CV to Martine as soon as possible in order to have a better understanding of which type of work Jo-An would be potentially suited to perform;*

*- From now until our next meeting in 2 months, management will explore:*

*- Vacant EG03 positions that perform drafting type work that could accommodate telework as well as other, non-drafting type work that she would be suited to perform;*

*- Contact or meet with some of the organizations suggested by Jo-An to see if other solutions could be explored that have not been considered yet. It was suggested that a committee be set up to review these options.*

...

[197] The grievor offered the following suggestion on April 16, 2019:

*Hi Martine,*

*Thank you for your time today. It was nice to meet you.*

*I had a thought on my way home. Might there be temporary work at the Pubs [Publications] Depot? Something to do until the situation with my own workplace is ironed out? I believe some employees there work from home. My technical documentation background might be of interest to them.*

...

[198] On May 14, 2019, the grievor sent her résumé to Mr. Rolfe and Ms. Poirier to assist in the process of researching a suitable position for her.

[199] On May 27, 2019, the grievor looked into the possibility of temporarily working with the director of supply chain operations (DSCO), which she considered a “stop-gap” measure until she could be properly accommodated.

[200] Mr. Rolfe advised that he had secured a temporary position with the DSCO. The grievor worked there until the onset of the global COVID-19 pandemic in March of 2020.

[201] Efforts to secure a suitable telework position continued, but the grievor testified to hearing nothing of her accommodation until December of 2020, when she received a

letter offering the use of a form of hazardous materials, or HAZMAT, suit. When she researched the product, she testified to learning that it was sealed, so she could not eat or drink with it on. It was essentially a HAZMAT suit that workers in medical labs wear when dealing with hazardous materials. It was definitely not suitable or viable in an office setting, she testified. She testified to feeling insulted by the offer.

[202] Major-General Basinger testified to his efforts to locate a suitable position for the grievor. He explored the possibility of finding similar work in another location and was unsuccessful. He researched all the trades and classifications similar in nature to the DD classification, but the majority were either not funded or could not be done remotely. He testified to a degree of flexibility to move funding, but he found no solutions. He also spoke of the difficulty associated with bundling work, which necessarily involved specific programs and interacting with artifacts that were being designed and modeled. He stated that he simply could not find a suitable design position for the grievor.

[203] Major-General Basinger emphasized the importance of finding something that could be done remotely. He added that these attempts to accommodate, like many other projects, were significantly delayed by the onset of the global COVID-19 pandemic.

[204] On March 18, 2021, the grievor received a letter from Colonel Martin Corriveau, advising her of a position within DND that would allow her to work remotely. The letter reads, in part, as follows:

...

*... an exercise to identify an alternate position that could be held remotely on a permanent basis was carried out, which led to the identification of the following:*

**Position Title:** *Financial Administration Coordinator*

**Position Number:** *00809140*

**Group and Level:** *AS-01*

...

*A copy of the Standardized Job Description is attached.*

*In light of the information at its disposal, the employer is of the view that this position constitutes a reasonable accommodation and thus meets its obligations pursuant to the Canadian Human Rights Act and the Directive on the Duty to Accommodate. I hereby inform you that you will be formally offered this position*

*by way of a letter of offer in the coming weeks and that the employer expects you to accept it. Should you reject this offer, the employer will be obliged to consider all available options to remedy the situation, including termination of employment.*

...

[205] The grievor testified to being unhappy with it because she wanted to return to her position at LESC Uplands. She did, however, accept the position. She remains in it as of the present day.

#### **A. Submissions of the parties**

[206] Owing to the many hearing days and the number of continuations that were required to receive the testimonies of all the witnesses, the parties agreed to present written arguments rather than make oral submissions.

#### **B. The grievor's arguments**

[207] The grievor opened by stating that the first three grievances arose as part of a continuum of events that took place over the course of several years. The first three grievances raise similar and related issues and engage the same human rights principles. The main issue was the employer's failure in its duty to accommodate her disability, contrary to article 19 of the collective agreement and s. 7 of the *CHRA*.

[208] The second issue for the grievor is the *CLC* complaint. The issue is whether the employer's decision to remove her from the workplace was a reprisal because she exercised her right to refuse unsafe work under the health-and-safety provisions in Part II of the *CLC*.

[209] The grievor acknowledged the employer's limited attempts to accommodate her disability but stated categorically that she felt they did not go far enough. Insufficient steps were taken to provide a scent-free work environment. She has not been able to continue her career in her chosen profession because of the employer's failure of its duty to accommodate.

[210] Each of the three grievances engages clause 19.01 of the collective agreement and the relevant *CHRA* provisions.

[211] Clause 19.01 of the collective agreement provides as follows:

**19.01** *There shall be no discrimination ... with respect to an employee by reason of ... [physical] disability ....*

**19.01** *Il n'y aura aucune discrimination [...] à l'égard d'un employé-e du fait de [...] son incapacité [...]*

[212] The onus was on the grievor to establish a *prima facie* case of discrimination. Per *Moore v. British Columbia (Education)*, 2012 SCC 61, she had to establish that she has a disability, that she experienced adverse employment-related impacts because of her disability, and that her disability was a factor in the adverse impacts.

[213] After the grievor establishes a *prima facie* case, the burden shifts to the employer to justify its conduct or practice, per *Moore*, at para. 33. In duty-to-accommodate cases, the employer must prove that it had a “*bona fide* occupational requirement” that justified the adverse impacts. To do that, the employer must establish that it accommodated the grievor to the point of undue hardship, per *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC) (“*Meiorin*”).

[214] Parliament has legislated that an employer can establish undue hardship by referring to only three considerations, according to s. 15(2) of the *CHRA*, namely, health, safety, and cost. These are the only three factors that can establish undue hardship, per *Ahkwesahsne Police Assn. v. Mohawk Council of Akwesasne*, [2003] C.L.A.D. No. 642 (QL) at paras. 23 to 27. Furthermore, this onus must be met by means of “... clear, objective, direct and, in the case of cost, quantifiable evidence”, per *Meiorin*, at paras. 78 and 7, *Ahkwesahsne*, at para. 29, and *Tanzos v. AZ Bus Tours Inc.*, 2007 CHRT 33 at paras. 47 and 48 (upheld in 2009 FC 1134 at paras. 44 and 45).

[215] The grievor submitted the cases of *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, and *Juba v. Treasury Board (Department of Citizenship and Immigration)*, 2011 PSLRB 71, both of which deal with issues of the employer’s obligations when issues of chemical sensitivity are in play.

[216] The grievor submitted that the employer took no issue with her disability, which was made clear in the text of Dr. Molot’s letter dated November 17, 2011, and provided to the employer on January 26, 2012.

[217] The grievor testified to being able to work matters out with colleagues with respect to the use of scented products. In previous work situations, the

accommodation measures were, in her estimation, about 80% effective. She has never expected perfection, just that management would take reasonable steps to ensure compliance with a scent-free policy.

[218] The grievor submitted that many times, she referred management to resources emphasizing the importance of scent-free policies that incorporated enforcement mechanisms, which were absent from the scent-free policy at LESC Uplands.

[219] The grievor submitted the case of *Ontario Public Service Employees Union v. Ontario (Minister of Correctional Services)*, 2003 CarswellOnt 3444, as an analogy to the present circumstances. In that case, the employer discriminated against an employee by taking insufficient steps to prevent exposure to cigarette smoke in a provincial correctional facility, which triggered an asthma attack.

[220] However, there is no formal record of the grievor's accommodation, she submitted. The "Plan for Workplace Accommodation" was never completed, despite the Treasury Board's directive that managers should retain a written record of an accommodation. The employer's witnesses testified to seeing this document for the first time in the course of their respective testimonies.

[221] Once the grievor produced Dr. Molot's note and medical report, LESC Uplands management accepted that she had medical restrictions requiring accommodation. She maintained that it took insufficient steps to accommodate her disability, which ultimately led to her losing what she called her "dream job" at LESC Uplands. The loss of the work she valued immensely was most certainly an adverse impact.

[222] The implementation of a voluntary scent-free guideline was, according to the grievor, an insufficient accommodation because of the non-compliance of the LESC Uplands staff. She submitted that the staff were skeptical of the policy in the first place and resentful of it, and she complained of regular instances of non-compliance. The issue of visitors wearing scented products was particularly problematic, she submitted, because LESC Uplands staff were never really sure about how to deal with the situation.

[223] Although Mr. Rolfe and Mr. McBeath testified about raising awareness, there is no record of any education being provided to LESC Uplands employees. An orientation package for new employees refers to the scent-free guideline, but since the orientation

was to be completed within 24 hours of arrival, new employees could arrive at work within that time wearing scented products, completely unaware of the potential impact upon the grievor. There is insufficient evidence, she argued, of briefings to new staff, and no evidence that newly arriving staff understood the briefing or the importance of the scent-free policy.

[224] The grievor referred to a WO's continued use of scented products in the washroom and shower area. As a result of continued exposure and the related stress it caused her, the grievor was obliged to take a period of medical leave.

[225] The grievor submitted that if she tried to open a window for fresh air, colleagues would complain about the cold. She testified to feeling as though she was "ratting" on her colleagues because she was obliged to police the scent-free guideline, since management was not doing it.

[226] The grievor submitted that Mr. Rolfe's reaction to her complaints about people wearing scented products was ineffective. He would simply ask employees if they were wearing anything scented. This, she argued, was an indication of management's lack of understanding, since a "scent-free" label on a product can mean that the scent has been hidden by a masking agent that can, in and of itself, cause a reaction.

[227] After her first grievance, on September 6, 2013, the grievor's situation did not improve. The first-level grievance response on September 27, 2013, is an indication that management had no interest in revisiting accommodation measures already taken, namely that employees had been "... encourage[d] to refrain from wearing or using scented products ...". The grievor submitted that subsequent events bear out her contention that management had done all it intended to do.

[228] The approach taken to visitors, submitted the grievor, was particularly problematic, because management's primary concern was the LESC Uplands facility's reputation and not her health. Mr. Rolfe stated that "[t]here will be occasions when, despite our best efforts, clients will arrive with scents and refusing entry would have a negative effect on our business".

[229] Since the same issues continued to recur, a second grievance was filed, on November 26, 2014, to try to address the continuing failure to accommodate the grievor's disability.



[230] At that time, at the employer's request, the grievor underwent a Health Canada FTW assessment. The report, dated May 5, 2015, simply affirmed what was already known: medical limitations required that she avoid exposure to scented products. Health Canada advised against using a mask, since masks made it difficult for her to breathe. Notably, the report also recommended ensuring "good air quality/air exchange", but there is no evidence that management took steps to assess building ventilation. Mr. Rolfe testified that he felt that the heating, ventilation, and air conditioning (HVAC) system was functioning properly because it was regularly maintained.

[231] As a result, throughout 2015 and 2016, the grievor continued to experience asthma attacks due to workplace exposures.

[232] On November 28, 2016, the grievor's adverse reaction to scented products in the washroom was of such an intensity that she could not use it. She ultimately began driving home just to use the washroom. Apparently in that period a new cleaner had been contracted, and there was no method in place to ensure that the cleaning products known not to trigger the grievor's sensitivities would continue to be used. Mr. McBeath, Mr. Rolfe, and Mr. Provencher all testified to their inability to control the cleaning staff's activities.

[233] Mr. Rolfe's approach was to authorize the grievor to use an off-site washroom, which was not only an inconvenience, it prevented her from effectively doing her job.

[234] On the morning of March 9, 2017, Mr. Rolfe emailed the grievor to let her know that he had removed the Dove Unscented Body Wash and a purple liquid soap dispenser from the washroom, and he informed her that the soap in the dispenser was labelled "fragrance free". No one consulted her on the use of a different soap.

[235] Throughout this time, in the spring of 2017, the grievor continued to experience adverse reactions to employees wearing scented products in the workplace. On August 17, 2017, when she was enroute to an off-site washroom site, she was involved in a motor-vehicle accident. Not surprisingly, she submitted, driving back and forth to use her home washroom was an untenable approach. On August 30, 2017, she asked what other steps would be taken.

[236] The grievor found out soon enough. She was ordered out of the workplace on September 15, 2017. The letter indicated she would have to apply for long-term disability, which she argued demonstrated the employer's lack of any intention to provide any other work for her. Mr. Rolfe confirmed in cross-examination that management was looking only for telework arrangements as it had assumed that the grievor would have the same problems in any workplace.

[237] On October 10, 2017, the grievor filed a grievance challenging the decision to remove her from the workplace.

[238] The grievor experienced a considerable amount of stress following her eviction from the workplace. On January 23, 2018, Mr. Provencher wrote to her, advising her that she would continue to be on paid leave until management received the results of yet another Health Canada assessment.

[239] On July 6, 2018, Health Canada completed its second assessment. The recommendations were virtually identical to those in the first assessment. It acknowledged that there was no standardized testing for triggering agents and indicated that identifying them "... is often laborious and must rely on a certain element of trial and error ...". The physician recommended a work environment "as free as possible" of triggering agents.

[240] The grievor argued that the employer's refusal to consider the reporting physician's recommendations was a clear indicator of its failure of its duty to accommodate. Among the ignored recommendations were the following:

- make certain that the ventilation system was not distributing pollutants throughout the worksite;
- use HEPA filters and air-purification systems; and
- have an industrial hygiene professional perform an air-quality test.

[241] Most notably, argued the grievor, management refused to comply with the physician's recommendation to enforce the scent-free policy.

[242] Neither Mr. Rolfe nor Mr. Provencher is an HVAC expert, yet they both decided that ventilation and air-quality issues were of no concern.

[243] The grievor submitted that the December 15, 2020, offer of a HAZMAT suit was inconsistent with the requirement to maintain the dignity of the employee requiring accommodation.

[244] The AS-01 position pays approximately \$2000 per year less than she made in her DD-04 position and is not her preferred line of work. It is clerical rather than technical, and the grievor testified to feeling demoralized because she could no longer do the work she loved and had been doing for almost 30 years.

[245] The grievor submitted she has established a *prima facie* case. The employer took no issue with her disability and acknowledged that the triggers included products with an alcohol base, fabric softener, laundry soap, personal-hygiene products like hair spray and deodorant, scented shampoos, and cleaning products.

[246] In *Hughes v. Transport Canada*, 2014 CHRT 19, the Canadian Human Rights Tribunal (CHRT) affirmed that there is an “extremely low” threshold for a complainant to establish a *prima facie* case of discrimination. The circumstances of this matter, argued the grievor, easily meet that threshold. Every one of the adverse effects she suffered was unquestionably related to her disability.

[247] With respect to the first grievance, filed on September 6, 2013, she experienced the following adverse impacts, all of which were related to her disability:

- exposure to scents in the workplace that caused not just discomfort but physical harm, to the point that she was not able to work for long periods;
- animosity from co-workers who resented the no-scent policy;
- negative performance assessments; and
- inability to participate in work-related activities because a scent-free environment could not be guaranteed.

[248] Since the pattern of behaviour continued after her first grievance, a second one was filed on November 6, 2014. In that period, she experienced the same adverse impacts summarized in the last paragraph. In addition, she was faced with the prospect of visitors arriving at LESC Uplands and wearing scented products.

[249] The same issues repeated to the point that the grievor was unable to use the washroom at work. She submitted that it had been outrageous for her to be forced to travel home or to find some other off-site facility.

[250] Furthermore, throughout the entire time, management knew of the tension between the grievor and her colleagues for reasons related to her disability and did nothing to address it other than to suggest that she was the problem.

[251] Ultimately, submitted the grievor, the removal from her “dream job” was the most significant adverse impact that she suffered. She had no way of knowing how long her salary would continue to be paid in the lengthy period she was without work.

[252] The grievor argued that the employer did not reach undue hardship in its efforts to accommodate her, for several reasons.

[253] First, the employer was clear about the steps it was willing to take and how far it would go to accommodate the grievor’s disability. Mr. Provencher, in his testimony, could point to no effort other than a limited scent-free guideline. Even that step was, in his words, a “learning process for staff” that required “continuous training and reinforcement”. This is what the grievor requested from the beginning, and it was never provided. Continuous training and reinforcement could have gone a long way to creating a safe work environment for her, she argued.

[254] Instead, she encountered resistance from all levels. She experienced animosity from her colleagues. Mr. Rolfe resisted looking into whether a WO could use a different shower, and he permitted her to continue showering with Pert shampoo, a product known to harm the grievor. Mr. Provencher removed the grievor from the workplace without considering whether any other work might be available at LESC Uplands or elsewhere. When she complained about being unable to attend work-related events because a scent-free environment could not be guaranteed, upper management did nothing other than ask the attendees to limit their use of scented products.

[255] Second, there was no written accommodation plan for the grievor, contrary to the employer’s directives. There does not even appear to be a record of her initial accommodation request of February 2012.

[256] Third, the scent-free guideline was, at best, voluntary. Staff acted accordingly. No one was ever told that there would be consequences for failing to refrain from wearing scented products. Management seemed to feel that tacking the poster to the wall in a few places around the office would suffice.

[257] Fourth, the department took no steps to revise the guideline over time, even though it was apparent that LESC Uplands employees were not getting the message. No steps were taken to enforce the guideline.

[258] Fifth, nothing was done to address the situation in the women's washroom and shower area after the grievor refused to work. When it was cleaned, a product was used that no one had confirmed was suitable to her.

[259] Sixth, no effort was made to address Health Canada's recommendations. By the time the second Health Canada assessment was done, it seems that Mr. Provencher had already made up his mind that nothing further could be done to accommodate the grievor's disability. This, she argued, demonstrates that the employer never saw accommodation as an ongoing process.

[260] Finally, rather than implement any of the just-listed steps in an effort to fulfil its duty to accommodate, the employer simply removed the grievor from the workplace. There is no evidence of a fulsome assessment of the possibility of telework. No effort was made to determine if work could have been bundled to create a full-time technical position for her that she could have performed by telework. She found lower-rated work with the DSCO, which made her responsible for her own accommodation, which was contrary to the former Board's finding in *Kelly v. Treasury Board (Department of Transport)*, 2010 PSLRB 80. At paragraph 105, it states, "The primary responsibility for accommodating the grievor falls to his home department ...". At paragraph 106, the former Board observes that "[m]ore effort could have been made by the employer to market the grievor ...". The same is true in the present case, argued the grievor.

[261] When the lower-rated position was offered to the grievor in March of 2021, shortly before the hearing was to resume on continuation, she was told she was required to accept it. There is no explanation as to why it took so long to propose the position, other than Major-General Basinger's testimony to the effect that the employer was waiting for a fully funded position to open.

[262] In *Audet v. Canadian National Railway*, 2006 CHRT 25 at para. 118, the CHRT characterized a job offer that arrives just days before a hearing as being more of a settlement offer than an accommodation.

[263] With respect to her first three grievances, the grievor seeks the following orders from the Board:

- the department violated article 19 of the collective agreement and s. 7 of the *CHRA*;
- the department cease violating the collective agreement and s. 7 of the *CHRA*;
- the department return the grievor to her substantive position classified at the DD-04 group and level and take every reasonable measure to accommodate her disability;
- the department provide duty-of-accommodation training to Mr. Provencher, Mr. McBeath, and Mr. Rolfe's replacement at LESC Uplands and to any supervisor there;
- the department pay her damages of \$20 000 for pain and suffering as a result of its discriminatory practice, under ss. 53(2) of the *CHRA*; and
- the department pay her damages of \$20 000 for its wilful and reckless discriminatory practices, under ss. 53(3) of the *CHRA*.

[264] The grievor submitted the following cases in support of her request for damages under the *CHRA*:

- *Hare v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2019 FPSLRB 59;
- *Stringer v. Treasury Board (Department of National Defence)*, 2011 PSLRB 110;
- *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36; and
- *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520.

[265] The grievor also seeks an order from the Board declaring that her demotion to an AS-01 position was inappropriate and unreasonable, per the grievances assigned Board file numbers 566-02-43632, 43633, 43634, and 43636.

[266] The grievor also seeks a Board order mandating scent-free policies and procedures across every one of the Treasury Board's workplaces. She supported her request in the following manner, at paragraph 242 of her written submissions:

*242. The bargaining agent acknowledges that there is no precedent of the Board awarding this kind of far-reaching remedy. We note that the Board has jurisdiction over this grievance, pursuant to paragraph 209(1)(a) of the Federal Public Sector Labour Relations Act, as it involves the interpretation or application of the collective agreement between the Treasury Board of Canada Secretariat and the bargaining agent. The department is responsible for the accommodation, but it is not Ms. Munday's legal employer. In deciding the grievance, the Board has the power to interpret and apply the CHRA, including to award systemic remedies apart from those related to pay equity, pursuant to paragraph 226(2)(a) of the Act, and to "make the order that the adjudicator or the Board consider[s] appropriate in the*

circumstances.” There is no explicit prohibition on the Board from awarding a systemic remedy such as the requirement to provide a scent-free environment that would bind the department, acting in place of the employer, or the employer itself.

[267] With respect to the CLC complaint, the grievor argued that by removing her from the workplace, the department breached s. 147 of the CLC, which reads in part as follows:

**147** No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

...

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

**147** Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :

[...]

c) soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.

[268] The grievor submitted the case of *Ouimet v. VIA Rail Canada Inc.*, 2002 CIRB 171 at para. 56, for the following analytical framework:

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

[269] The *Ouimet* decision, along with *Chaney v. Auto Haulaway Inc.*, 2000 CIRB 47, and *Gaskin v. Canada Revenue Agency*, 2008 PSLRB 96, hold that it is sufficient that the employer's decision was at least in part related to the grievor's decision to exercise her rights under the CLC.

[270] The analysis consists of these three steps:

- 1) the employer imposed or threatened discipline against the employee;
- 2) the employee was exercising their rights under Part II of the *CLC*; and
- 3) there was a nexus between the employee exercising their rights and the employer's actions.

[271] The grievor submitted that the employer took disciplinary action against her when it dismissed her from her position on September 15, 2017.

[272] In exercising her rights under Part II of the *CLC*, the grievor engaged two processes. On November 28, 2016, she advised Mr. Rolfe that she refused unsafe work because she could not safely use the washroom. With the issue still unresolved, on February 10, 2017, she again registered a work refusal under s. 128 of the *CLC*.

[273] The grievor offered the following facts in support of her submission that her removal from the workplace was directly related to her work refusal:

- Mr. Rolfe testified to wondering whether she could remain in the workplace when he received the workplace health-and-safety report in January of 2017.
- He also testified that the decision to remove her from the workplace was made about a month before the September 15, 2017, letter. On August 29, 2017, he emailed her about the cleaning of the washroom on March 15, 2017.
- In response, on August 30, 2017, she emailed him, advising him that she had experienced an adverse reaction to something in that washroom on March 30, 2017, and that "... if nothing further has been done to the washroom since March 30th when I entered it last then it's still a problem for me." She then asked about the next steps that would be taken to make the washroom safe.

[274] The next step was to remove her from the office, which the grievor maintained was a disciplinary response.

[275] Thus, the grievor's exercise of her rights under the *CLC* was at least a factor in the decision to remove her from the workplace. She added that Mr. Rolfe's failure to inform the Labour Program of the reason she was no longer in the workplace underscores this point.

[276] With respect to the *CLC* complaint, the grievor requested the following orders from the Board:

- that the department violated s. 147 of the *CLC*;
- that the department cease violating s. 147;
- that the department return her to her substantive DD-04 position; and



- that the department pay her the salary difference between her AS-01 position and her substantive DD-04 position.

### C. The employer's arguments

[277] The employer acknowledged the permanent and debilitating nature of the grievor's disability, referring to the evidence at the hearing to the effect that her condition is triggered by exposure to an undefined and evolving list of chemicals, which cannot be ascertained or detected by any method of testing. The only way to determine whether she will react to a product or chemical is through trial and error, with the grievor herself acting as the barometer.

[278] In addition to the danger this poses to the grievor, it is not a viable method of detecting chemicals brought into LESC Uplands by employees or visitors. There is simply no way, argued the employer, to detect what might cause harm, which necessarily means that it is incapable of providing a safe working environment for her.

[279] The employer agreed that the grievor established a *prime facie* case of discrimination. She has a disability, she suffered an adverse impact, and but for her disability, she would not have been sent home from work. This does not mean that it breached its duty to accommodate her disability.

[280] The burden then shifts to the employer to provide a reasonable explanation or justification for its behaviour, per the analysis in *Bourdeau v. Treasury Board (Immigration and Refugee Board)*, 2021 FPSLREB 43 at para. 147.

[281] Contrary to the grievor's submissions, argued the employer, it was not required to demonstrate undue hardship as it did not mount a statutory defence under s. 15(2) of the *CHRA*. Rather, the concept of reasonable accommodation is sufficient to discharge an employer's duty to accommodate, per the finding in *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97 at para. 127, as follows:

*127 ... The grievor is not entitled to his choice of accommodation. Nor is an employee entitled to an instant or perfect accommodation but only to a reasonable accommodation ... Furthermore, the employer's decision not to appoint him to the SMO position was not a failure to accommodate the grievor. If reasonable accommodations can be put in place without reaching the point of undue hardship, then they are sufficient to discharge the employer's duty to accommodate.*

[282] In *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4 (“*Nash*”), the sufficiency of reasonable accommodation, when a *prima facie* case of discrimination has been made out, was accepted. That case states as follows at paragraph 102:

*102 Thus, the employer provided a reasonable explanation demonstrating that the grievor was in fact fully accommodated. While the accommodation might not have been perfect, it met the grievor’s limitations and was reasonable. Therefore, even if a prima facie case of discrimination had been established, the employer provided a valid defence. The grievor’s allegations that the employer engaged in a discriminatory practice have not been substantiated.*

[283] The employer also submitted the case of *A.B. v. Canada Revenue Agency*, 2019 FPSLREB 53 at paras. 64 and 65, on this point.

[284] The employer submitted the cases of *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (“*Elk Valley*”) at para. 56, and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 994 and 995 (“*Central Okanagan*”), as well as *Duval v. Treasury Board (Correctional Service of Canada)*, 2019 FCA 290 at para. 42, for the authority that what is required is a reasonable and not a perfect accommodation, given all the circumstances. The employer conceded that while it was not ideal to place the grievor on leave for an extended period or to have her perform an alternate form of work from home, the question is whether it was a reasonable form of accommodation, given the severity of her condition and the risk of harm to her should she be exposed to scents or chemicals undetectable to others.

[285] Employees are not entitled to *carte blanche* accommodation, submitted the employer. Similarly, an employer need not provide instant or perfect accommodation or the employee’s preferred accommodation. Accommodation requires compromise and cooperation. It is a two-way street, and the employee cannot dictate the precise form that an accommodation should take.

[286] The employer conceded that a number of glitches arose during the course of the grievor’s accommodation, but they did not amount to a failure of accommodation. Each time she raised the issue of scented products or chemicals, management did its best to address her concerns and resolve it. The attempts might not have always been

executed perfectly, but given the circumstances, especially that it is not possible to measure or objectively detect scent or problematic chemicals, the employer always responded in a reasonable fashion and took the grievor's concerns seriously.

[287] The grievor was not entitled to dictate what form her accommodation ought to have taken, argued the employer, either a comprehensive written accommodation plan, standard operating procedures, or training that she that felt her colleagues ought to have received. It does not follow that the employer failed to accommodate her merely because it did not follow the precise procedures that she would have liked.

[288] From 2012, when management was first informed of the grievor's need for accommodation, until late 2017, when the employer finally concluded it could not provide her with a safe workplace, it consistently acknowledged her disability, sought her input into what form of accommodation she required, and made good-faith efforts to ensure that LESC Uplands was a scent-free environment.

[289] The scent-free policy was put into place soon after the grievor raised the issue. On February 3, 2012, she emailed Mr. Ramsay, the health-and-safety representative:

...

*I haven't heard from you in two weeks (I provided my supervisor with a doctor's instruction on Jan 6) and wanted to touch base with you about your progress on implementing a scent free workplace here at Bldg 555 Uplands. While most of the issues I mentioned to you have been addressed so far, there continue to be issues for me which could be solved by by [sic] putting such a policy in place as soon as possible.*

...

[290] Thus, argued the employer, the grievor acknowledged that most of the issues had been addressed within one month of her providing management with medical documentation about her disability. The employer argued that the many emails back and forth make it clear her concerns were taken seriously. The employer took action.

[291] The employer submitted that the grievor's impatience with the implementation of the scent-free policy reflects an unrealistic view of the complexities and competing interests involved with implementing the accommodation that she sought. The policy was implemented in March of 2012, after meeting with her on February 15, 2012, to obtain her input.

[292] The employer submitted that the grievor made much of the voluntary nature of the policy, but the testimonies of Mr. McBeath, Mr. Rolfe, and Mr. Provencher were clear. There was never an instance of any employee indicating they would not comply.

[293] By April 2012, a poster detailing many of the products to be avoided was prepared and posted throughout the office. The employer noted that the grievor, in cross-examination, testified to being pleased with the poster's content. Its purpose was met: it reminded people of the guideline.

[294] All cleaning products, hand soap, and dish soap were changed to scent-free products. This demonstrates that the employer took prompt and comprehensive action, it submitted. Aside from her belief that Mr. McBeath occasionally used a scented product, the grievor acknowledged that the use of scent largely dissipated. The problem was, as she pointed out, that just because a manufacturer places the label "unscented" on a product does not mean it will not cause a reaction. The employer repeated its earlier assertion that the list of potentially harmful elements is undefined and can change over time.

[295] The grievor was also provided with a closed office space with a window for fresh air. She had not informed anyone that sitting close to the washrooms would be problematic, but when management learned that it was, it took immediate action and moved her workstation, without question. This, argued the employer, also demonstrated management's commitment to accommodating her disability.

[296] The issue of visitors to LESC Uplands proved problematic, submitted the employer. Visitors are not generally LESC Uplands employees, and management has no authority to require of them the kind of lifestyle changes that those at LESC Uplands underwent. The employer submitted that there was nothing management could do to restrict visitors from using an undefined list of "unscented" products containing chemicals to which the grievor might possibly react.

[297] Given the logistical challenges associated with applying the scent-free guideline to visitors, argued the employer, it was reasonable to expect a few hiccups along the way. One such incident occurred in October of 2014, when a commissionaire informed the grievor that a visitor's driver had entered the building wearing a scented product. In response, Mr. Rolfe instructed that in such cases, management had to be informed

and action would be taken, including informing the grievor. The employer submitted that under the circumstances, this was a reasonable procedure.

[298] In November of 2014, Mr. Rolfe reminded the staff of the need to advise prospective visitors of the no-scent policy before their arrival. This, argued the employer, is another example of management taking the grievor's concerns seriously and responding in good faith.

[299] The grievor provided many examples of off-site events that she could not attend because it could not be guaranteed that they would be scent-free. The employer pointed to the testimonies of Mr. Rolfe and Mr. Provencher with respect to their inability to control non-LESC employees in other venues. Management consistently advised the grievor of its requests that event organizers add a note to attendees asking that they not wear scents. The grievor agreed that nothing more could have been done given the lack of a scent-free policy across DND or the public service.

[300] The employer further submitted that the grievor's expectations with respect to the viability of making all off-site events scent-free are a reflection of an unrealistic view of what accommodation entails.

[301] The employer took issue with the grievor's characterization of the decision to send her home as a termination and the subsequent offer of alternate employment as a demotion. It submitted that those steps were an integral part of its ongoing accommodation of her disability. When faced with the reality that it could not provide her with a safe work environment, it took a necessary step and accommodated her by means of remote work or telework.

[302] In September of 2017, the grievor was initially placed on sick leave without pay, but this was quickly changed to a period of paid leave. She has been paid since then and has suffered no financial losses associated with the decision to ask her not to return to work in September of 2017. Her continuity of pay, submitted the employer, is a significant element of its reasonable accommodation. This fact alone distinguishes the present circumstances from many of the cases submitted by the grievor.

[303] The grievor could not be assigned the work associated with her substantive DD-04 position to do at home or from a remote location, owing to security-related issues.

She admitted that the design programs were contained within a closed system and that they could not be accessed remotely, for security reasons.

[304] The employer submitted that management made extensive efforts to locate suitable alternate work, which was consistent with its duty to accommodate an employee who could no longer perform her substantive work as a result of her disability. All available DD-04 and EG-03 positions were canvassed, and inquiries were made as to whether she could perform the work remotely. Major-General Basinger testified that he explored bundling options and the transfer of funding if necessary, but given the nature of the work of the grievor's substantive DD position, it was simply impossible.

[305] The grievor was assigned to a temporary full-time position with the DSCO in 2019, which enabled her to work from home. The three-month period was extended by an additional three months, ending in March of 2020. At that point, accommodation (like so many things) was delayed by the onset of the global COVID-19 pandemic. The employer acknowledged that there were significant delays identifying a full-time position that could be performed remotely.

[306] In December of 2020, a device was proposed that would "eliminate smells and any particulates" triggering the grievor's condition. It was clear she was not interested in that accommodation method and that she was insulted by it. The employer maintained its efforts to accommodate her, nonetheless.

[307] The employer took issue with the grievor's characterization of the AS-01 position as a demotion. The pay scale was slightly lower, but the difference was not significant.

[308] The employer submitted the case of *Toronto District School Board v. Ontario Secondary School Teachers' Federation, District 12*, [2011] O.L.A.A. No. 461 (QL) (*Toronto District School Board*), on the difficulties associated with enforcing a scent-free policy. That case states as follows at paragraph 242:

*242 It also must be recognized that effective enforcement of a Scent Free Policy is extremely problematic. This is best revealed by the example of the maintenance person who came to repair the clock in Room 133. Ms P demanded that he leave the School because she believed that he was wearing scented products. He insisted that he was not scented and his denial has the ring of*

*credibility because he also had an aversion to fragrances. Was he scented or not? How could this possibly be determined? What is the proper protocol when someone denies being scented and someone else says s/he [sic] is? Is there any objective way of determining this? Who can/should be designated as a "scent-free enforcer"? Enforcement is easy when someone admits that they have applied a fragranced product. But what is a school administrator to do when someone denies being scented? Further, what can realistically be done when a scent is detected in a crowded hallway? How can the offending student(s) be isolated or identified? Ms P complained that the Administration never caught any of the offenders when she complained about detecting strong fragrances in the hallways, even though video surveillance of the hallways was available. But the videos cannot detect scents ... So the inability to identify specific "offenders" is not surprising. While teachers and administrators may well be expected to enforce the Scent Free Policy when they can detect fragrance on an individual, it is close to impossible to enforce such a Policy when no scent can be detected on the person being accused who is in denial, and/or it is virtually impossible to identify the source of the fragrance in a crowded [sic] hallway. This is even more complicated by the fact that people with Multiple Chemical Sensitivities/Idiopathic Environmental Intolerance are known to have a heightened sense of smell. Therefore, they will detect or identify fragrances that the rest of the population will not notice. This leads to the situations where it is completely possible for them to believe that their need for a Scent Free environment is being ignored, whereas those responsible for enforcement may be quite unaware of the problematic fragrances that exist in the building....*

[309] The employer submitted that the challenges faced in the *Toronto District School Board* case are closely aligned with the present set of circumstances. The record is replete with the grievor's complaints about scented products or chemicals at LESC Uplands, but Mr. Rolfe and Mr. Provencher both testified that no individuals did not comply with the scent-free policy, and they both added that they could not detect the scented products complained of. How, questioned the employer, can management enforce a scent-free policy if nobody acknowledges being scented and cannot detect a scent? Even if they were able to detect a scent, how would it be possible to identify, with any certainty, its origin?

[310] The *Toronto District School Board* decision goes on to contemplate whether the accommodation plan in that case would have ever been adequate to accommodate the grievor, stating as follows at paragraph 247:

**247** *Therefore the next question becomes whether the Plan would ever have been adequate to accommodate the Grievor. On the*

*basis of the evidence presented and the conclusions reached above, it cannot be concluded that the Plan would have been adequate. The Grievor herself sought changes to the Plan within the first day of her return to work. She did not accept assurances about accommodation measures that were in place that complied with the Plan and she was not able to fully function even within the classroom where the Plan was being enforced to the best of anyone's ability. She simply did not trust the Employer and nothing that it did ever satisfied her. She repeatedly accused the Employer and the School's Administration of "doing nothing except discriminating against her." While the Employer did not do all that it could, it certainly cannot be said to have done 'nothing.' This approach, together with the totality of the evidence, leads to the conclusion that even the full implementation of the Plan would not have resulted in Ms P being able to perform the essential elements of her role as a teacher.*

[311] The employer submitted that it is difficult to see how a written accommodation plan or standard operating procedures would have changed the level of distrust and suspicion the grievor held toward it and her co-workers or the ultimate issue of detecting scents.

[312] The grievor stated this in her WSIB claim: "... if I have a disagreement with certain individuals they will wear scented products to 'teach me a lesson'...". When asked who she believed wore scented products to "teach her a lesson", she identified a commissionaire and Mr. McBeath. Mr. McBeath denied the allegation unequivocally.

[313] The grievor was equally untrustful of management, testifying that Mr. Rolfe would shrug his shoulders or roll his eyes when she raised concerns with him. He denied ever having done so and testified to taking her concerns seriously. He also testified to the impossibility of detecting who might be wearing a scented product if he could not detect it himself. In cross-examination, the grievor said that she was the means of detecting scents. This was not a realistic or feasible accommodation method. The employer used the example of Sergeant Groleau, whom the grievor accused of wearing a scented product. Mr. Rolfe testified that he detected nothing, and the grievor cannot be the judge and jury of her peers.

[314] The employer submitted that Mr. Rolfe candidly admitted he could have done some things differently; for example, having a WO shower at a different facility. With the benefit of hindsight, there were indeed imperfections in the grievor's



accommodation, but none would change the central issue of management's inability to detect problematic scents.

[315] The employer submitted that returning the grievor to LESC Uplands would place her in harm's way and that it would return the parties to the same patterns they found themselves in before. Whether or not the Board is convinced that the employer satisfied its duty to accommodate the grievor, it must consider whether there is any reasonable prospect of returning her to the workplace, given that she is unable to identify the chemicals or products that she reacts to. Often, others cannot detect the chemicals that she reacts to.

[316] There is no basis for damages under the *CHRA*, submitted the employer, given its consistent pattern of good-faith efforts to accommodate the grievor. However, if the Board is inclined to award damages, they should be on the lower end of the spectrum, with none for special circumstances, given that there is simply no evidence of wilful or reckless discriminatory practices.

[317] With respect to the broader issue of a scent-free policy across DND or the entire public service, the employer submitted that the Board is without jurisdiction. Such an overarching remedy would be entirely disproportionate to the accommodation to which the grievor is entitled. Moreover, it submitted, such a request is reflective of the nature of her unrealistic expectations.

[318] With respect to the *CLC* complaint, the employer cited *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52, for the appropriate analytical framework. The successful complainant in a complaint made under s. 133 of the *CLC* must demonstrate the following:

- that they exercised their rights under Part II of the *CLC*;
- that they suffered reprisals;
- that the reprisals were of a disciplinary nature, as defined in the *CLC*; and
- that there was a direct link between the exercise of their rights and the action taken against them.

[319] There is no dispute that the grievor exercised her rights under Part II of the *CLC*, submitted the employer, but her claim that the September 15, 2017, letter dismissed her from her position is baseless. There is no evidence of a reprisal. Mr. Rolfe and Mr. Provencher were unequivocal that her removal from the workplace was not in response to her work refusal. She was not dismissed, laid off, suspended, or

demoted, and she suffered no penalty. In fact, the employer has never taken any disciplinary action against her.

[320] In summary, the employer submitted that the *CLC* complaint should be dismissed, as well as her grievances.

#### **D. The grievor's rebuttal**

[321] The grievor contradicted the employer's claim that it is not required to demonstrate accommodation to the point of undue hardship. By taking this position, she submitted, it failed to account for the simple fact that on September 15, 2017, it refused to continue employing her in her substantive position and excluded her from the workplace.

[322] Since the employer's actions were *prima facie* discriminatory, the only available defence to the discriminatory actions was to establish under s. 15 of the *CHRA* that its refusal to continue to employ the grievor in her substantive position and its exclusion of her from the workplace were *bona fide* occupational requirements. The employer could do that only by way of clear and cogent evidence that doing so would have imposed hardship on it, considering health, safety, and cost, had it had to accommodate her needs.

[323] In all the cases cited in which employers were not required to establish undue hardship it was because, unlike in the present case, they had implemented accommodation measures that fully met the employees' medical restrictions. The grievor submitted that if the medical restrictions are not fully met, then the employer must prove undue hardship.

[324] Furthermore, argued the grievor, the employer was required to accommodate her in her substantive position before it took any other steps, per the *Nicol* case. None of the cases it cited involved employees who were forcefully removed from their substantive positions.

[325] In *Leclair*, there was no question that the grievor was unable to perform the duties of his substantive position, but in this case, the employer met the grievor's restrictions by instituting the accommodation measures that the grievor's physician recommended.

[326] The *Nash* decision, submitted the grievor, did not involve disability, and there was no *prima facie* case. In that case, the measures that the employer implemented permitted the grievor to meet his family obligations.

[327] The grievor's discharge was not at issue in *Bourdeau*. Rather, the grievor alleged that he suffered other, less-tangible impacts from shortcomings in the employer's accommodation process. In that case, the Board concluded the employer had taken adequate measures to meet the grievor's medical restrictions. While the employer's accommodation process was not perfect and was not always timely, the Board held "... such problems would indicate only a failure of accommodation if they were not addressed and resolved."

[328] This, argued the grievor, is the crux of the issue in the present case. The employer has never addressed and resolved the problems that she identified. As they went unaddressed and unresolved, over time, they compounded and led to the employer's refusal to continue employing her in her substantive position. They were not "hiccups" or "glitches" as the employer maintained; they were, taken together, circumstantial evidence of its failure to accommodate her disability.

[329] The employer essentially argued that it was too hard to meet the grievor's medical restrictions in the workplace and claimed that its accommodation measures were reasonable. This, she argued, is not the standard. If her restrictions were not being met, the employer had to prove that further measures would constitute undue hardship. It had no interest in taking any of the further measures such as improving its scent-free guideline or improving the air quality. Without having attempted any of these further measures, argued the grievor, the employer simply could not establish that it accommodated her disability to the point of undue hardship.

[330] The *Toronto District School Board* case involves a completely different environment. LESC Uplands is not a crowded school; it is a small, controlled workplace. Besides, argued the grievor, in *Toronto District School Board* a detailed accommodation plan was in place that made extensive demands of management and staff. By contrast, the employer in the present case has no point of reference, since it never bothered to create an accommodation plan in the first place.

[331] The grievor further submitted in rebuttal that the employer's claim that removing her from the workplace was a reasonable accommodation cannot be

sustained because it was not an accommodation measure. It could have removed her only had it reached undue hardship. It could not escape its duty to accommodate her in her substantive position to the point of undue hardship. At best, its decision to continue paying her merely mitigated its liability.

[332] Human rights law concerns the elimination of discrimination and providing equal opportunity to persons living with a disability, not merely determining the cost of an employer's discriminatory treatment. It would be contrary to the fundamental purpose of this remedial legislation to consider the payment of the grievor's salary, in the circumstances of this case, as anything other than an offset to any potential damage award.

[333] The employer's position ignores the fact that when it made the decision to remove the grievor from the workplace, it had no intention of continuing to employ her, let alone pay her salary. The wording of the September 15, 2017, letter is clear. She was destined for leave without pay.

[334] The pain and suffering that the grievor experienced, and continues to experience, might have been ameliorated by the employer's reversal of its decision to place her on leave without pay.

[335] The grievor testified that the AS-01 job that she was forced to accept, under threat of termination, was administrative in nature and that it paid less than her DD-04 position, which was technical in nature. They are materially different jobs.

[336] In rebuttal, the grievor took issue with the employer's characterization of her as being distrustful of her colleagues. They mistreated her.

[337] In rebuttal, the grievor took issue with the employer's submission that Mr. McBeath denied the use of scented products because he admitted in alternative dispute resolution (ADR) that he had used them. When it was put to him on the witness stand, he did not unequivocally deny it, as the employer submitted. His response was simply that he understood that the ADR process is confidential.

[338] The grievor continued her rebuttal with the observation that when discrimination has occurred, damages must follow. In *Jane Doe v. Canada (Attorney General)*, 2018 FCA 183, the Federal Court of Appeal found that the former Board had

unreasonably applied the *CHRA*'s remedy provisions by failing to award damages to a grievor who had suffered, in part, due to the employer's discriminatory practices.

[339] In concluding her rebuttal, the grievor took issue with the employer's assertion that the Board lacks the jurisdiction to order a uniform scent-free policy. The Board has the authority in its originating legislation to order the employer to adopt a uniform policy in the workplace to address a systemic issue.

### **III. Decision and reasons**

[340] I have read and carefully considered the many cases submitted by both parties in support of their respective arguments. I will refer only to those cases that support my reasoning.

#### **A. Background**

[341] The origin of the grievor's environmental sensitivities, according to her testimony, was the unfortunate release of chemical products from a crop-dusting aircraft over her automobile while she was driving on an Alberta highway. This unfortunate accident, if it was indeed the cause, has had life-altering consequences, with profound impacts on her health and her personal, social, and professional relationships. Ever since this event, she has been under a doctor's care for the environmental sensitivities she experiences.

[342] The grievor's testimony about the mercurial and unpredictable nature of her environmental sensitivities was clear, convincing, and very moving. The uncertainty this creates in her life is profound because she is often not capable of identifying what she is reacting to or where the trigger is coming from. What I found particularly troubling was her testimony that she cannot guarantee that she will or will not react differently to the same product or chemical in the future. This creates a great deal of uncertainty, not only in her life but also in the lives of those close to her.

[343] Her testimony about the day-to-day impact was compelling indeed, especially where her family members are concerned. Virtually every product brought into the household must be carefully chosen and in many cases brought to her so that she can measure her reaction (or lack of one), knowing that today's results are no guarantee of what might happen tomorrow. Although I am sure that the grievor's family is used to

all this by now, it must still generate some uneasiness, given the potential severity of her reactions to any given product.

[344] The grievor's family has no choice but to live in this climate of uncertainty. The employer, on the other hand, while obliged to accommodate, has other options. Some of the options that were exercised might have been flawed, and they might not have been precisely what the grievor would have wanted, but they were reasonable and understandable.

**B. Overview of the grievances and the CLC complaint and the hearing into their respective merits**

[345] The timely release of this decision has been compromised by two major factors, the first being the global COVID-19 pandemic, about which more will be said. The second complicating factor has to do with the number of grievances under consideration and the decade-long span within which they were filed.

[346] The grievance carrying Board file number 566-02-11333 was filed on September 6, 2013, because the grievor was experiencing adverse reactions to chemicals and scented products in the workplace, despite the presence of a no-scent guideline that the employer had implemented as part of its accommodation obligations. These reasons will demonstrate that the guideline was a reasonable approach.

[347] The grievance carrying Board file number 566-02-42768 was filed on November 26, 2014, when the grievor continued to suffer adverse impacts for the same reasons as before, plus related impacts due to the arrival of visitors at LESC Uplands who might have been wearing scented products, despite management's efforts to control it. As these reasons will demonstrate, these efforts were a reasonable aspect of the accommodation process.

[348] The grievance carrying Board file number 566-02-42769 was filed on October 10, 2017, or approximately three weeks after the grievor was removed from the workplace. She characterized her removal as a dismissal, but as these reasons will demonstrate, it was a reasonable accommodation measure.

[349] The grievor made the CLC complaint on November 17, 2017, to the effect that her removal was an act of reprisal, and this complaint carries Board file number 560-

02-00134. As these reasons will demonstrate, there is no evidence that the grievor's removal was a reprisal; it was part of an accommodation process.

[350] The first grievance was referred to adjudication pursuant to s. 209(1)(a) of the *PSLRA* and set down for a hearing in due course. Unfortunately, the hearing could not commence until January 19, 2021, owing in part to disruptions in service delivery caused by the global COVID-19 pandemic. After the hearing began, the Board agreed to consolidate the two new grievances, referred pursuant to s. 209(1)(a) of the *Act*, and the *CLC* complaint with the first grievance.

[351] Once the hearing was underway, it became apparent that the time spans encompassed by the set of grievances as well as the number of witnesses to be heard would necessitate a series of continuations. At the hearing, the parties informed me that the grievor had filed new grievances with the employer concerning the AS-01 position offer. During the last October continuation, in the latter stages of the hearing, the grievor referred these grievances carrying Board file numbers 566-02-43632, 43633, 43634, and 43636, all of which pertain to the employer's offer (and the grievor's acceptance) of a position classified at the AS-01 group and level. These grievances were referred to adjudication pursuant to ss. 209(1)(a) and (b) of the *Act*. On the parties' consent, and by way of a Board decision rendered orally at the hearing, these grievances were heard concurrently with the three previous grievances and the *CLC* complaint because all the circumstances pertaining to each one were related, continuous, and ongoing. With respect to the final four grievance files pertaining to the offer and acceptance of a position classified at the AS-01 group and level, these reasons will demonstrate that it was a reasonable accommodation measure.

### **C. The confidentiality of the mediation process**

[352] At the outset of my decision and reasons, I must address one issue in particular that I continue to find troubling. Apparently, these matters proceeded to mediation at some point, and in the course of mediation, Mr. McBeath is alleged to have admitted to his use of scented products. This allegation arose in his testimony. An objection was immediately raised, which I sustained, on the basis that the mediation process is supposed to be confidential. Of course it is; it must be, and I need not dive very deeply into the underlying reasons for confidentiality because they strike at the very heart of the integrity of labour relations. Parties must be able to speak freely when they are in mediation, and they must be confident in their expectations that their discussions in

mediation will remain confidential. This is why I was somewhat distressed not only to have to deal with this at the hearing but also to have read certain related passages in the grievor's written submissions and in rebuttal.

[353] Worse, the grievor sought to use this information to attack Mr. McBeath's credibility on the basis that he provided different answers to the same question. Leaving aside for the moment the issue of confidentiality in mediation, some clarity is in order as to what those questions actually were.

[354] On the witness stand, Mr. McBeath was asked whether he had admitted, while in mediation, to having worn a scented product in the workplace. Instead of providing a direct answer, he stated that he thought the mediation process was confidential. My ruling at the time was that the question was inappropriate, which the witness did not have to answer, because he was correct about the confidentiality of the mediation process. Mr. McBeath was later asked whether he had deliberately worn a scented product in the workplace "just to teach the grievor a lesson", which he unequivocally denied. I believe him wholeheartedly.

#### **D. The grievor established a *prima facie* case of discrimination**

[355] Both parties correctly set out the analytical framework surrounding the establishment of a *prima facie* case, which need not be repeated. The evidence is clear that the grievor suffers from a disability the employer recognizes as requiring accommodation. She suffered adverse impacts as a direct result of her disability. With respect to the grievances carrying Board file numbers 566-02-11333 and 42768, the adverse impacts were primarily the asthmatic and other physical reactions she experienced in the workplace, despite management's implementation of a scent-free guideline. Understandably, these intense physical reactions gave rise to emotional distress. For the grievance carrying Board file number 566-02-42769, the grievor experienced adverse impacts including difficulty sleeping and waking up, being devastated at losing her "dream job", and depression.

[356] Aside from the mental and physical discomfort, she was absent from the workplace for extended periods due to these reactions, and she complained that they affected her ability to work effectively. Ultimately, she was removed from the workplace on September 15, 2017. These were all undoubtedly adverse impacts, and they were obviously directly related to her disability.



[357] With respect to the grievances carrying Board file numbers 566-02-43632, 43633, 43634, and 43636, the adverse impact is the loss of what the grievor described as her “dream job”, her technical position classified at the DD-04 group and level, and her subsequent assignment to an administrative position classified at the AS-01 group and level. She testified to a drop in salary of approximately \$2000 per year, and there is no evidence to the contrary. Those adverse impacts were directly related to her disability.

[358] I find that the grievor has established a *prima facie* case of discrimination.

[359] In response to the grievor’s *prima facie* case, the employer argued that it had a reasonable explanation or justification, that it provided the grievor with reasonable accommodation. The employer submitted the cases of *Bourdeau*, *Leclair*, *Nash*, *Jones v. Deputy Minister of National Defence*, 2017 FPSLREB 49, and *A.B.* for the proposition that the employer does not have to prove undue hardship in all instances in which discrimination has been established on a *prima facie* basis. Supreme Court cases such as *Elk Valley* and *Central Okanagan* have established that the accommodation measures need not be perfect but must be reasonable.

[360] The grievor, on the other hand, insisted that the employer had to prove that it had a *bona fide* occupational requirement justifying the adverse impacts and that it accommodated her to the point of undue hardship. In support, she submitted the Supreme Court of Canada’s cases of *Moore* and *Meiorin*. In rebuttal, she distinguished the cases that the employer submitted on the following basis (from paragraph 2 of her rebuttal):

*2. In taking this position, the employer fails to account for the simple fact that, ultimately, on September 15, 2017, it refused to continue employing Ms. Munday in her substantive position and excluded her from the workplace: Exhibit J-2, Tab 181. At that time, the employer placed her on immediate sick leave without pay and confiscated her building keys and pass. Since then, the employer has continued to refuse to reinstate Ms. Munday to her substantive position and exclude her from the workplace....*

[361] The grievor opened her rebuttal with, “The Employer Must Prove Undue Hardship to Rebut the *Prima Facie* Case”. I must point out that the employer did not set out to rebut the *prima facie* case. In its submissions, it openly acknowledged the

existence of the grievor's *prima facie* case. The crucial analysis has everything to do with the duty to accommodate and nothing to do with establishing a *prima facie* case.

[362] Once the grievor has established her *prima facie* case, the employer may refute the allegation of discrimination by demonstrating that it has reasonably accommodated the grievor's needs or that accommodating the grievor would impose undue hardship on it, per s. 15(2) of the *CHRA*. In this case, the employer elected to rely only on an explanation of reasonable accommodation. This is up to the employer. The law does not oblige the employer to go further and also establish a statutory defence of undue hardship.

#### **E. Documentary evidence, and the testimonies of the witnesses**

[363] There were very few points of clear divergence in the testimonies of all the witnesses, but where they do exist, my analysis is governed by the principles set out in the well-known case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.): "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."

[364] The parameters within which credibility must be assessed are succinctly laid out as follows in *R. v. Gagnon*, 2006 SCC 17 at para. 20:

*20 Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events....*

[365] As I have indicated, points of departure in the testimonies of witnesses were rare in the hearing. I find that each witness testified in an honest and forthright manner and that each witness was credible. When these points of departure occur, I will attempt to articulate with precision my reasoning for preferring one version over another.

[366] Mr. McBeath, Mr. Rolfe, and Mr. Provencher all testified to readily acknowledging the grievor's disability as described in Dr. Molot's note when they received it in January of 2012. Because of its importance to these proceedings, the note is reproduced, in part, as follows:

...

*This letter is to certify that Jo-Ann [sic] Munday has been diagnosed with environmental sensitivity disorder manifest as multiple chemical sensitivities. Most significant is her sensitivity to scented products.*

*Environmental sensitivity disorder is a disability recognized by the Canadian and Ontario Human Rights Commissions and therefore she has a right to accommodation in the workplace. The only treatment for this disorder is avoidance of chemical pollutants which are known to trigger reactions. There is no standard testing available which could help to identify specific agents.*

*Given the nature of her job description, she is unable to work from her own home and therefore telework is not an option. Therefore, a scent-free policy should be implemented and all employees should be encouraged to follow this policy.*

*Other recommendations which may be of benefit include providing a work station away from high traffic areas such as restrooms, boardrooms, conference rooms and reception areas. The work station should be away from photocopying, printing and fax equipment. She should be provided an enclosed office if available, not recently renovated and with no carpet if possible. Furthermore, Ms. Munday should be provided with an alternative work location whenever there are ongoing renovations, construction or cleaning of carpets.*

*Information to aid in the implementation of a scent-free policy in the workplace is available on the website of the Canadian Centre for Occupational Health and Safety.*

...

[367] The evidence is replete with emails that the grievor sent about her detection of scented products. The email chain demonstrates management's almost immediate response to her concerns. This is the first and perhaps most important point of departure in her testimony from those of Mr. Rolfe, Mr. Provencher, and Mr. McBeath. At several junctures in her testimony, and in many items of correspondence that she authored, she characterized management's response as uncaring, indifferent, sarcastic, or dismissive. I cannot find any evidence of these attitudes in the totality of the email exchanges and certainly not in the demeanour of these witnesses on the stand.

[368] With respect to Mr. McBeath, the grievor's direct supervisor, whom she accused of wearing scented products "just to teach her a lesson", I paid careful attention to his testimony about **why** he took to heart her complaints about sensitivity to scented products. Mr. McBeath's late wife suffered from the same sort of affliction, he testified,

and as a result, he was very conscious of the effect that his grooming products might have on others. Therefore, I believe him on this important point.

[369] Mr. Rolfe was questioned directly on whether he ever rolled his eyes or shrugged dismissively when the grievor brought her concerns about scented products to his attention. He unequivocally denied it. The respectful manner in which he corresponded with her about her concerns and about the implementation of accommodation measures, including the scent-free guideline and the implementation of measures to address visitors wearing scents, the activities of the cleaning staff, and his orders to move the grievor's workstation to lessen the likelihood of exposure, all speak volumes about the seriousness with which he took her concerns. I do not believe her testimony that Mr. Rolfe rolled his eyes or shrugged his shoulders dismissively with respect to her complaints.

[370] In his testimony, Mr. Rolfe was willing to admit that in hindsight, he perhaps would have done some things somewhat differently. This is admirable in a witness, and it enhances credibility. I refer in particular to that aspect of his testimony in which he admitted he should have explored the possibility of having a WO shower at another building near LESC Uplands. This might have made a difference, and then again it might not have, because the grievor complained about the layer of chemical residue the fragrances in Dove Unscented Body Wash or Pert shampoo can leave on the ceiling and on the walls long after the shower is over, even with ventilation. There will always be some scented product or other that lingers in the shower area, detectable only by the grievor. Recall her following narrative on this point, from correspondence she prepared on November 30, 2016:

...

*It can take days for a room that has been exposed to scents to clear out — if it does. (I have had clothing given to me that has been exposed to fabric softeners that I've had to throw out because even after weeks of airing outdoors the scent chemicals are still present at sufficient levels to cause me injury.) Depending on what else I've been exposed to (fabric softener in the main area of the building, deodorant on hot days, etc) I can be sick for weeks from exposures in this workplace and the washroom in particular.*

...

[371] A WO, who did not testify at the hearing and therefore could not respond to the grievor's assertions, seems to have been a focal point for the grievor's complaints

about scented products in the women's shower. The grievor testified to discussing her environmental sensitivities with the WO in August of 2012 and to providing her at that time with a type of soap the grievor used safely at home. The situation seemed fine until March of 2013, when there was a recurrence. There is some indication that WO needed her own soap as some form of medical accommodation, but there was no hard evidence of this fact at the hearing.

[372] The grievor was harshly critical of the WO's use of Dove Unscented Body Wash, but L.S., another LESC Uplands employee, also used it. The grievor testified that she had a temporary understanding with L.S. about her use of that body wash since apparently, it was compatible with L.S.'s eczema. Again, L.S. did not testify, so the usefulness of this evidence is limited, but I find this inconsistent approach somewhat puzzling. I should note that this inconsistency does not affect my finding that the grievor provided credible testimony for the most part.

[373] Mr. Provencher, like Mr. McBeath and Mr. Rolfe, testified to responding diligently to the grievor's complaints about someone wearing a scented product, and they all said the same thing. There were no incidents of voluntary non-compliance with the scent-free guideline. Even if disciplinary measures were available to them, they had no reason to impose discipline on any LESC Uplands employee for failing to comply with the scent-free policy.

[374] The grievor's correspondence is replete with instances of perceived non-compliance, but in the absence of any method to detect or prove the existence of a scented product on any given individual, I must rely on the evidence of Mr. Rolfe, Mr. McBeath, and Mr. Provencher, as well as the manner in which they treated the grievor's complaints, to make the finding that there was no basis to impose discipline. No one was ever found deliberately non-compliant with the scent-free guideline.

[375] This finding highlights one of the cornerstones of the employer's case, namely, detecting these scents or chemicals is almost entirely dependent upon one person, the grievor. There was no evidence adduced at the hearing of any form of scientific method available that might measure the extent to which one person can detect scents better than any other person, or even a method of measuring the concentration of scents themselves, so the grievor must act, as the employer has pointed out in its

submissions, as a “barometer”. This is a highly subjective process, but more importantly, it can be dangerous to place her in that situation.

[376] This unfortunate state of affairs is complicated and exacerbated by the grievor’s admission at the outset of her testimony that the reactions she experiences on any given day to a certain chemical may change and that often, this change is precipitated by other environmental factors, such as heat or humidity. All of this is completely beyond the control of the individuals tasked with ensuring the grievor’s safety and ensuring compliance with the duty to accommodate.

[377] It is difficult for me to understand the grievor’s motivation behind mounting search expeditions into the washroom and elsewhere to look for (and unfortunately occasionally locate) rogue bottles of Dove Unscented Body Wash and Purell hand sanitizer. Mr. Rolfe and Mr. Provencher had no explanation for their appearance other than to suggest that they had been purchased on a prior occasion. They were immediately removed. I cannot accept that they were deliberately placed there to trigger a reaction, and I see absolutely nothing in the evidence to suggest that they were so placed, but why on Earth would the grievor go looking for them in the first place if she is so violently allergic to them?

[378] The grievor argued that the scent-free guideline, because it was entirely voluntary, was ineffective as an accommodation measure. I find otherwise. Dr. Molot referred to it explicitly in his letter when he stated that it “should be implemented”, and it was. The employer implemented the guideline about two months after receiving this recommendation. The evidence showed that Mr. McBeath replied to the grievor’s reports of an LESC Uplands wearing scented product by investigating to find the source. The grievor asked that a reminder email on the scent-free guideline be sent to staff, and Mr. Rolfe did so.

[379] The accommodation measures were not perfect. The grievor did take leave related to her disability and associated stress during this time. However, the employer kept responding to incidents and taking its duty of accommodation seriously. Following her leave, the employer implemented the limitations in the grievor’s occupational fitness assessment form. The employer spoke with the same WO on two occasions, several months apart, to use unscented products in the shower. Although management instructed visitors to refrain from wearing scented products, the evidence

presented two specific occasions when visitors to LESC Uplands wore scented products. In response to the potential adverse impacts to the grievor, the employer acted quickly to send the grievor home on one occasion, and another asked the visitor, a training presenter, to shower to remove the scented product. The accommodation process was ongoing and responsive to changing circumstances in the workplace.

[380] Dr. Molot also suggested relocating the grievor's workstation to an area that was not as susceptible to environmental triggers. Management did this as well, moving her workstation and placing her in a separate office with a door that could close and a window that she could open.

[381] The findings thus far are sufficient to dispose of the grievance in Board file number 566-02-11333, filed on September 6, 2013. Although a *prima facie* case of discrimination has been made, when looking at the employer's ongoing efforts and measures it put in place, the employer's accommodation measures were reasonable given all the circumstances, and on that basis, it did not discriminate against the grievor. This grievance is denied.

[382] The grievance in file 566-02-42768, filed on November 26, 2014, contains the same complaints about the employer's failure to accommodate but focuses on the issue of visitors to LESC Uplands. I find that management's approach to visitors was reasonable. It cannot control what visitors might wear in the way of scented products, the fabric softener that they might have used on their clothing in the last several weeks, or what their dry cleaner might have used in cleaning their suit jackets. The best management can do is to alert potential visitors to the fact that LESC Uplands is a scent-free area, which they did to the best of their ability. Mr. Rolfe, Mr. McBeath, and Mr. Provencher all testified to instructing employees to remind potential visitors of this fact. Some employees added a reminder to the signature block of their emails.

[383] Management also instructed the commissionaires, or anyone for that matter, to alert it to the presence of scented products on a visitor so that it could advise the grievor. To the extent possible, the visitor's movements inside LESC Uplands were controlled or restricted to limit the possibility of exposure, but anyone can see the potential for the grievor to accidentally come into contact with a scent under these circumstances. The situation was highly problematic, but I find that management did its best to manage the risk.

[384] The cleaning staff's activities were much more difficult to control because management lacked the ability to control them. Cleaning services contracts were the responsibility of another department entirely, and the grievor was repeatedly exposed to cleaning products (or to cleaning staff wearing scented products), which caused an adverse reaction. However, whenever this happened, she immediately brought her concerns to management, which immediately did what it could, usually by contacting those responsible for securing cleaning services and advising them of the problem. If it knew that the cleaners had been in the night before, it advised the grievor of this fact so that she could avoid exposure as best she knew how.

[385] Again, anyone can see the potential for continued occasional and accidental exposure because there seemed to be a revolving door of cleaning staff, and every time a new cleaner entered, they seemed to either wear scented products or use a chemical cleaner that caused an adverse reaction. Again, given the absence of any control management had over the cleaners' activities, I find that it managed this risk as best it could. It was constantly in dialogue with those who contracted out cleaning services, to try to ensure a safe environment for the grievor.

[386] Thus, the grievance in file 566-02-42768 is denied. Although a *prima facie* case of discrimination has been made, the accommodation efforts were reasonable given all the circumstances, which were difficult. On that basis, I find that the employer did not discriminate against the grievor. Its accommodation of her was reasonable.

[387] The grievance in file 566-02-42769 was filed on October 10, 2017, in response to the grievor having been removed from the workplace. For the foregoing reasons, I find that the employer's decision to remove the complainant from the workplace was a reasonable accommodation measure, to prevent her from being exposed to potentially harmful substances in the workplace, while it determined how best to accommodate her going forward.

[388] Ground Zero was without a doubt the women's washroom and shower area. Several attempts were made to clean it using products that management hoped would be benign, all to no avail. On July 17, 2017, for example, Mr. Rolfe advised the grievor, "I've directed that no cleaners are to be admitted to the building until I receive a plan from PSPC (our property managers) as to how they will prevent cleaners from wearing



or having scents from entering our building.” The grievor replied, “OK, thanks. I’ll be into [sic] work tomorrow.” Unfortunately, the state of affairs was still not to her liking.

[389] Both Mr. Provencher and Mr. Rolfe acknowledged in their testimonies that the point at which the grievor was driving back and forth to her residence during the workday just so that she could use her washroom was when they realized that her continued presence at the worksite was untenable.

[390] In August of 2017, the grievor was involved in a motor-vehicle accident while in transit to her home washroom. In her pleadings, she maintained that “[t]he accident was a direct result of the work refusal, and the department’s inability to provide Ms. Munday with a safe washroom.” No, it was not. The accident was a direct result of someone driving their car into her car. While the decision to allow the grievor to travel to use a bathroom was not ideal, it demonstrates that the employer was continually trying to accommodate her so she could do the job she loved.

[391] The employer’s witnesses both testified that they realized that the employer could not make the workplace safe enough for the grievor, regardless of the accommodation measures in place, to ensure the grievor was not exposed to triggering chemicals.

[392] This was clearly explained in the employer’s letter of September 15, 2017. The employer concluded that “... our accommodation efforts for your disability are insufficient to ensure your safety”, and that “[w]ithout a means of detecting these scents, management cannot determine which persons present a hazard to you.”

[393] The initial stance, according to the terms of the September 15, 2017, letter, was a drastic course of action involving the use of available sick leave, then unpaid sick leave, then disability, then unemployment. Fortunately, management very quickly righted this course of action and placed the grievor on indeterminate sick leave with pay until a suitable alternate position could be identified for her. As a result, she has never lost a day’s pay, which I find was a very effective aspect of the accommodation process.

[394] Considering the employer’s explanation for the grievor’s removal from the workplace, the removal was not discrimination. The removal was part of the ongoing accommodation process, and it was a reasonable accommodation measure in the

circumstances. Since she was accommodated, the grievance in Board file number 566-02-42769 is denied.

[395] The *CLC* complaint, in Board file number 560-02-00134, is dismissed. I will use the term “complainant” to refer to Ms. Munday for the purpose of addressing her *CLC* complaint. There is no evidence that the complainant was removed from the workplace as a form of reprisal for exercising her rights under Part II of the *CLC*. Her refusal to work because the washroom and shower area could not be a guaranteed safe environment was entirely legitimate, and management saw it as such. Indeed, this is why management implemented the questionable accommodation measure of letting her drive home and then eventually implemented the only accommodation measure that could possibly work under the circumstances, namely, removing her from the workplace. Her removal was an accommodation measure, not a reprisal.

[396] Section 147 of the *CLC* would be violated were the employer to dismiss, suspend, lay off, or demote an employee or impose a financial or other penalty upon an employee who exercised their rights under Part II, or sought to enforce any of the provisions of that part. The complainant maintained that she was dismissed when she was removed from the workplace. She was not. Since the respondent did not take an action prohibited by s. 147 of the *CLC*, the *CLC* was not violated by the complainant’s removal from the workplace.

[397] If permitting the grievor to drive home to use a safe washroom was a questionable accommodation measure, then the offer of a HAZMAT suit on December 15, 2020, was downright bizarre. She testified to feeling insulted by this offer, and I can see why. She would have been unable to eat or drink with the sealed suit in place. Thankfully, no discussion ensued at the hearing about how the suit could possibly have addressed the grievor’s predicament when it came time to use the washroom.

[398] However, the HAZMAT gesture was a reflection of management’s recognition of the grievor’s desperate desire to return to her “dream job”, which was irreconcilable with management’s inability to let her do the job from a remote location. The only way she could return to her substantive position classified at the DD-04 group and level was to return to LESC Uplands. The evidence is very clear that she could not do that. The security issues surrounding the work performed at LESC Uplands meant that even during the global COVID-19 pandemic, those individuals performing such work were

not permitted to work remotely. Apart from the security issues, the nature of the work at the DD-04 group and level means attending the worksite to work with equipment and machinery to perform hands-on construction, adaptation, and modification. I accept the testimonies of all the witnesses, who confirmed that this type of work simply cannot be done remotely.

[399] Thus, the employer made efforts to secure alternate employment for the grievor. I accept the testimonies of Mr. Provencher, Mr. Rolfe, and Major-General Basinger, as well as the documentary evidence of their significant efforts to “market” the grievor, coast to coast. The record is replete with their correspondence with managers in many cities across the country where DND facilities are located, looking to place the grievor in a similar position. Their efforts were unsuccessful.

[400] There was simply no way that she could perform similar work remotely, no matter the location, and I accept Major-General Basinger’s testimony about his unsuccessful efforts to bundle work in an effort to return the grievor to work that might not be her “dream job” but might be close to it. These were all reasonable efforts to accommodate her.

[401] The grievor was offered a position classified at the AS-01 group and level, which she accepted. She continues to work in it and has never suffered the loss of even a single day’s pay as a result of the employer’s accommodation efforts. The grievor referred grievances to adjudication under s. 209 (1)(b), carrying Board file numbers 566-02-43633 and 43636. Section 209(1)(b) grievances are for disciplinary action resulting in termination, demotion, suspension, or financial penalty. No argument was made that the offer of the AS-01 position was in fact a disciplinary measure. There was nothing in the evidence to lead me to conclude the offer was a disciplinary measure, and so these grievances are dismissed. As for the grievances with Board file numbers 566-02-43632 and 43634, referred to adjudication under s. 209(1)(a), I find that there was no violation of the “no discrimination” clause of the collective agreement, for the reasons that follow. The AS-01 offer was an entirely suitable accommodation measure, and these two grievances are denied.

[402] I accept the cases submitted by the employer, notably *Elk Valley* and *Central Okanagan*, on the reasonableness of an accommodation measure. It need not be perfect, and it need not be the grievor’s preferred accommodation. The grievor made

much of the employer's perceived failure to implement all the doctor's recommendations after the second Health Canada assessment. I find that the employer did not dismiss those recommendations. Rather, it considered all of them.

[403] This is especially true where the prospect of a modified HVAC system is concerned. While it is probably true that none of the employer's witnesses was an HVAC engineer or expert, it is also true the doctor was probably not, either. The January 12, 2017, Joint Occupational Health and Safety Incident Investigation report findings were categorically supportive of the employer's efforts to heed the doctor's recommendations.

[404] It was not up to the grievor or her doctor to dictate the accommodation measures to the employer. The doctor's task was to describe her functional limitations and restrictions and to provide other helpful information, but the ultimate accommodation decision rested with the employer. Since accommodation is a shared responsibility, the grievor also plays a role, but the final accommodation decisions rest with the employer. However, because of the emphasis that the grievor placed on the employer's supposed failure to consider the doctor's recommendations, I feel that it is important to repeat certain aspects of the Joint Occupational Health and Safety Incident Investigation report, issued on January 12, 2017, following the grievor's first unsafe-workplace complaint. The report is lengthy and contains, on page five, the list of Dr. Molot's 2011 recommendations and the investigation committee's findings as to how these recommendations were addressed, as follows:

- Scent free policy should be implemented. *Done, the policy is in place and posters could be seen all over the unit starting with the entrance doors as well as canteen areas and washrooms. See photo 3;*

[The "No Scents is Good Sense" poster appeared next.]

- All employees should be encouraged to follow this policy. *Management encouraged this policy and numerous staff met during the interviews clearly stated that they have been briefed (many times) and that they are supporting this policy since its implementation;*

- Have a work station away from high traffic areas such as restrooms, boardrooms, conference rooms and reception area. *Done, Mme Munday has a private office away from those areas.*

- She should be provided with an enclosed office. *Done, Mme Munday has been provided with an enclosed office with her own air conditioning. See photo 4.*

[A photo of the grievor's office appeared next.]

[405] Page 6 of the report lists Health Canada's recommendations from 2015 and the investigation committee's findings as follows:

- Continuing the use of a closed office space. *Done;*
- Ensuring good air quality/air exchange. *Done;*
- Encouraging scent free work environment. *Done;*
- Using environmentally friendly cleaning products. *As far as the investigation team is concerned, LESC is really trying hard to use products that does not affect Mme Munday' [sic] condition (she may be too sensitive for some of these products);*
- Avoiding/minimising the time spent in an environment where ongoing renovation/construction is present. *Done, there is no construction/renovation that is taking place close to her office;*
- Having the work place away from high traffic areas such as restrooms, boardrooms, conference rooms and reception areas as well as photocopier/printer/fax equipment. *Mme Munday [sic] office is located away from heavy traffic areas.*

[406] Also on page 6, the report noted "[f]unctional ventilation system is in place in the washroom and seems adequate to support normal requirements. See photos 5 & 6".

[407] In its conclusions, the January 12, 2017, Joint Occupational Health and Safety report noted:

...

*... The past history dictates that the possibility of a recurring incident of the same nature is real and should not be taken lightly. Considering that:*

- *All the recommendations/accommodations from his [sic] Doctor and Health Canada have been put in place by Management;*
- *The only treatment for this disorder is avoidance of chemical pollutants which are known to trigger reactions;*
- *It is not known what precisely triggered the most recent incident;*
- *There is no standard testing available which could help identify which specific chemical agents trigger reactions;*

*DND may not be in a position to provide Mme Munday with the safe working conditions/environment requires [sic] for her to perform her duties in her current job. Mme Munday particular health condition combines with LESC facilities configuration*

*(washroom + ventilation + shower) may potentially expose Mme Munday to future Health and Safety risk despite the fact that all recommended accommodations from experts have been put in place.*

...

[408] It is no wonder that the grievor is not supportive of this report. It reinforces the close attention that the employer paid to the doctor's recommendations in the first Health Canada assessment in arriving at suitable accommodation measures, before her removal from the workplace.

[409] After the grievor was placed on leave in September 2017, the employer referred her for another FTW assessment with Health Canada. The second Health Canada assessment was completed in July 2018. The parties met in April 2019 to discuss various options, including those in the second Health Canada assessment. The discussion included the option of moving the grievor to another job. The grievor made her wishes to stay in her position known to the employer, noting she was open to another position if other accommodation options were exhausted. It was clear that the employer was considering other positions for the grievor, and it requested a copy of her CV.

[410] Unfortunately, the employer was unable to secure a similar DD position for the grievor, whether in another location, or in a similar classification doing design work. The employer considered bundling work, but concluded it was not possible given the nature of the design work.

[411] The employer then made efforts to find her work related to her other skills and abilities. The grievor was offered the AS-01 position that allowed her to work remotely. The grievor argued that this position appeared to be more of a settlement offer than an accommodation measure, since it was offered to her prior to a continuation of the hearing. However, I find that the respondent's evidence on its efforts over the years to secure her an indeterminant position that allowed for telework counters any negative inference that can be drawn from the timing of the offer.

[412] There is no question that the grievor's administrative work in finance at the AS-01 level is different work from her "dream job", classified at the DD-04 group and level, but it does play to her strengths and to her experience. It is, above all else, work

that she can do from home, and for this reason alone, her permanent assignment to this position was a satisfactory and reasonable accommodation measure.

[413] It was not perfect. I accept the grievor's testimony that the position pays approximately \$2000 less per year than does the DD-04 position. However, when taking into account the employer's explanation, the grievor's new position is a continuation of the accommodation process. The parties met in 2019 to explore various accommodation options, including a new position. The employer conducted a comprehensive job search related to the grievor's skills and experience and found no other vacancies for a remote position that allows the grievor to work within her restrictions. I find that it is a reasonable accommodation measure, and on that basis, the employer did not discriminate against the grievor. The two grievances in Board files 566-02-43632 and 43634 are denied.

[414] Security issues continue to evolve. If there is one positive aspect to the global COVID-19 pandemic, it is the continuing development of secure technological infrastructure to permit remote work. There is always the possibility that the grievor will eventually be able to remotely perform work closely related to that done at the DD-04 group and level, if not identical to it. She would do well to scan the horizon from time to time for such opportunities because, by all accounts, she was good at that kind of work.

[415] For all of the above reasons, I make the following order:

*(The Order appears on the next page)*

**IV. Order**

[416] The grievances carrying Board file numbers 566-02-11333, 42768, 42769, 43632, 43633, 43634, and 43636 are denied.

[417] The *CLC* complaint, carrying Board file number 560-02-00134, is dismissed.

April 25, 2024.

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