Date: 20241002

File: 566-34-12932

Citation: 2024 FPSLREB 136

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

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

BETWEEN

CHRIS IBBITSON

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Ibbitson v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Himself

For the Employer: Daniel Côté-Finch, counsel

Heard at Kitchener-Waterloo, Ontario,
April 15 to 18, 2024.

REASONS FOR DECISION

I. Overview and summary

[1] Chris Ibbitson ("the grievor") was with the Canada Revenue Agency ("the employer" or CRA) from March 2001 to November 2, 2015, when he was terminated for abandoning his position.

[2] Throughout the events that gave rise to this grievance, the grievor occupied a programs officer position at the SP-07 group and level.

[3] The grievor had been on extended sick leave without pay (LWOP) since May 15, 2012. He was deemed fit to return to work in April 2013, and steps were taken to return him to work, but a doctor's letter dated October 1, 2013, negated a return to work at that time because of a family related emergency that had increased his stress and anxiety levels. On October 1, 2013, his doctor specified that his return to work had only been delayed and that the prognosis for a successful return remained good.

[4] In February 2014, the employer advised the grievor of the impending two-year limit to his LWOP for medical reasons. He was provided these options to resolve his LWOP situation: return to work, resign, or retire (for non-medical or medical reasons).

[5] In March 2014, the grievor advised that he was not able to return to work, as he was still seeking medical help for his condition. He indicated then that it was still his desire to remain employed with the CRA in his substantive position.

[6] In April 2014, the employer granted a six-month extension to the grievor's LWOP for medical reasons.

[7] The grievor met with his doctor on June 26, 2014, who suggested that he simply return to work and learn to live with the anxiety that it would entail. He did not want to do that, so he did not return to work.

[8] Later that year, the grievor advised the employer that he was unable to obtain any medical services. With his consent, it arranged for an evaluation of his fitness to return to work by Workplace Health and Cost Solutions (WHCS).

[9] In June 2015, WHCS cleared him to return to work, but the employer wanted clarification on two of the limitations and restrictions. In August 2015, it was provided.

The only accommodation specified was a four-to-six month period of treatment that the grievor was obliged to obtain and undergo on his own. Once he had completed that treatment program, all the limitations and restrictions would be lifted. A gradual return to work was explicitly ruled out. The grievor was cleared to return to work full-time.

[10] On September 16, 2015, the employer emailed the grievor to discuss the logistics of his return to work. He did not return to work as requested; nor did he provide a medical certificate justifying his absences from work.

[11] On October 2, 2015, the employer demanded that the grievor either return to work or that he provide a medical certificate to explain his absence. It advised him that if he did not provide a medical certificate explaining his absence since September 16, 2015, then that period would be considered unauthorized leave. It ordered him to return to work on October 5, 2015, or to provide a doctor's note explaining his absence.

[12] The grievor did not report then; nor did he provide a doctor's note.

[13] On October 20, 2015, the employer requested a return to work by no later than October 26, 2015, and the provision of a doctor's note explaining his absence since September 16, 2015. The grievor was warned that failing to comply could result in a determination that he had abandoned his position, and his employment would be terminated.

[14] The grievor did not report for work by October 26, 2015; nor did he provide a doctor's note.

[15] On October 27, 2015, the employer provided the grievor with another letter ordering him to return to work by no later than November 2, 2015, or to provide a medical certificate explaining his absence. He was once again warned that failing to comply would result in a determination that he had abandoned his position and that his employment would be terminated.

[16] The grievor did not attempt to report for work by November 2, 2015; nor did he provide a doctor's note. Since then, he has never attempted to return to work and has never consulted a medical professional about returning.

[17] The grievor's employment was terminated as of the close of business on November 2, 2015.

[18] The grievor filed a grievance on December 1, 2015, requesting the following: "That I be reinstated forthwith and I be reimbursed for all pay and benefits lost as a result of my termination."

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

[20] The grievance was referred to adjudication under s. 209(1)(d) of the *Act* and was heard in Kitchener-Waterloo, Ontario, from April 15 to 18, 2024, inclusively. Discrimination was alleged and proper notice was filed with the Canadian Human Rights Commission and the Public Service Alliance of Canada (PSAC), but since the grievor is no longer represented by the PSAC, any argument of discrimination under the collective agreement is impossible. In any case, as will be seen in the reasons to follow, there was no evidence of discrimination.

[21] For the reasons that follow, the grievance is denied. The employer's decisions to deem the grievor's absence from work unauthorized leave and to ultimately terminate his employment were reasonable. He simply abandoned his CRA position.

II. Summary of the evidence

[22] The grievor was a programs officer with the CRA at the SP-07 grade and level. He began his career there in March of 2001. He was working at that grade and level when he left on sick leave for the second time in his career, on May 16, 2012. He testified that that leave was due to the anxiety he experienced from activities at work involving work colleagues dropping by his cubicle to discuss matters that he described as "apropos of nothing".

[23] The grievor testified to an underlying condition of his, apparently diagnosed as Post-Traumatic Stress Disorder (PTSD), which he testified arose following a horrific beating he sustained on the streets of Toronto, Ontario, in the 1980s that left him in a hospital, unconscious, for a week. He described the different triggers, social and environmental, which seemed to plague him at work after that incident of violence.

[24] Trish Draper, Manager, Validation Policies and Procedures Section, CRA, handled the grievor's return to work after the extended period of absence for medical reasons. She testified to being unaware of the cause of his medical leave, only that he had been absent from work for reasons having to do with stress and anxiety.

[25] Ms. Draper testified to never having met the grievor face to face until this hearing. He was absent from the workplace when she began in her position as his supervisor, and they have only ever communicated by email or letter or, a couple of times, over the telephone.

[26] On June 5, 2013, Dr. Ken Welburn, the grievor's treating psychologist, wrote as follows:

> *I am a clinical Psychologist and Director of the Ottawa Anxiety & Trauma Clinic. I have been treating Mr. Chris Ibbitson for Posttraumatic Stress Disorder and stress. He has been fully engaged in his therapy and participates actively in his treatment. He carries out exposure based treatment and practices CBT anxiety management techniques. As a result of his engagement in his treatment he has been improving and the severity of his PTSD symptoms has been decreased. He does have residual symptoms and he is not anxiety free. However, he is ready to try a gradual return to work.*
>
> *In order for him to have a chance at a successful re-entry, he needs to work in a different location than from his past environment. He is not able to go back to his previous workplace environment. He felt harassed, undermined and excluded in that environment. Neither is he able to go back into the physical location of that particular building as he fears he will run in to some of the people in his previous workplace in that location. His anxiety increases at the thought of going even near the building.*
>
> *In order for him to have a successful re-entry to the workplace, he needs to be in a new environment. Any help you could give him in that regards would be appreciated.*
>
> *Thanks in advance for your consideration and help you can give to anxious but motivated client.*
>
> [*Sic* throughout]

[27] On July 9, 2013, Ms. Draper arranged for an interview between the grievor and the manager of a different CRA branch, at 395 Terminal Avenue in Ottawa, Ontario. This meeting took place and an offer was made to the grievor to start his return to work at the new location.

[28] On July 11, 2013, the grievor declined the offer. He testified to having discussed the offer with his doctor, who stated that "… the frequent tight timelines and national responsibility relating to this position would … be too stressful for him."

[29] In cross-examination, the grievor admitted that the 395 Terminal Avenue location satisfied the stated limitations and restrictions; it was a different building and a different work environment. He admitted that he could have accepted the offer, attended work, and engaged in the return-to-work process just to see how things went at the new location, but he did not.

[30] Ms. Draper testified to some confusion over the grounds for the grievor's refusal of the July 9, 2013, offer. To her, they appeared to be new limitations and restrictions. On August 2, 2013, the employer requested clarification from Dr. Welburn, since the previous limitations and restrictions were limited to a new work environment. Specifically, the employer sought clarification surrounding these new restrictions about deadlines and about work involving national responsibilities.

[31] Dr. Welburn responded to Ms. Draper on August 28, 2013, in a detailed letter that specified the limitations and restrictions for both the gradual and the return-to-work periods.

[32] With respect to the limitations and restrictions applicable during the gradual return-to-work period, Dr. Welburn provided the following three clarifications on the form, in his own handwriting:

- Under "12 week gradual reintegration period. If yes, please provide details in the space below", Dr. Welburn wrote by hand, "start with (for example) 2 half days per week, add one half day per week over 12 weeks. Some flexibility needed related to how he is doing week by week."
- Under "Limitations/restrictions related to tight deadlines, which is defined as less than 3 days. If yes, please provide details in the space below", Dr. Welburn wrote, "- that he be given support and assistance where needed in order to meet the deadlines - for example - proper coaching, clear directives, relevant information needed in order to do the work."

- Under "Other limitations/restrictions. If yes, please provide details in the space below", Dr. Welburn wrote, "that he be given time off to see [*sic*] therapist regularly - also, if given deadlines, that this work be balanced so that he is able to complete the work in a reasonable time."

[33] With respect to the limitations and restrictions applicable during the return-to-work period, the following clarifications appear:

- Under "Limitations/restrictions related to tight deadlines, which is defined as less than 3 days. If yes, please provide details in the space below", Dr. Welburn wrote, "no restrictions after the re-entry. However, a less stressful job would be the best fit and give the best chance on a successful re-entry so that he would be more likely to be able to stay working and not have a remission."
- Under "Other limitations/restrictions. If yes, please provide details in the space below", Dr. Welburn wrote this:

  It's more of a goodness-of-fit issue than a restrictions/limitations issue. Even the "restrictions" noted above are really just a reasonable work environment for anyone. Mr. Ibbitson should be supported in finding the best fit for himself rather than just what meets some legalistic description in order to have a truly successful re-entry to work that sticks for the long run.

[34] The grievor did not return to work as anticipated. On September 8, 2013, his mother suffered a severe stroke, which created a great deal of anxiety for him. He went to Dr. Welburn with the news. On October 1, 2013, Dr. Welburn wrote:

> *I am a clinical Psychologist and Director of the Ottawa Anxiety & Trauma Clinic. I have been treating Mr. Chris Ibbitson for stress and anxiety. Recently, he had been ready to try a return to work. Unfortunately, his mother suffered from a severe stroke (September 8, 2013) and this has increased his stress and related anxiety. He has gone to Waterloo, Ontario to help out with his mother as her condition is still critical and her prognosis is uncertain at this time. As her condition settles, I would have a better idea of when we could re-initiate the return to work.*
>
> *He is not presently able to try a return to work at this time because of his increased stress and anxiety. I think that his prognosis for a return to work remains good ultimately and I see the present situation as only a delay in the return to work plan.*
>
> …

[35] Dr. Welburn did not provide an expected return-to-work date; nor did the grievor attempt to return to work at this time.

[36] The grievor's two-year LWOP for medical reasons was set to expire on May 16, 2014. Ms. Draper emailed him on February 13, 2014. She described it as a "heads up",

since she would soon send him a letter about the expiry of his sick leave entitlements. She advised him in the email that the letter would set out some options to resolve his LWOP situation.

[37] The grievor testified to his appreciation of Ms. Draper's email, because he felt he would have been blindsided by the letter had it arrived without warning. He testified that the "heads up" email was a compassionate approach on her part and it demonstrated flexibility. He appreciated that she could simply have just sent the letter without any warning but took the time to warn him it was coming.

[38] The grievor responded to Ms. Draper's email the following day, on February 14, 2014, as follows:

> *Hi Trish,*
>
> *thank you for the heads up. I am still caring for my Mom and I am finding it very stressful. My health has been severely exacerbated by the stress of caring for her. I will consult with the relevant professionals and get back to you as soon as possible. You can send the package to the following address ….*
>
> *…*

[39] Approximately three minutes later, Ms. Draper replied, "Thanks for the quick response, Chris. Sorry to hear that your mom is still not fully recovered. We'll be in touch."

[40] The employer's letter is dated February 21, 2014, and reads, in part:

> *…*
>
> *Based on our records you will reach your 2-year leave without pay for illness or injury in May 2014. In accordance with the CRA policy on leave without pay for illness or injury, I would like to present to you the following options:*
>
> - ***Return to work** (may be subject to a medical assessment);*
> - ***Retire on medical grounds** (subject to Health Canada's approval*); or*
> - ***Resignation, retirement for non-medical reasons** (resignation letter is required).*
>
> *…*
>
> *In order to help with your decision, you will be receiving a letter with an information package concerning your benefits relating to each of the above-mentioned options. This letter will be from the*

> *Compensation Client Service Centre (CCSC) regarding your pay and benefit estimates.…*
>
> *Also, should you wish to seek support during this time, you may access the Employee Assistance Program (EAP). The confidential services are available to you and to members of your family at no cost. For EAP related matters, you may call one of the Regional EAP coordinators ….*
>
> *Having said the aforementioned, please advise me* ***no later than April 25, 2014*** *as to which option you wish to exercise. If you do not choose your option by this date, I may begin the process to terminate your employment "for reasons other than breaches of discipline or misconduct" pursuant to Section 51(1)(g) of the* Canada Revenue Agency Act.
>
> …
>
> [Emphasis in the original]

[41] In cross-examination, the grievor testified to not really knowing what the Employee Assistance Program (EAP) was all about and to his impression that it offered only a very basic level of service. He also testified to his suspicion that it was not impartial. He stated that he was not aware of its availability, which was 24 hours per day, 7 days per week. Nor was he aware that it offered support for the LWOP process as well as the entire return-to-work and accommodation processes. Nor was he aware that it was able to provide referrals to healthcare professionals, including psychologists and counselors. The grievor admitted to never calling the EAP's telephone numbers or exploring it in any fashion.

[42] However, the grievor did express his desire to remain employed by the CRA and said as much in an email dated April 25, 2014. In his testimony, he acknowledged that he did not select one of the three options (return to work, retire on medical grounds, or resign) offered in the February 21, 2014, letter.

[43] On seeing the grievor's clear expression of his desire to remain with the CRA, Ms. Draper drafted the following letter to him on April 30, 2014, offering him a six-month extension to his LWOP if his treating physician could justify it. The letter reads, in part, as follows:

> …
>
> *Dear Chris,*
>
> *This is further to your email of Friday, April 25, 2014, in which you informed me that you would like to remain an employee of the*

> *Canada Revenue Agency (CRA), and continue on leave without pay due to medical reasons, as currently you are still not able to return.*
>
> *As you know, the CRA policy on leave without pay requires management to resolve situations within a 2-year period of the commencement of such leave. You have now been on leave without pay since May 15, 2012.*
>
> *Please note that, in accordance with the Agency's* Leave without Pay Policy, *where management is satisfied that there is a good chance the employee will be able to return to duty within a reasonable period of time (generally within a 6 month time frame), an extension to the leave without pay can be granted to bridge the employment gap.*
>
> *It is recommended that you discuss your leave without pay situation with your treating physician to consider the options that were presented to you in my February 21, 2014, letter.*
>
> *In light of you expressing a desire to return to work, I will require confirmation from your treating physician to validate that you are still unable to return to work at the present time. Further, if a return to work is expected, an anticipated date of return must be identified in your physician's confirmation.*
>
> *However, if your treating physician believes that you will not be able to return to work with* [*sic*] *the foreseeable future (i.e. within 6 months), then you will need to consider resolving your leave without pay situation through one of the other options available to you:*
>
> - *Retire on medical grounds (subject to Health Canada's approval*); or*
> - *Resignation, retirement for non-medical reasons (resignation letter is required).*
>
> …
>
> *I will wait to hear back from you following your consultation with your treating physician to obtain confirmation on your ability to return to work. It would be appreciated if you could provide me with the medical note by May 16, 2014, to ensure this matter is addressed in a timely manner.*
>
> …

[44] The grievor and Ms. Draper were in contact by email in May of 2014 about the prospect of a six-month extension to the LWOP. On May 13, 2014, he emailed: "RE: a six month extension of my leave - Would a letter from my Psychologist suffice?" On May 15, 2014, she replied, "If your psychologist is the physician who will be in a position to clear you to come back to work, then a medical note from him/her is acceptable …". In a separate email, the grievor asked if that psychologist could be Dr.

Welburn, and Ms. Draper responded "… since you indicated below that he will be making the determination regarding your fitness to return to work", a letter from Dr. Welburn would be sufficient. The grievor responded, "that is very kind! I will get a note from Dr. Welburn to you as soon as possible."

[45] On June 26, 2014, Ms. Draper sent the following email to the grievor: "I'm following up on the email below. We have not received a note from Dr. Welburn to date. Would you please confirm when we will be in receipt of it?"

[46] The grievor responded on July 2, 2014, by stating, in part: "I was finally able to meet with Dr. Welburn last Thursday. I hope to have a note to you by the end of week." He testified that he remembered going to Dr. Welburn's Ottawa clinic on Thursday, June 26, 2014.

[47] To corroborate his meeting with Dr. Welburn on Thursday, June 26, 2014, the grievor produced an email that he sent to Dr. Welburn on Saturday, July 5, 2014, which reads, in part, as follows:

> …
>
> *thank you for seeing me a week and a half ago. Thank you also for your patience.*
>
> *However, our meeting left me confused as to what I should* [*sic*] *next:*
>
> *what I heard from you was - I could return to work, but should resign myself to being anxious or learning to live with the anxiety while at work(?). Or the alternative is to use the electro device?*
>
> *That seems like two non-choices for me.*
>
> …

[48] The grievor testified that he did not receive a reply from Dr. Welburn to his July 5, 2014, email, has never followed up on it, and in fact has never seen him since.

[49] The grievor was asked whether it might be possible that the reason that Dr. Welburn did not provide a doctor's note was that at the June 26, 2014, meeting, Dr. Welburn suggested he go back to work, which he did not want to do. The grievor testified that "this was a possible reason" for there being no note from Dr. Welburn.

[50] On July 9, 2014, the grievor emailed Ms. Draper the following:

…

> *I'm sorry that you haven't heard anything from me for a few weeks.*
>
> *I am waiting for responses about my health from various professionals which - to date - I have not received. I will be hearing something from one medical professional on this Friday. I will try to have a detailed and comprehensive update for you by this Friday, July 11, 2014.*
>
> *I wanted to reiterate, that I do wish to return to work at CRA. But I also wanted to state that I am worried that without the correct environment/supports - as was noted by Dr. Welburn in September/October - that I am almost assured to not be successful in my return to work.…*

…

[51] Ms. Draper responded on July 22, 2014, as follows:

> *Chris, thanks for your email of July 9th. Sorry for the delay in responding, but I was away on vacation, and only returned to the office this week.*
>
> *I do understand that you have a desire to return to work at the CRA. Until you have been cleared by your doctor(s) to return to work, it is premature for management to look for a position for you. As you know, when you initially presented to me last year that you were cleared to return to work, measures were undertaken to try to locate a position for you within another HQ Branch. That was put on hold however as Dr. Welburn's letter of October 1, 2013 advised that, as a result of your mother's stroke, a return to work was not possible due to your increased stress and anxiety.*
>
> *In February 2014, I notified you by letter that you were approaching your 2 years on leave without pay (LWOP) due to medical reasons, and as such requested you to exercise one of the options available to resolve your leave situation. On April 25, 2014, you expressed that you still intended to return to work when it was medically possible. In a letter dated April 30, 2014, I advised you that an extension to your LWOP was possible if such a return was within the foreseeable future (i.e. within a 6 month period). At that time, I requested confirmation from your doctor to substantiate when a possible return to work may be. I am still waiting for you to provide me with that confirmation, specifically the medical note from Dr. Welburn as indicated in your May 16th email below, as well as in your July 1st email, a copy of which is attached. Please note that if you are not able to return to work by November 3rd, 2014 (6 months since April 2014), you will need to reconsider and choose one of the other options available to you to resolve your LWOP situation (i.e. resignation, or retire on medical or non-medical grounds).*

…

[52] On September 15, 2014, the grievor emailed this to Ms. Draper:

> *Hello Trish,*
>
> *my understanding of my current situation is that I have three options:*
>
> *1) return to work;*
>
> *2) medical retirement - subject to Health Canada approval;*
>
> *3) resignation.*
>
> *I have until November 2014 to sort out what I am going to do.*
>
> *I want to return to work.*
>
> *If I get a Doctor's note stating I can return to work, is that sufficient? Or are there additional forms that have to be filled out?*
>
> *And if the return to work comes with conditions i.e. different workplace, shorter hours etc etc, and/or there is additional time required to find a suitable position, or that my substantive could be filled by me, but only with certain changes, what paperwork is required?*
>
> *There is also the question of - if the Doctor reports that I can return to work eventually but not now i.e. only after further counselling, treatment, what happens then? Do I have only Medical Retirement or resignation as options?*
>
> …

[53] Ms. Draper responded on September 22, 2014, in part:

> …
>
> *In my letter of April 30, 2014, and as reiterated in my email dated July 22, 2014, I advised you that a letter from your medical practitioner* ***was required*** *to support an extension to your leave without pay. Your email of July 1, 2014 indicated that you met with Dr. Welburn at the end of June 2014, and that I should receive a medical note by July 4th in support of an extension. In your July 9th email to me, you indicated that you would try to have "a detailed and comprehensive update by July 11, 2014" after recently having seen another medical professional. I have not received any documentation to-date from you from either your appointment with Dr. Welburn on June 26th or from the other medical professional you mentioned.*
>
> *I require a medical note to validate your continued absence on which your 6-month extension was based, and request that you please send it to me* ***no later than October 3, 2014****, as two months has* [*sic*] *passed since you said you would have it to me.…*
>
> …

[Emphasis in the original]

[54] The grievor testified that he met with a different doctor, Dr. Anello, who wrote this letter to the employer, dated September 14, 2014:

…

I am a medical doctor duly qualified to practice medicine in Ontario by the College of Physicians and Surgeons of Ontario (Licence # 50083). I am a member in good standing of the Canadian Medical Association, Ontario Medical Association, a member of the GP Psychotherapy Section and a member of the Complementary Medicine Section of the OMA.

I saw Mr. Ibbitson for issues of anxiety, depression, insomnia all made worse by stress in his life due to family issues, including being caregiver for his mother following a CVA. He also has medical issues of endocrine dysfunction for which he has seen Dr. Usman Chaudhry (Endocrinologist). He does not have a regular family doctor at this time. I have a focused practice in Psychotherapy/Complementary Medicine and have agreed to see him in the interim and write this letter in support of his medical leave of absence.

I trust this is helpful in Mr. Ibbitson's ongoing care.

…

[55] Ms. Draper testified that she required more information from Dr. Anello about a timeline for the grievor's return to work. On October 6, 2014, in an email to the grievor, she acknowledged receiving Dr. Anello's letter, which also stated, in part:

…

As I stated in my September 22nd email below: "if your treating physician(s) has/have advised you that they do not foresee you able to return by November 3, 2014, then you will be required to choose from the other remaining options available to you to resolve your leave without pay situation with the CRA. If your treating physician(s) feel(s) you will be able to return by November 3, 2014, then I will require a new OFAF to be completed to identify any limitations/restrictions that may require accommodation" in your substantive SP-7 position. Until you are cleared to return to work and I have a medical note to substantiate that, it is premature to consider any work-related options.

…

If Dr. Anello believes that you are able to return to work at the present time, then you will need to provide me with a medical note to that effect. Once that is presented, I would then proceed to have your medical practitioner complete the OFAF.

> *If Dr. Anello believes that presently you are still* ***not*** *medically able to return to work, you must choose between the two options remaining. That is, retire (for non-medical or medical reasons).*
>
> *In this regard, I would appreciate* ***having your decision concerning which option you are choosing no later than Friday, October 31, 2014, end of business day****, including the medical note if you are able to return to work. Please understand that no further extension will be granted if you cannot return at the present time.*
>
> *I trust that I will have your cooperation to respect the deadline put in place.*
>
> …
>
> [Emphasis in the original]

[56] The grievor advised Ms. Draper that he was unable to obtain clarification from Dr. Anello because he was no longer Dr. Anello's patient, and he had been unable to obtain the services of any other doctor. He testified to feeling frustrated at not being able to find a family doctor.

[57] Ms. Draper testified to her own feeling of frustration that the return-to-work process had completely stalled because of the grievor's inability to obtain a medical assessment. After consulting her labour relations advisor, Ms. Draper proposed sending the grievor to WHCS, the CRA's health services provider, for the necessary return-to-work evaluations. The grievor consented and testified that at the time, he was excited by the prospect of being evaluated for a return to work.

[58] Ms. Draper drafted a letter for WHCS dated November 26, 2014. She provided the grievor with a copy for his review.

[59] The grievor had some issues with the proposed draft letter. On January 12, 2015, he emailed the following to Ms. Draper:

> …
>
> *Here are the concerns I have with the draft WHCS letter you propose for me which you sent me a draft of on November 26, 2014:*
>
> *1. The letter describes me as being an employee of CRA since March 2001, but I have service that I successfully bought, that goes back to 1998. I was told my 15th anniversary was at least two years ago. Meaning I have been a CRA Employee since at least 1998?*

> *2. Dr. Welburn, as he is only a psychologist, filled out the original OFAF form with the assistance of my then family physician. The return to work OFAF he filled out with a description of restrictions and limitation, on his own. The more intangible mental/emotional restrictions seem to be what you are asking the WHCS physicians to* **not** *provide. I also note that the letter asks WHCS to determine if I am "***physically** *fit to return to work", but there is no mention of whether I am mentally or emotionally able to return to work? How can this be useful if my condition is one that centers on PTSD? This also begs the question, what group of professionals or individual professional will be assessing me for WHCS?*
>
> *3. I am really surprised at the* ***explicit restriction*** *noted in the letter as instruction to WHCS that my work is* ***not conducive*** *to telework. I recall that there were at least three people on my own team that were regularly working from home using telework ….*
>
> *4. The bolded instruction -* ***"Please do not include a diagnosis or recommend an accommodation measure(s)"*** *- seems to be a restriction to prevent my returning to work, as it directly contradicts the purpose of the OFAF and especially as that it may be likely that I can only return to work with certain accommodations. Identifying limitations and restrictions in the OFAF inherently indicates accommodations, would it not? Especially as Dr. Welburn's previous instructions were deemed acceptable?*
>
> *5. As WHCS is located in Toronto, and Toronto is a short commute from Waterloo, I can easily attend any sessions WHCS needs me to attend in Toronto.*
>
> *6. I would appreciate a copy of the full package that you propose to send to WHCS, including all enclosures.*
>
> *7. As Dr. Welburn is not a medical professional - he is a psychologist, not a psychiatrist, any consent I sign to allow WHCS consultation with my physicians should not apply to him. Is that correct?*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[60] Ms. Draper responded by email on February 10, 2015:

> *Chris, below is my response to your email in the order the questions appear in it.*
>
> *1) According to CAS, your start date with the CRA and your continuous employment are showing as March 2001, while your continuous/discontinuous service dates from September 1998. Your start date within the public service is September 1995.*

2) I am aware that Dr. Welburn is a psychologist. When you were preparing to return to work in 2013, there was never any concern or issue mentioned by you or Sun Life in regards to Dr. Welburn supplying CRA with information to assist in your return to work, which included providing limitations/restrictions. It would appear that he was likely the best qualified, more so than your family physician, as he specializes in treating patients with PTSD.

The wording in the drafted letter can be revised to remove the word "physically", as the fundamental purpose of the assessment is to determine if you are fit to return to work in all capacities – mentally, physically and emotionally.

In regards to who will assess you from WHCS, I can confirm that our health service provider's roster of doctors includes only qualified medical practitioners. Your initial assessment will be with a medical practitioner, however should he/she feel that they require a more specialized practitioner (such as a psychologist in a certain field) to assess the medical condition, then you will be referred to a specialist through the WHCS office (hopefully they have someone already qualified on their roster; if not, they will seek the necessary specialist and request appropriate security clearance through CRA channels). The specialist will prepare a report for the WHCS doctor, and from there the WHCS doctor will finalize the fitness to work assessment report and release it to CRA.

3) Telework may be a type of accommodation measure that can be considered when an employee requires accommodation, if it is feasible for the work to be performed. Telework still remains the discretion of management, even when an accommodation is to be considered. The Employer determines if an employee's work is conducive to telework; the doctor is not in a position to do that as he/she has no knowledge to speak to the business needs and operational requirements of the CRA. Telework however will not necessarily be the sole measure to consider, and management will therefore evaluate all possible accommodation measures that can respect any limitations/restrictions identified. Each request for accommodation is reviewed on a case-by case basis, so I cannot speak to any of the situations you indicated. As you have been gone for over 2 years, the work environment has changed in many ways. The work within my area is based on a team environment that requires staff to be present in the office, to be able to effectively communicate and discuss work, to develop and implement strategies to ensure a consistent approach, to participate in learning events, which include on-the-job training, to facilitate the transfer of corporate knowledge, to participate in adhoc [sic] meetings with other stakeholders both within and outside the division as we manage different workloads, etc.. We currently do not permit full-time telework arrangements, so as to optimize on the business needs of the work done in this area.

4) To clarify, the doctor's role is not to provide management with accommodation measures as they do not know the work environment, the business needs or the operational requirements that must be taken into consideration when an accommodation is put in place. The Injury and Illness Policy *as well as the legislation on the duty to accommodate are both clear to indicate that it is the Employer who identifies the accommodation measure to put in place, which must be reasonable to respect the limitations/restrictions, and the employee is to understand that a perfect solution may not be possible or meet the employee's preferences.*

The limitations/restrictions that are provided by the doctor are related to your functional ability to perform your work duties, that is what tasks or actions you cannot do, or can only do for a certain period of time, as a result [*sic*] *your medical condition. The limitations/restrictions may be permanent or temporary, depending on the medical condition.*

5) A revision to the letter can be made to indicate that you are available to attend an appointment within the Toronto area as well, and not just within Kitchener/Waterloo.

6) The attachments identified in the draft letter are documentation for which you already have copies, as they are information that stems from the assessment that was being undertaken to assist in your return to work … I will therefore not be sending you a copy, to avoid any further delay in addressing your leave without pay situation which is now going on 3 years. Management has been more than accommodating in working with you through this process over the past year, and no longer want to delay bringing resolution to this matter.

7) Dr. Ken Welburn is a clinical psychologist and I understand he is to be well renowned in his field of PTSD. To be able to practice clinically, these types of psychologists must hold a clinical license to practice. Psychologists will evaluate, diagnose and treat their patients, similar to an MD. The CRA recognizes these practitioners as acceptable medical professionals to assist in fitness to work assessment [*sic*]*. Therefore, any consent you sign may encompass WHCS to consult with him, or subsequently the specialist if the WHCS doctor feels a referral is necessary to complete the assessment. Any information shared between the medical professionals for your assessment is strictly kept between them, to secure doctor-patient confidentiality, with the fundamental purpose to determine your fitness to return to work. If your consent is not given, then the CRA cannot proceed with a fitness to work assessment, which will mean that you will not be allowed to return to work and will have to choose from the other options presented to you to resolve*

> *your leave without pay situation – namely resign or retire (medically or otherwise).*
>
> *Based on your desire to return to work I provided you with a consent form in the package sent to you on November 26, 2014, to sign to agree to undergo a fitness to work assessment. I would appreciate if you could provide me with your decision to consent to undertake the fitness to work assessment by signing and returning the consent form no later than February 28, 2015. Without your consent, I cannot schedule an appointment with the WHCS office. If you fail to return your consent by that date, I will require you to choose from the other options available to resolve your leave without pay situation (i.e. resign, retire or retire on medical grounds) no later than March 13, 2015. If you do not comply, then I may have to take the necessary steps to end your employment with the CRA pursuant to 51(1)(g) of the* CRA Act*.*
>
> …

[61] Ms. Draper then revised the draft to the grievor's satisfaction and obtained his consent for the WHCS medical assessment. The revised draft, along with the Occupational Fitness Assessment Form (OFAF), describing the grievor's physical work-related capacities, was sent to WHCS.

[62] The grievor underwent the assessment in the spring of 2015 in Toronto. He testified to what he testified was an inadequate and unsatisfactory analysis at the hands of the WHCS medical assessment team.

[63] Dr. Jugnundan, the physician coordinating the WHCS medical assessment, provided his report on June 15, 2015. He checked boxes on the OFAF indicating "No limitations/restrictions" for every category, except the one entitled "Social/Emotional demands". These are the doctor's handwritten comments on the limitations and restrictions with respect to the social and emotional demands of the grievor's job:

> *Able to work at own occupation*
>
> *Able to work at previous location after completion of appropriate treatment recommendation (4-6 mo.)*
>
> *Until completed*
>
> - *restricted from leadership roles*
> - *restricted from previous work location*

[64] The WHCS report was released to CRA management on July 14, 2015. Ms. Draper testified to her opinion that the articulation of the limitations and restrictions was overly broad. She wanted two of the limitations and restrictions clarified, namely,

the work location, and the employees and supervisors in the work environment. Ms. Draper engaged the services of Claudine Chauret, who acted for her from time to time because she (Ms. Draper) was on a temporary leave of absence from work.

[65] Both Ms. Chauret and Ms. Draper testified that they were regularly in contact with one another about the grievor's return-to-work situation despite Ms. Draper's absence. They communicated by telephone frequently.

[66] Ms. Chauret testified to working with Barbara Dempsey, a CRA labour relations advisor, on drafting the request for the required clarifications.

[67] With respect to the first clarification, namely, the work location, Ms. Chauret testified to discussing the work-location issue with Ms. Dempsey. Ms. Chauret testified that the Labour Relations team agreed that the work location would not be an issue because the CRA's office had been relocated from its MacArthur Street address in Ottawa to 750 Heron Road. With respect to the second issue, she testified to preparing a series of bullets for the WHSC medical assessment team's consideration, as follows:

> …
>
> *• The employee's substantive position reports to a Senior Programs Officer, for whom the employee has never worked with before, for workload purposes (review work, help with questions, etc.)*
>
> *• The employee's manager is new to the section, having joined after the employee commenced his extended period of sick leave, so he has never worked for or with this manager.*
>
> *• The manager is currently on extended sick leave until Sept 18th; her replacement is a former colleague. However interaction with the manager is very minimal, primarily to address performance issues and approve leave requests (ie. reporting absences, requesting vacation, etc.)*
>
> *• If the acting manager must address a situation that the Senior Programs Officer cannot, then the matter would be referred to the Director, for whom the employee has never reported to or had interactions with (same Director as prior to commencing on extended sick leave).*
>
> *• Employee would be re-located to another floor in the building at 750 Heron Road where the team is situated. He can call into team meetings etc. and not actually attend to the same floor for anything as management can go to him.*
>
> …
>
> [*Sic* throughout]

[68] That team responded as follows to management's request for clarification on the accommodation issues:

> …
>
> *We would assume that there would be no issues with this work arrangement including the Acting Manager. We have no names of the person(s) that CI* [the grievor] *perceives precipitated his increased symptoms however given that interactions with the Acting Manager would be on rare occasions, we predict no issues. However, we would suggest that the worker be directly asked if he has any issues working on an occasional basis with the acting manage* [*sic*]*.*
>
> …

[69] Ms. Chauret testified to being the "Acting Manager" that the WHCS medical assessment team mentioned in the above paragraph. The grievor testified that he was never asked if he would have any issues working with Ms. Chauret. She testified that she probably should have spoken with him about whether he had any issues with working with her, but she did not. She could offer no explanation as to her rationale for not speaking to him about it.

[70] The grievor testified that he received one copy of the WHCS report from the employer, which contained the handwritten note about limitations and restrictions, and a second version of it from WHCS itself, which contained the paragraph reproduced in this decision.

[71] Ms. Draper testified to being satisfied with the clarifications and with the plan to return the grievor to work at a new building, with new supervisors and colleagues and on a different floor from the rest of the team, which met the WHCS accommodation specifications. Ms. Chauret emailed him on October 2, 2015, offering him bereavement leave. Otherwise, he was to report to work on October 5, 2015.

[72] The grievor, on the other hand, was not satisfied with the WHCS's clarifications. Instead of reporting to work on October 5, 2015, as instructed, he expressed his misgivings in lengthy written correspondence on that date. Ms. Draper responded on October 19, 2015. Due to their importance in these proceedings, I will reproduce these items of correspondence in full, but for ease of reference, I will reproduce the grievor's six concerns one at a time followed by Ms. Draper's response to each of them in turn.

A. The grievor's concerns with the WHCS limitations or restrictions and Ms. Draper's response

1. His first concern

[73] The grievor wrote his first concern as follows:

> …
>
> *As I have been living in Waterloo these last two years, I would have to try to find a place to live, presuming I have to move, wherever it is that I am to be working. I would also have to arrange the movement of my stuff out of my Sister's Home and out of my ex-wife's garage. As I do not know yet where I am working for the next 4 to 6 months, it is hard for me to make those preparations. All of this while my Mother has just died, her funeral service taking place and estate matters to be taken care of.*
>
> *Once I know where I am working, then I can find a place to live, a place to move my stuff to.*
>
> …

[74] Ms. Draper's written response was as follows:

> …
>
> *#1. Management is willing to grant sick leave without pay with a medical certificate justifying your absence from work from September 16, 2015, onwards. In regards to your move to Waterloo, during a telephone conversation with you on November 14, 2014, I had advised you of the likelihood that you would need to return to Ottawa. Also, in my email of February 10, 2015, I advised you that we currently do not permit full-time telework arrangements, so as to optimize on the business needs of the work done in this area. In addition, in Claudine's email of September 16, 2015 (see below), you were advised that your work location would be in Ottawa. Therefore, it was clear that you are expected to return to the Ottawa office located at 750 Heron Road.*
>
> …

[75] Ms. Draper testified to having many conversations and emails with the grievor that made it abundantly clear that telework was not an option and that his new workplace would be in Ottawa. He did not challenge her in cross-examination on these points.

2. His second concern, and Ms. Draper's response to it

[76] With respect to his second concern, the grievor wrote the following:

…

*#2. Accommodation measures, as noted in WHCS/OFAF report - I have not heard anything from Management as to what is proposed in this regard. "**Restricted from previous work location**" and "**after completion of appropriate recommended treatment**" are the notes made in the report.*

Again, once I know where I am working and receiving treatment I can make the relevant preparations. But I have received no indications from management as to where I am to be working or what is appropriate treatment. And again, it is difficult to prepare for a return to work when I don't know where that workplace is, or what treatment is appropriate and where that treatment might be.

…

[Emphasis in the original]

[77] Ms. Draper responded as follows:

…

#2. The report states that the only area where you have limitations in is "social and emotional demands", and the limitations noted by the doctor are:

Able to work at own occupation

Able to work at previous location after completion of appropriate treatment recommendation (4 - 6 mo)

Until completed

- Restricted from leadership roles

- Restricted from previous work location

As Claudine indicated in her email of September 16, 2015:

*"The WHCS doctor has confirmed that given the limitations/restrictions identified in the report, you can return to work in your substantive position within the Validation Policies and Procedures Section. Given this, we will need to discuss with you the logistics to your return to work, which includes the **temporary** accommodation measure(s) that management will be implementing to respect the limitations/restrictions identified in the WHCS report while you seek the appropriate and recommended treatment, and subsequently confirm a date that would be acceptable to allow you time to get your affairs in order to return to Ottawa. As indicated in the report, upon completion of treatment (within a 4-6 month period), you should no longer would require an accommodation. Management will therefore need to know when your treatment will be concluded to bring conclusion to your accommodation."*

> *I can reconfirm that you will be required to work at 750 Heron Road in Ottawa, and management will ensure a reasonable and suitable accommodation is provided to accommodate your temporary limitations and restrictions while you are undergoing treatment. This temporary accommodation will be outside the area on the 6th floor where the Validation Policies and Procedures Section is currently situated, as discussed with WHCS for clarification. For example, your office may be located on a temporary basis on a different floor. WHCS has not indicated that you are incapable of returning to your substantive position which is located in Ottawa (noting that the letter to WHCS clearly indicated that your position is in Ottawa).*
>
> *I cannot comment on the treatment, since management it not privy to that type of information other than it is your responsibility to seek assistance with a medical practitioner to get a referral for appropriate treatment.*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

3. His third concern, and Ms. Draper's response

[78] The grievor wrote as follows:

> …
>
> *#3. 'While in treatment' seems clear enough, but who decides what this treatment should be? With whom? and where? And as that seems crucial to my successful return to work, again, how can I make arrangements for the return to work until I know what those details are? Selection of correct treatment is essential for a successful return to work. Should that determine where I end up working in the transitional period? The preferred recommended treatment from the main consultant to WHCS was a course of treatment based here in Southern Ontario that is, serendipitously, funded by OHIP. Can CRA find me a posting for 4 to 6 months in Southern Ontario? This would allow me to attend the recommended treatment course. But I have heard nothing from work about this.*
>
> …

[79] Ms. Draper responded:

> …
>
> *#3. As accommodation is a shared responsibility, you will need to undertake your part to initiate necessary treatment. Until the treatment is undertaken, I can assure you that a reasonable and*

> *suitable temporary accommodation will be implemented based on your current limitations and restrictions, confirmed in consultation with WHCS as being acceptable.*
>
> …

[80] In cross-examination, the grievor admitted that after he received the WHCS report, he did not speak to any medical professional about anything, including the apparent availability of a program of treatment in southern Ontario.

4. His fourth concern, and Ms. Draper's response

[81] The grievor wrote:

> …
>
> *#4. The Diagnosis that the Consultant to WHCS has made is from the latest reference work created for his profession. Unfortunately, that iteration of that reference work and the particular diagnostic entity he has selected are receiving some of the harshest criticism from experts within that profession that has been received in recent years. Indeed, some major health organizations in the US have refused to use the reference work in question and are also not recognizing the various entities postulated in the reference work, including the one used in this instance by this consultant. Even without these particular professional concerns, I still have other factual issues with the diagnosis. This begs the question, is this the correct diagnosis? What can be done if I feel this is not the right diagnosis? Who can answer these questions? What advice can Management or the Union provide to these questions? I look forward to a detailed response from Management and the Union.*
>
> …

[82] Ms. Draper replied:

> …
>
> *#4. The WHCS doctor has confirmed that you are fit for work. You were referred to WHCS since you no longer had a doctor. I had previously advised you in an email dated February 10, 2015, that:*
> "In regards to who will assess you from WHCS, I can confirm that our health service provider's roster of doctors includes only qualified medical practitioners. Your initial assessment will be with a medical practitioner, however should he/she feel that they require a more specialized practitioner (such as a psychologist in a certain field) to assess the medical condition, then you will be referred to a specialist through the WHCS office (hopefully they have someone already qualified on their roster; if not, they will seek the necessary specialist and request appropriate security clearance through CRA channels). The specialist will prepare a report for the WHCS doctor, and from there the WHCS doctor will

> finalize the fitness to work assessment report and release it to CRA." *The medical practitioners that you have seen provided their expertise, and the report is the outcome of their assessment.*
>
> …

5. His fifth concern, and Ms. Draper's response

[83] The grievor wrote:

> *#5. There are various discrepancies in the various reports that I have from WHCS; for now, I will note the most relevant one for the purposes of this email. In one version of the OFAF I have there is a paragraph that has been removed by photocopying it with taped paper over the missing paragraph. In another version of the OFAF I have, there is the same missing white patch in the OFAF document, but an* **additional** *"missing" paragraph which itself has obviously been cut and pasted from another larger document is present.*
>
> *I hesitate to share this information with you, as I am unsure of the relevant privacy concerns, but it seems important and directly pertinent to the current endeavour. I do not know who the author is as there is no attribution.*
>
> *The paragraph is the following typewritten text, which itself seems to be cut from a larger typewritten text:*
>
> *"We would assume that there would be no issues with this work arrangement including the Acting Manager. We have no names of the person(s) that CI perceives precipitated his increased symptoms however given that interactions with the Acting Manager would be on a* [*sic*] *rare occasions, we predict no issues. However, we would suggest that the worker be directly asked if he has any issues working on an occasional basis with the acting manage" (sic).*
>
> *This paragraph* **was not present** *in the copy of the OFAF that was sent to me by management.*
>
> *I have not been directly asked if I have any issues working with the acting manager. I'd like to take this opportunity to state that working with you, Claudine, whether as the acting manager or not,* **does cause me anxiety**, *does cause me "issues".*
>
> *Does this mean we should wait to continue with this process until Ms. Draper returns to work? I did find it odd that when I called her phone number of record recently, it was no longer her current number. Is there something I should know about the VPP team? Can Ms. Draper still be reached at* [number]*?*
>
> [Emphasis in the original]

[84] Ms. Draper responded, "The latest report form [*sic*] WHCS is the report that management is referring to and was sent to you on September 16, 2015. If you need an additional copy please let me know and I will resend one."

[85] The grievor did not ask Ms. Draper any questions about her response to this fifth concern when Ms. Draper was on the witness stand.

[86] The grievor testified about his one misgiving about working with Ms. Chauret. It was about one incident before he went on sick leave in 2012. They had been researching an aspect of a project that they had been working on. Since he did not question her about this incident when she was on the witness stand, which would have given her the opportunity to consider it, I gave no weight to this part of his testimony, as it ran afoul of the rule in *Browne v. Dunn*, 1893 CanLII 65 (FOREP). Ms. Chauret, in direct examination, stated that she had a professional relationship with the grievor. The grievor did not challenge her on this.

6. His sixth concern, and Ms. Draper's response

[87] The grievor articulated his sixth and final concern as follows:

> …
>
> *#6. In all of my dealings with the various professionals I have dealt with regarding my various work absences over the years,* ***each one*** *has emphasized that a successful return to work involved a 'supported transition'. In most cases that involved a 'stepped' return, i.e. 8 hrs a week for the first two weeks, 16 hrs a week, etc. etc. until a full time schedule was achieved. As well, counselling was to be ongoing during that transition and for some time after it having been* [*sic*] *completed. This seems supported by the* ***"after completion of appropriate recommended treatment"*** *note from the OFAF. I hope that something similar can be worked into the plan for my return to work.*
>
> …
>
> [Emphasis in the original]

[88] Ms. Draper responded in the following fashion:

> *#6. In the latest report, the medical professionals have not recommended a gradual return to work as a requirement. They state that you are fit to return to work. As I have advised, unless you provide me with medical information justifying your continued absence from work, your absences may be considered unauthorized.*

B. The events of October and November 2015 that led to the termination

[89] The grievor did not return to work or provide a doctor's note following his exchange of correspondence with Ms. Draper about the limitations and restrictions. Despite his misgivings in his written correspondence, he did not question either Ms. Draper or Ms. Chauret on their interpretation and approach to the WHCS limitations and restrictions when either of those witnesses were on the stand.

[90] Ms. Draper, who by then had returned to work from her temporary leave of absence, wrote a letter to the grievor dated October 20, 2015. In it, she summarized the steps that had been taken recently to return him to work, or in the alternative, to have him provide a medical certificate explaining his absences. In part:

…

> *You are hereby requested to report to work on Monday, October 26, 2015, as you are deemed fit to work. In addition, you are to provide me with a medical certificate no later than October 26, 2015, to support your continued absence from September 16, 2015 to October 23, 2015, inclusive. Should you not be able to return to work due to illness at this time, then the medical certificate must cover the period of your absence from September 16, 2015, onward, stating that you have been unable to report to work due to illness and must include a return to work date. Should you fail to report to work on October 26th or provide me with a medical note to confirm ongoing medical leave with a return to work date, you will be considered to be on unauthorized leave and potentially to have abandoned your position with the CRA.*
>
> *I would also like to make sure that you are aware that the Agency's Employee Assistance Program (EAP) is available to provide confidential assistance and advice to all employees who voluntarily seek help in coping with personal, health, family, behavioural or work-related problems. If you wish to do so, contact the* [EAP at a number] ….

…

[91] The grievor did not report to work by Monday, October 26, 2015. Ms. Draper testified that the employer received no medical certificate, and the grievor testified that he did not make any effort to contact a medical practitioner or the EAP. Nor did he make an effort to return to work.

[92] Ms. Draper then sent the grievor the following letter, dated October 27, 2015, which opened as follows:

…

> *Mr. Ibbitson,*
>
> *This letter is in follow up to my letter dated October 20, 2015.*
>
> *As of September 16, 2015, you are considered to be absent without authorized leave since you have been deemed fit to return to work by the CRA's health service provider, Workplace Health and Cost Solutions.*
>
> *To date, you have not returned to work as instructed on October 2 and 20, 2015 nor have you provided any medical documentation to support a continued need to be absent due to illness since September 16, 2015.*
>
> …

[93] At that point in the letter, Ms. Draper repeated the chronology of events from September 16 to October 20, 2015. After that, her letter went on to state:

> …
>
> *You have failed to report to work on October 26, 2015 as ordered to do, and you have not provided me with a medical note to justify an absence since September 16, 2015 due to illness. Your leave is therefore considered to be unauthorized.*
>
> *You are hereby advised that you must report to work on November 2, 2015, or provide me with a valid medical certificate by November 2, 2015, to substantiate that you are unfit to work at the present time. The medical certificate must cover the period of your absence from September 16, 2015, onward, stating that you have been unable to report to work due to illness and must include a return to work date. Failure to comply with this order will result in management considering you to have abandoned your position and will therefore be putting* [*sic*] *forward a recommendation to terminate your employment for cause, pursuant to subsection 51(1)(g) of the* Canada Revenue Agency Act*.*
>
> *Should you wish to seek support during this time, you may access the Employee Assistance Program (EAP). The confidential services are available to you and to members of your family at no cost. For EAP related matters, you may call* [number].
>
> …

[94] The grievor did not report to work, contact the EAP, or make any attempt to contact a medical professional after he received that letter. In cross-examination, he was asked whether he was aware of other methods of seeking medical attention, such as attending a walk-in clinic or an urgent-care centre, going to any hospital's emergency ward, or engaging a specialist's services. He acknowledged that he was

aware of those options. He was aware of the urgency of the situation at the time, and he knew that his job was on the line. He testified that he was aware of those and other options but that he did not pursue any of them. He offered no explanation, other than his perception that a medical practitioner at any one of those facilities would have been unlikely to provide the kind of ongoing care that he felt he needed.

[95] Ms. Draper testified to preparing a synopsis and chronology of events for the CRA's director general, Kevin McKenzie. She testified to attending a number of meetings with Mr. McKenzie on this file.

[96] Ms. Draper also drafted the termination letter, which bears Mr. McKenzie's signature and is dated November 3, 2015. It reads as follows:

> …
>
> *The purpose of this letter is to inform you that your failure to report to work as instructed or to provide a medical note to justify continued leave without pay due to illness has necessitated the review of your employment status with the Canada Revenue Agency (CRA).*
>
> *You have been deemed fit to work by the CRA's health service provider, Workplace Health and Cost Solutions (WHCS), following the assessment report completed on June 23, 2015, which was released to management on July 14, 2015. Management required clarification from WHCS on the limitations/restrictions identified, and subsequently received written confirmation from WHCS on August 28, 2015. On September 16, 2015, management communicated with you in order to work with you on a return to work. You were also mailed a copy of the WHCS assessment report.*
>
> *As described below, management's efforts to work with you for a return to work have been unsuccessful. Furthermore, you have failed to provide management with a medical note to substantiate the need for continued leave without pay for illness.*
>
> - *On September 16, 2015, Claudine Chauret contacted you via email and advised you to contact her by Friday September 25, 2015, to discuss your return to work. On the same day you advised management of your mother's passing and that you would review the report.*
> - *On September 24, 2015, Claudine Chauret contacted you via email, and advised you that "at this time the only information we have is a report that states that you are fit to return to work, which means that we would expect you back in the office. However, given the circumstances should you wish to request some leave from work, I am willing to grant bereavement leave based on your collective agreement. If you chose to use sick leave without pay I will need a medical*

certificate indicating the start and end dates of your sick leave. Could you please advise me by Monday, September 28, 2015." No further medical information has been provided by you as requested.

- *On September 30, 2015, you sent an email to Claudine Chauret, but did not provide any details concerning your continued leave nor your return to work.*
- *On October 2, 2015, Claudine Chauret sent you and email in which she reiterated that "unless you have a medical certificate that says otherwise, management currently has a medical assessment which stipulates that you are fit to return to work. Therefore you are expected to report to work, otherwise your leave may be considered unauthorized. Given the circumstances with your mother's passing, I am willing to grant you some bereavement leave from work and or if applicable, sick leave without pay supported by a medical certificate to justify your absences to date. With that said, I am willing to honour your request to advise and provide me with medical information by Oct 5th latest. Otherwise, if I do not receive a response with a medical certificate justifying your absences from work by Oct 5th, you are expected in the workplace as of that day, (Monday, October 5, 2015)." You failed to do as instructed.*
- *Trish Draper sent you a letter dated October 20, 2015 to advise you that you were required to report to work on October 26, 2015. Should you not be able to return to work, you were advised to provide a medical note by October 26, 2015 stipulating your inability to work due to illness dating back to September 16, 2015. You acknowledged having received the letter on Friday, October 23, 2015 in an email dated October 26, 2015 (3:37 p.m.), however you failed to do as instructed.*
- *Subsequently, Trish Draper sent you another letter dated October 27, 2015 to again instruct you to report to work on November 2, 2015 or present her with a medical note to substantiate an absence due to illness since September 16, 2015. You were advised that you are on unauthorized leave, having failed to do as instructed by management previously.*

Further to these efforts, leave, as defined in your collective agreement, requires that it be approved by management. Furthermore, the Injury and Illness Policy *stipulates that leave without pay due to injury or illness cannot continue indefinitely.*

Following the letter of October 27, 2015, you were advised that failure to report to work on November 2, 2015 or present management with a medical note to validate your absence from work since September 16, 2015 on that date would lead to a recommendation for the termination of your employment for reasons other than breaches of discipline or misconduct. Accordingly, since you did not respect the order given to you, I

> *must inform you that I find it necessary to terminate your employment effective November 2, 2015 end of business day, pursuant to subsection 51(1)(g) of the* Canada Revenue Agency Act.
>
> …
>
> [*Sic* throughout]

[97] The grievor testified to sending the following email, dated November 3, 2015:

> *Hello Ms. Draper,*
>
> *I have been advised today by Linda Koender* [*sic*] *- Union Representative - that I should ask you for "leave without pay for personal needs".*
>
> *This is the only advice I have received so far.*
>
> *I have yet to speak to an EAP person, but plan to do so tomorrow.*
>
> *Depending on what EAP advises there may be further requests/advice/information from me regarding my position with CRA.*
>
> *I look forward to your reply,*
>
> *Chris*
>
> …

[98] Ms. Draper responded the following day, on November 4, 2015:

> *Chris, despite repeated requests, you did not report to work as instructed or provide a medical note to justify your continued leave without pay due to illness. Therefore, your employment has been terminated effective November 2, 2015 end of business day, pursuant to subsection 51(1)(g) of the* Canada Revenue Agency Act. *You will receive a letter shortly confirming same and providing additional details.*
>
> *Please return your identification card to me as instructed in my email of November 3, 2015.*
>
> *As for EAP, since you are no longer an employee of the CRA, these services are not available to you.*
>
> …

[99] The grievor concluded his testimony with his perception that he feels that his medical condition has not changed since November of 2015. He testified that he has never sought or obtained medical treatment since these events took place.

III. Summary of the arguments

A. For the employer

[100] The employer set out the legislative framework for a termination of employment from the CRA for non-disciplinary reasons.

[101] Section 51(1)(g) of the *Canada Revenue Agency Act* (S.C. 1999, c. 17; "the *CRA Act*") reads as follows:

51 (1) *The Agency may, in the exercise of its responsibilities in relation to human resources management,*	***51 (1)*** *L'Agence peut, dans l'exercice de ses attributions en matière de gestion des ressources humaines :*
…	[…]
(g) *provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part ….*	***g)*** *prévoir, pour des motifs autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur et préciser dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces mesures peuvent être appliquées, modifiées ou annulées, en tout ou en partie* […]

[102] The grievor was terminated for abandoning his position. It was an administrative action, and as such, the Board is without jurisdiction to hear the grievance, submitted the employer. It chose not to raise this preliminary issue and preferred to allow the hearing to unfold on the merits of the grievance.

[103] The employer submitted the case of *Lindsay v. Canada (Attorney General)*, 2010 FC 389 (*Lindsay*), in which the Federal Court rendered a decision on jurisdiction. At paragraph 2, it found as follows:

> *[2] Having duly considered the record and the parties' oral and written submissions, I have come to the conclusion that the decision of the Adjudicator is reasonable considering the facts that were before him. The Adjudicator's finding that he did not have jurisdiction, because the decision to terminate the Applicant had not been made on disciplinary grounds, is essentially a factual*

> *finding and is therefore entitled to a considerable amount of deference by this Court.*

[104] The case of *Pachowski v. Canada (Treasury Board)*, [2000] F.C.J. No. 1679 (T.D.)(QL)(*Pachowski*), submitted the employer, is similar to the present matter in that it involved an employee who was on sick leave that resulted from a fellow employee harassing her. She was given a choice of returning to her original position, transferring to another location, or resigning. Her employer indicated that if she did not return to work by a certain date, her employment would be terminated. This happened repeatedly until, after a final ultimatum, her employment was terminated. Paragraphs 64 to 68 read as follows:

> ***64*** *Thus, in examining whether the applicant was aware of the consequences of failing to obey the notice, the Adjudicator was assessing whether the respondent respected its duty of fairness and the Policy principle which imposes on the employer the duty to inform the employee that she or he is not meeting the requirement of the position, and to inform him or her of the nature of the deficiency and what the consequences will be if she or he continues to fail in meeting the requirements of the position.…*
>
> ***65*** *The only way the Adjudicator could determine if the respondent respected the Policy and acted reasonably and in good faith was to examine the respondent's orders that the applicant report for work and the respondent's statements that the applicant's employment would be terminated if she did not report to work.…*
>
> ***66*** *This duty of the Adjudicator to assess the warnings given to the employee is required to establish the reasonableness of the respondent's action in a non-disciplinary discharge.…*
>
> ***67*** *The Adjudicator also assessed the evidence regarding the various offers received by the applicant and the applicant's actions subsequent to those offers. In doing so, the Adjudicator was evaluating whether the respondent had provided the applicant with the opportunity to make the necessary adjustments to meet requirements and that the respondent had assisted the employee in making these adjustments.*
>
> ***68*** *The fact that the applicant chose not to return to work was relevant in the Adjudicator's determination that the respondent acted reasonably and in good faith. In considering whether the department's demand that the applicant return to her substantive position was illegal, immoral or unsafe, the Adjudicator was assessing whether the respondent's demand was not arbitrary, discriminatory or unreasonable, which is the applicable test in the case at bar.*

[105] The employer submitted *Asare v. Deputy Head (Department of Indigenous and Northern Affairs)*, 2018 FPSLREB 57 (*Asare*). It contains a framework for analyzing the reasonableness of an employer's decision to find that an employee abandoned their position. Paragraphs 577 to 581 read as follows:

> ***577*** *In* Laye, *I concluded that even though the deputy head's express authority to terminate employment by reason of abandonment was repealed by the* Public Service Reform Act *(S.C. 1992, c. 54), the provisions of the same statute expressly empowering the deputy head to terminate employment for non-disciplinary reasons include in that broad authority the power to terminate employment by reason of abandonment.*
>
> ***578*** *Section 12(1)(e) of the* Financial Administration Act *(R.S.C., 1985, c. F-11) empowers the deputy head to terminate employment or to demote to a position at a lower maximum rate of pay persons employed in the public service for reasons other than breaches of discipline or misconduct.*
>
> ***579*** *Based on the jurisprudence, I found in* Laye *that even in the absence of an express definition of abandonment in the legislation, the employer's guidelines, or the collective agreement, an employee may still be deemed to have abandoned his or her position in circumstances in which he or she has been absent from work for a significant period of time without authorization and without valid reasons, under circumstances within his or her control, and without notice to the employer, unless the employee shows that he or she was unable to notify the employer because of exceptional circumstances.*
>
> ***580*** *I also concluded based on a review of the jurisprudence that the employer's decision to deem an employee to have abandoned his or her position should be reviewed on a standard of reasonableness. The employer's decision is reasonable if, when viewing the factual situation at hand, it decides that the employee's conduct, viewed objectively, supports a conclusion of abandonment.*
>
> ***581*** *I also concluded on the basis of arbitral jurisprudence that there is an obligation on the employer to act fairly and in good faith when terminating an employee for non-disciplinary reasons and that when appropriate, the principles of notice, waiver, and condonation may apply.*

[106] That case further states this, at paragraph 583:

> ***583*** *In* Hayter, *at para. 65, Adjudicator Filliter stated that no definite line can be drawn between periods that will support a declaration of abandonment and that each case must be evaluated on its own merits, within its own context. Standing on its own as a factor to be considered in support of a declaration of*

> *abandonment, a period of absence from work of one year and three months appears to me to be a significant period of absence.*

[107] In this case, observed the employer, the grievor's unauthorized absence from work was from September 16 to November 2, 2015, or 7 weeks. This must be taken in the larger context of the grievor's total period of absence from the workplace. May of 2012 to November of 2015 encompassed 3.5 years. Generally speaking, the absent worker's skill set quickly begins to fade, as does their ability to work effectively in a team environment. Perhaps the greatest impact of a workplace absence is on the day-to-day work ethic and the drive to get up in the morning and go to work every day. With every month that passes, submitted the employer, the prospect of a successful return to the workplace diminishes. It argued that that is why, as more and more time passes, the approach must be more forceful to have the absent worker return to the work environment.

[108] The criteria for considering whether a position was abandoned were set out in *Hayter v. Deputy Head (Department of National Defence)*, 2015 PSLREB 15 (*Hayter*), as follows:

> …
>
> *45 Section 12(1)(e) of the* FAA*, in my view, provides authority to the Deputy Head to exercise his or her discretion to terminate for non-disciplinary reasons including abandonment. The decision of the Deputy Head is to be reviewed by an adjudicator on the standard of reasonableness (*Laye *and* Lindsay*). In other words, the employer must satisfy me that it acted fairly and in good faith.*
>
> *46 I accept the conclusion that in presenting their [sic] evidence, the employer did not have to establish that the grievor intended to abandon her position (*Lindsay*).*
>
> …

[109] The employer submitted the case of *Jensen v. Deputy Head (Department of the Environment)*, 2009 PSLRB 153, which involved a termination of employment under very similar circumstances. The employee failed to return to work despite the employer's accommodation measures, which were reasonable.

[110] In *Kwan v. Treasury Board (Revenue Canada - Taxation)*, [1996] C.P.S.S.R.B. No. 66 (QL), an employee who had been involved in a workplace altercation refused to return to work despite being offered another work location. Paragraph 68 reads as

follows: "Mr. Kwan could not understand that as an employee his first obligation was to report to work as instructed. He could have then requested a transfer to another department. He had no valid grounds to refuse a direct and legal order."

[111] Similarly, argued the employer, the grievor in this case could simply have shown up, if only for one day, to at least attempt to return to work. Instead, he chose to do nothing at all.

[112] The circumstances of *Lapointe v. Canada Revenue Agency*, 2020 FPSLREB 19 (*Lapointe*), are set out at paragraph 103 as follows:

> *[103] The grievor had been on leave without pay for illness or injury since December 16, 2008. Two years later, as per the policy on leave without pay, the employer provided him several options, including returning to work or taking medical retirement. His leave without pay was extended many times to allow him to obtain the necessary information from his family doctor to facilitate an accommodation commensurate with his functional limitations. The information was never provided. The help of a vocational assessment group was offered but was declined.*

[113] In *Lapointe*, at para. 137, the Board found as follows:

> *[137] The employer's actions of extending deadlines, offering an assessment service, and asking repeatedly for a statement from the treating physician and the grievor's consent to allow it to contact the physician all are difficult to reconcile with a punitive motive. Its efforts to return the grievor to work were met by a complete absence of cooperation.…*

[114] Those facts justified the termination in *Lapointe*, argued the employer, and should carry the day in this case as well. The grievor was offered several opportunities to return to work or to obtain medical notes justifying his absence and did nothing.

[115] The case of *Laye v. Deputy Head (Department of Agriculture and Agri-Food)*, 2013 PSLRB 27 (*Laye*), was cited to demonstrate the importance of providing notice to the employee of the possibility that they may be terminated for abandoning their position. Paragraph 178 reads as follows:

> *178 The letter that directed the grievor to attend the mandatory meeting in March 2011 did not give her notice that she might be deemed to have abandoned her position but rather notified her that the employer wished to discuss her unauthorized absence and her failure to maintain acceptable communications, which could*

> *lead to discipline up to and including termination. Further, there was no warning at the meeting of March 11 that her employment might be terminated because she had abandoned her position. She was not provided with any opportunity to provide input on that issue. I conclude that the failure to provide the grievor with notice that she may be deemed to have abandoned her position was arbitrary and unreasonable in the circumstances.*

[116] In the present case, argued the employer, clear notice was provided many different times to the grievor that he would be deemed to have abandoned his position unless he either returned to work or provided a medical note justifying his absence.

[117] In *Navikevicius v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 34, the former Board found reasonable the employer's determination that the employee's continuous absence from work constituted an abandonment of her position. At paragraph 123, it generalized as follows:

> *123 It is well accepted in labour jurisprudence that when an employee fails to show up for work without being on some form of authorized leave, that employee has for all intents and purposes abandoned their job, which is cause within the meaning of paragraph 12(1)(*e*) and subsection 12(3) of the* FAA. *(See, e.g.,* Lindsay, Okrent, Weiten, *and* Latchford*).*

[118] The employer argued that it demonstrated ample patience with the grievor, which was found an important factor in the case of *Okrent v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 65 at paras. 41 to 43 (*Okrent*), as follows:

> *41 Through her actions or lack thereof, she is deemed to have abandoned her position. The following was stated in* [Lindsay]:
>
> …
>
> An employer is fully entitled to expect an employee to show up for work. That is an intrinsic part of the employment relationship and contract. The employee needs advance authorization to be absent from work…. The only exceptions to that basic logic would be situations in which an employee, for compelling reasons, cannot contact the employer to obtain leave authorization.
>
> …
>
> *I concur with this reasoning. There is absolutely no evidence that the grievor had compelling reasons preventing her to obtain [sic] leave authorization. Despite very clear instructions and explanations as to the consequences of a failure to cooperate, the*

> *grievor chose to ignore the employer's legitimate requests. For months, she was absent from work on unauthorized leave. Consequently, I find that the grievor is deemed to have abandoned her position as it was the case in* Lindsay *where the adjudicator wrote at paragraph 97: "In this case, I find that the grievor has abandoned her position by being absent from work without authorization for a lengthy period of time."*
>
> *42 I find that the employer had ample administrative reasons to terminate the grievor's employment based on her ongoing failure to respond to its legitimate requests for information to substantiate her absences from the workplace. The employer had the right to terminate the grievor's employment pursuant to paragraph 12(1) e) of the* FAA.
>
> *43 On a balance of probabilities, the employer has proven that it acted fairly and in good faith when it terminated the grievor's employment. I should add that the employer was very patient with the grievor and that it could have terminated her employment sooner due to the numerous attempts it made to facilitate her compliance with clear and legitimate instructions and her ongoing failure to do so.*

[119] In the present case, argued the employer, the period of unauthorized leave was substantial, from September 16 to November 2, 2015. It demonstrated ample patience by clearly explaining the grievor's options and the steps that he had to follow to avoid being deemed to have abandoned his position, but he did nothing.

[120] Finally, the employer submitted the case of *Pachowski v. Treasury Board (Revenue Canada - Customs and Excise)*, [1999] C.P.S.S.R.B. No. 115 (QL), which was also on the issue of adequate notice to the employee with respect to abandoning a position. Paragraph 77 reads as follows:

> *77 Therefore, I find that the Department put the grievor on notice that she must report to work or risk termination of her employment; the notice to do so was not illegal, immoral, or unsafe; the grievor was aware of the consequences of failing to obey the notice; the grievor received independent advice from her bargaining agent representative with regard to the seriousness of the notice; the grievor chose to ignore the notice even after learning that the proposed settlement she and her bargaining agent advisor had crafted was rejected; the grievor knew, or ought to have known, that even after the proposed settlement was rejected, she could have obeyed the instruction to return to work but she chose not to; finally, there was no other factor which I was made aware of that the Department should have considered before terminating the grievor's employment.*

[121] The employer concluded its submissions by noting that it would be difficult to imagine what more it could have done. The grievor gave up seeking medical attention and gave up seeking to return to work. It submitted that the grievance must be denied.

B. For the grievor

[122] The grievor made no submissions on any of the cases that the employer cited.

[123] The grievor argued that the employer discriminated against him in his efforts to return to work based on his mental illness, namely, PTSD. He did not refer to any evidence that would have indicated a form of discrimination.

[124] The grievor submitted that the employer failed to follow the restrictions and limitations itemized in the WHCS report and that it failed its duty to accommodate him, in part because it did not familiarize itself sufficiently with the symptoms and manifestations of PTSD. He submitted that it erred by interpreting a consultant's opinion on its own rather than seeking a professional opinion, with the result that it did not fully understand the parameters and the implications, potential or otherwise, of PTSD.

[125] The grievor submitted the case of *Ontario Public Service Employees Union v. Ontario (Northern Development and Mines)*, 2007 CanLII 14610 (ON GSB)(*OPSEU*), in which an employee, whom the employer knew suffered from mental illness, reacted violently to a supervisor's criticism. The employee tendered his resignation, which was accepted without question. He sought and received reinstatement. Page 30 reads in part as follows:

> …
>
> *I agree that the grievor did not like what he was being told and he acted out in what only be described as an inappropriate and disrespectful manner. The obvious question that no one asked, however, was why… They viewed the grievor as a disgruntled employee and never had regard to what he was actually doing and saying. Even when the grievor tried to raise his mental health as an issue, it never occurred to either Mr. Hunt or Ms. Lepage that he might be asking for help. Not only did they consider it irrelevant, they made it clear to the grievor that they were there to discuss performance issues, not his health. If that was the grievor's cry for help, it was clearly ignored.*
>
> …

[126] Similarly, *Purolator Inc. v. Teamster's Local No. 91*, 2018 CanLII 81566 (ON LA) at 24 (*Purolator*), states this:

> …
>
> *Having regard to the circumstances of this case, the evidence reveals that Purolator gave limited regard to the Griever's medical situation rather focussing on its own mandated time lines. On reflection, I find Purolator's actions towards the Grievor, given the nature of his illness, were anything but reasonable.*
>
> …
>
> [*Sic* throughout]

[127] In the present matter, argued the grievor, Ms. Draper and Ms. Chauret made no effort to learn about PTSD. Had they done so, the grievor argued, they would have understood that some of its manifestations include avoidance.

[128] The grievor submitted that the employer failed its duty to accommodate. He submitted the case of *Seiu-West v. Cypress Health Region*, 2014 CanLII 21601 (SK LA)(*Seiu-West*). Paragraph 61 reads as follows:

> *61 …*
>
> *… The duty to accommodate is not a fixed and immutable rule. It arises when a combination of circumstances presents itself, which in each case will be different. In general, an employer is required to make a reasonable response to a reasonable request for accommodation. The individual, or his union, must make the first moves. Before an employer is required to respond, the individual must prove that he has a disability; that he cannot perform his old job (in whole or in part) by reason of the disability; and what abilities he retains to perform other duties the employer may reasonably have available.…*

[129] Further, paragraph 98 reads as follows:

> *98 It is* prima facie *discrimination for an employer to refuse to employ or to continue to employ an employee because of a physical or a mental disability. The Grievor's termination is* prima facie *adverse effect discrimination. The Grievor has a disability; she was terminated by the Employer for events linked to and flowing from her disability.*

[130] In the present case, argued the grievor, his termination was directly linked to his PTSD, and thus, he argued, he experienced discrimination at the employer's hands.

[131] The grievor also submitted the case of *Stevenson v. Canada (Canadian Security Intelligence Service)*, CHRT file number T.D. 16/01 (2001 CanLII 8497 (CHRT)) (*Stevenson*), in which Mr. Stevenson, who suffered from major depression of moderate severity, was medically discharged from the Canadian Security Intelligence Service. The grievor cited paragraphs 59 to 62 for the findings in that case, as follows:

> *[59] Mr. Stevenson alleges that he has been discriminated against by the Canadian Security Intelligence Service because they [sic] terminated his employment on a prohibited ground, namely, mental disability, contrary to section 7 of the* Canadian Human Rights Act. *I am satisfied that the complainant has in fact established a strong* prima facie *case of discrimination.*
>
> *[60] In coming to this conclusion, I am convinced that within days of being advised that Mr. Stevenson had requested stress leave, the wheels were put in motion by his superiors to find a way to terminate his employment. It is significant that as early as August 5, 1997, Mr. Peter Bulatovic, the Deputy Director of Human Resources, had already come to the conclusion that there were only three options to consider in the face of Mr. Stevenson's request for a three month leave of absence on medical grounds, namely, "retirement; retirement based on medical grounds; implement transfer to Ottawa." In addition, Mr. Bulatovic also specifies in the e-mail that he sent to Mr. Outhwaite on August 5, 1997, that Mr. Stevenson will have to be found fit to return to work in Ottawa, as there is no job for him in Vancouver.*
>
> *[61] The speed with which the Health Evaluation was requested also indicates a degree of bad faith on the part of Mr. Stevenson's superiors. There was no indication that Mr. Stevenson had abused his sick leave privileges prior to the request made on August 1, 1997. In fact, the Request for Health Evaluation submitted by Mr. Van't Slot to Mr. Outhwaite on August 5, 1997 indicates that Mr. Stevenson had used 7.5 days of sick leave in 1995-96, 10 days in 1996-97, and 5 days from April to July, 1997. One therefore wonders why Mr. Outhwaite suggests that the Health Evaluation should be undertaken as soon as possible "in view of the lengthy course, i.e. two years, Mr. Stevenson claims his illness has taken and the considerable effort he has already undertaken to obtain an evaluation of present and past psychologists."*
>
> *[62] I am also satisfied that the prerequisite that Mr. Stevenson had to be found fit to take the position that had been allocated to him in Ottawa was contrived.…*

[132] The grievor submitted the case of *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101 (*Rogers*), to support his argument that the employer discriminated against him by terminating his employment. In *Rogers*, the grievor went on medical leave in

2010 and unsuccessfully tried to return to work in 2012. At paragraphs 99 and 100, it reads as follows:

> ***99*** *The evidence is that the grievor could have returned to work and that the employer did not fulfil its duty to help him do so. The employer countered that as stated in* Renaud, *accommodation goes both ways, and the grievor simply did not provide enough information to allow it to accommodate him. In fact, the grievor had provided a completed OFAF in June 2014, and a follow-up by Mr. Leung had shown that a graduated return starting with two days per week, or fifteen hours, would have been a reasonable measure, according to the treating physician. At that point, the onus was on the employer, not the grievor, to consult the grievor and his bargaining agent as to the exact days and times he would work. This was not done, contrary to the employer's own policy. The employer made no attempt to accommodate him. Rather, starting with the request for a fitness-to-work evaluation, when his treating physician had stated that he was fully capable of returning to work, the employer used delaying tactics until the termination.*
>
> ***100*** *The employer discriminated against the grievor by not allowing him to return to work and by not actively seeking reasonable accommodation measures, including at the time of the termination. The employer has not met its onus of establishing that it fulfilled its duty to accommodate the grievor to the point of undue hardship.*

[133] In *Rogers*, the grievor was reinstated with full salary and benefits as of the termination. The grievor argued that the same remedy should apply in his case.

C. The employer's rebuttal

[134] The employer took issue with every case that the grievor cited. It stated that none are on point with the present matter, which is not a duty-to-accommodate case. Accommodation was never implemented because the grievor never returned to work. Had he returned and experienced the work environment under the terms of the WHCS's limitations and restrictions, even for as little as a single day, the potential would have been there to adjust the accommodation, if necessary. The point is hypothetical because the grievor simply never returned to work. He abandoned his position.

[135] The employer also took issue with the grievor's characterization of its approach to the fitness-to-work process as an exercise in bad faith. On the contrary, it argued,

Ms. Draper, in her letter to WHCS dated March 26, 2015, provided it every bit of information that the employer had in its file, to help WHCS with its evaluation.

[136] This is purely and simply a case of abandonment. The employer argued that the only evidence at the hearing that had anything to do with discrimination was the grievor's testimony. The grievor could point to nothing in the evidence indicating he experienced discrimination at the hands of either Ms. Draper or Ms. Chauret.

[137] The employer chose not to make a preliminary motion to the effect that the Board lacks the jurisdiction to hear this matter because this termination was an administrative measure. Rather, it wanted the grievance decided on its merits. It maintained that its decision to terminate the grievor's employment was reasonable because the evidence clearly demonstrated that he abandoned his position. It did everything it could to return him to work.

IV. Decision and reasons

[138] I read the cases that both parties cited, but I may not refer to them all.

[139] I agree with the employer that there was not so much as one iota of evidence suggesting any form of discrimination. The grievor himself admitted that he did not find any of the actions of Ms. Draper or Ms. Chauret discriminatory. Discrimination does not exist simply because the grievor said it did. There must be some evidentiary basis for this finding. Therefore, I find that his termination had nothing to do with discrimination on a prohibited ground. It is a case of abandonment of position.

[140] Every one of the cases that the grievor cited can be distinguished from the present set of facts.

[141] *Stevenson* was an exercise in bad faith by the employer in that case, which resulted in reinstatement. There is not the slightest indication of bad faith in the present matter.

[142] I do not understand why the grievor chose to submit the *Rogers* case in support of his position. Paragraph 100, which the grievor cited, states, "The employer discriminated against the grievor by not allowing him to return to work and by not actively seeking reasonable accommodation measures, including at the time of the

termination." The present matter, on the contrary, is characterized by earnest and repetitive attempts to return the grievor to work.

[143] The same is true of *Seiu-West*, which found that the employer terminated the employee's employment on the basis of a disability, which was clearly a prohibited ground of discrimination. *Seiu-West* has nothing to do with the present set of facts.

[144] The finding in *Purolator* was as follows:

> …
>
> *Having regard to the circumstances of this case, the evidence reveals that Purolator gave limited regard to the Griever's medical situation rather focussing on its own mandated time lines. On reflection, I find Purolator's actions towards the Grievor, given the nature of his illness, were anything but reasonable.*
>
> …
>
> [*Sic* throughout]

[145] The finding in *Purolator* has nothing to do with the grievor's circumstances. Rather than giving "limited regard" to his medical situation, the employer in this case fashioned its entire approach to his reintegration into the workplace on his medical situation. It provided ample flexibility by extending the period of LWOP to which he was entitled. Every time it received a medical note about his limitations and restrictions and possible accommodations, clarification was sought, to ensure the best possible chance of success at reintegration. That was hardly "limited regard". *Purolator* is completely off point.

[146] Similarly, *OPSEU* is about an employer readily accepting a letter of resignation from an employee it seemed quite happy to be rid of, without making any inquiry as to whether his decision to resign was a spur-of-the-moment manifestation of his mental illness, a medical condition with which the employer in that case was only too familiar. *OPSEU* has nothing to do with the present matter.

[147] The cases submitted by the employer, on the other hand, correctly reflect the nature of the present set of circumstances. I accept the cases of *Hayter* and *Asare* on the accurate articulation of the framework for analyzing the reasonableness of an employer's decision to find that a position was abandoned. The cases quite rightly point out that there is no set length for a period of unauthorized leave to trigger

administrative proceedings about a position being abandoned. The cases set out a range of several weeks to several years.

[148] In this case, I find that the period of unauthorized absence was substantial, from September 16 to November 2, 2015. This is almost seven weeks; a long time to sit there doing nothing, knowing that one is on a stretch of unauthorized leave and knowing that it could lead to a finding of abandonment of position.

[149] I also accept the line of cases articulating that an employer's approach must be reasonable and that its actions must be in good faith. In the present case, there is not so much as a hint of bad faith in any of the employer's dealings with the grievor. Every time he had a question or concern about some aspect of his proposed return to work, Ms. Draper went to great lengths to explain things to him. I deliberately reproduced the many pages of correspondence between them to demonstrate the painstaking manner in which she addressed his concerns, time after time. She was unfailingly polite and very clear about his options, about the procedures that he had to follow, and (most importantly) about the consequences of failing to act. He ignored all of it. Although he explicitly denied giving up on his job the same way he gave up on finding appropriate medical treatment, I find that this is exactly what he did.

[150] The turning point likely came at his June 26, 2014, meeting with Dr. Welburn, who seems to have suggested at that time that the grievor just go back to work and learn to live with whatever anxiety it would produce. The grievor did not want to, and he never even attempted to return to work, to see if he could actually cope. Instead, he shopped for a doctor who would not tell him what he did not want to hear, and he found Dr. Anello, who did not specify a return-to-work date. That, of course, might have suited the grievor quite nicely, but it was entirely unsatisfactory to the employer, who quite rightly took steps to obtain a medical assessment that would specify a return-to-work date should he be found fit to return to work.

[151] The grievor took issue with the WHCS report which cleared him to return to work. He was, however, unable to impugn or call into question any aspect of that report. The grievor maintains that it was up to the employer to educate itself about the many varied manifestations of PTSD, and that their failure to do so provided them with inadequate coping tools when it came to his tendency to avoid things. I cannot disagree more strongly with the grievor's characterization of the employer's duties in

this regard. The employer cannot hypothesize, in the abstract, about how the grievor's PTSD may or may not manifest itself. The employer can only rely on a doctor's articulation of the pertinent limitations or restrictions. In this case, the limitations and restrictions were clearly articulated. The grievor simply disagreed with them and refused to return to work.

[152] Since the issuance of the WHCS report which cleared him to return to work, the grievor has not even attempted to obtain medical treatment. He testified that he simply gave up on finding a doctor. When asked if he simply gave up on keeping his job, he denied it, but I see nothing in his actions to suggest otherwise.

[153] I accept the importance of providing adequate notice to the employee, as articulated in *Lindsay*, *Pachowski*, *Laye*, and *Okrent*. As far back as February 21, 2014, a full 20 months before the grievor was terminated, Ms. Draper clearly spelled out the consequences of failing to either return to work or to provide a medical note justifying his absence. The October 2, 2015, email, and the letters of October 20 and 27, 2015, all directed him to report to work or to obtain a doctor's note. Clear notice was provided to him of the consequences of taking no action. He acknowledged that he received notice. He knew his job was on the line. He knew exactly what he had to do to avoid a finding that he had abandoned his position, and yet he did nothing.

[154] There is nothing more that the employer could have done under the circumstances.

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

(The Order appears on the next page)

V. Order

[156] The grievance is denied.

October 2, 2024.

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