- **Date:** 20130402
- **Files:** 566-02-3880, 4051 and 6446
- **Citation: 2013 PSLRB 35**

2013 PSLRB 35 (CanLII)

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

TERRY RICHE

Grievor

and

TREASURY BOARD
(Department of Defence)

Respondent

Indexed as
Riche v. Treasury Board (Department of National Defence)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before:
Augustus Richardson, adjudicator

For the Grievor:
Matthew Way, Professional Institute of the Public Service of Canada

For the Respondent:
Pierre Marc Champagne, counsel

Heard at Halifax, Nova Scotia,
October 16, 17 and 18, 2012.

I. Introduction

1 Terry Riche ("the grievor") brought these grievances against Treasury Board ("the employer"):

a. PSLRB File No. 566-02-6446 grievance of two suspensions relating to alleged misconduct on February 22, 2007 and March 23, 2007;

b. PSLRB File No. 566-02-3880 grievance of three day suspension for alleged misconduct on November 15 and November 16, 2007;

c. PSLRB File No. 566-02-4051 grievance alleging discrimination and harassment (March 14, 2008).

2These three grievances arose from an ongoing struggle between the employer and the grievor that had its roots in his erratic attendance record. The employer imposed reporting requirements on the grievor with respect to when and how he was to advise his supervisor of any inability on his part to arrive at work on time, or at all ("the reporting conditions").The employer disciplined the grievor a number of times for his alleged failure to comply with those conditions. On the other hand, the grievor alleged that the conditions were unfair, constituted harassment that exacerbated his poor attendance record, and failed to take into account or to accommodate his medical and emotional problems.

3The employer first imposed the reporting conditions in August 2006. The conditions were reiterated several times after that. Mr. Riche grieved the reporting conditions on the grounds that, among others, "… the conditions have been too strenuously applied resulting in unnecessary levels of animosity and mistrust between [the] employee and managers" (PSLRB File No. 566-02-4051). He alleged that they constituted harassment and were discriminatory. I will call this grievance "the harassment grievance."

4On March 5, 2007, the grievor received a one-day suspension for alleged misconduct on February 22, 2007. On April 4, 2007, the grievor received a two-day suspension for alleged misconduct on March 23, 2007. The misconduct in both instances arose out of his alleged failure to comply with the reporting conditions (PSLRB File No. 566-02-6446).

5On December 11, 2007, the employer disciplined Mr. Riche for misconduct that again arose out of his alleged failure to comply with the reporting conditions. The employer imposed a three-day suspension. Mr. Riche grieved that discipline and requested that the suspension be rescinded. He requested an order stating the following:

a. that he be required to advise his employer of an absence from work before 12:00 on the day of the absence; and

b. that he be required to visit his physician not on the day of an illness but within three days of his return to work (PSLRB File No. 566-02-3880).

II. Preliminary issue

6The order of proceedings was discussed at the start of the hearing. The grievances respecting the suspensions were clearly disciplinary, which meant that the employer had to call its evidence first. The harassment grievance had more to do with alleged harassment, discrimination or failure to accommodate, which meant that the grievor had to call his evidence on that issue first. In addition, the employer objected to the harassment grievance on the grounds that an adjudicator had no jurisdiction to hear grievances based only on allegations of harassment. It withdrew the objection at the start of the hearing.

7It was decided that the order of proceedings (and the resulting onus of proof) would be as follows:

a. the employer would present its case first, with respect to the disciplinary suspensions;

b. the grievor would respond with respect to the discipline and would then present his evidence on the harassment grievance; and

c. the employer would respond with respect to the harassment grievance.

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8On behalf of the employer, I heard testimony from the following witnesses:

a. Lieutenant Robyn Locke, Technical Service Supervisor of the Naval Architecture Section at the Fleet Maintenance Facility Cape Scott in Halifax, Nova Scotia ("Cape Scott"), and the grievor's direct supervisor from July 2006 to November 2007;

b. Lieutenant Commander Rene Tremblay, who was the division head to whom Lieutenant Locke reported between summer 2006 and summer 2008;

c. Commander Ken Holt, who headed the engineering group within which the Naval Architecture Section was located and to whom Lieutenant Commander Tremblay reported during the relevant period;

d. Carol Ann Anderson, a generalist in human resources whose responsibilities included the engineering department at Cape Scott; and

e. Paul Hartigan, who was at the material time the manager of the human resources department at Cape Scott.

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9On behalf of the grievor, I heard testimony from the following witnesses:

a. the grievor; and

b. Alan Phillips, now retired but formerly the regional representative of the Professional Institute of the Public Service of Canada ("the union") for its Atlantic Region from 2005 until July 31, 2012.

III. Summary of the evidence

A. Events leading to letter of counselling setting out expectations dated August 28, 2006

10 The union and the employer are parties to a collective agreement for the Architecture, Engineering and Land Survey Group, which expired on September 30, 2011 ("the collective agreement").

11 The grievor has been employed in the federal public service since June 2000. In February 2006, he was living in Ottawa, Ontario. On February 23, 2006, he accepted the employer's offer of the position of Naval Architecture Project Engineer at Cape Scott, effective March 6, 2006; see Exhibit E1, Tab 1.

12 The grievor moved to Halifax to take up his new position. Almost immediately, he developed attendance problems. Between March 6 (his first day of work at Cape Scott) and August 24, he was late for work 8 times, most often by between 2 and 4.5 hours; see Exhibit E1, Tab 2. In the same period, he called in sick 21 times and took 9 days of annual leave or volunteer or personal days; see Exhibit E1, Tab 2.

13 Mr. Riche's attendance record caused his employer concern. On May 25, July 14 and August 1, his supervisor discussed those concerns with him. His supervisor recommended that Mr. Riche seek medical advice and that he participate in the Employee Assistance Program (EAP) of the Department of National Defence; see Exhibit E1, Tab 2.

14 At the hearing, Mr. Riche's representative asked him about his attendance at work. Mr. Riche explained that, when he accepted the position at Cape Scott, he "did not realize that [he] was starting to suffer from sleep apnea … [he's] always been a fairly heavy drinker, and at that time, [he] was going through a divorce and dealing with a long-distance relationship with a girlfriend of four years who was living in Ottawa."

15 In August 2006, Lieutenant Locke took over the supervision of Mr. Riche's department. She was concerned about Mr. Riche's attendance pattern, which had not improved since his discussions with his previous supervisor. She discussed her concerns with Ms. Anderson, who suggested that Lieutenant Locke prepare a "letter of counselling" setting out her expectations of the grievor with respect to attendance and reporting. On August 28, 2006, Lieutenant Locke presented the grievor with such a letter. In it, she recounted his attendance record and the history of concerns expressed by his previous supervisor and by her. It went on as follows (Exhibit E1, Tab 2):

To ensure improvement occurs you will be expected to conduct yourself in the following manner as it relates to leave usage:

a. When you call in sick, you must do so before you are scheduled to be in the office. You are to speak to me personally or whoever is acting for me. If I am not available, you are to call Lt. Cdr. Tremblay and speak to him personally.

b. When you call in sick I will require a doctor's note (sick leave) covering each period of sick leave you take.

c. All annual leave must be requested with the proper form in advance, calling in late is not acceptable.

d. You are to work the hours you agreed to work on the Hours of Work form (attached):

16 The grievor's start time was 07:30.

17 Lieutenant Locke acknowledged in her testimony that, strictly speaking, employees in her department did not have to produce a doctor's note every time they were sick. However, she testified that the grievor had been absent so many times for illness that she thought a requirement to produce a note would encourage him to find out from his doctor "what the issue was … so maybe something good would come of it." With respect to requests for annual leave, all employees were required to request it in advance. However, the grievor had a habit of calling in and saying that he was not coming in but wanted it counted as annual leave. Finally, as for hours of work, employees were able to choose them in advance. However, the grievor would often come in after the start time that had been agreed to and then ask to work his eight hours starting then. Since employees in her office often worked in teams, the grievor's conduct made it difficult to manage the work.

18 Lieutenant Locke also acknowledged in cross-examination that the grievor's attendance record suggested a chronic disability, but she wanted him to see a doctor and "to do something about it … the issue was not him being sick, it was him needing to call in or to go to a doctor to get it dealt with."

19 The grievor testified that he did not think that the reporting conditions "were legal … [he] told Lieutenant Locke that [he] didn't think they were right." Nevertheless, he tried to follow them "as best as [he] could." He also testified that he took the letter "as an affront," and that, in his words, "I felt that they'd just make me do what they wanted despite the fact that I had already told them that I was getting sick … that I'd told my previous supervisor about my state of mind."

20 However, from the employer's point of view, the grievor's statement that he tried to follow the reporting condition "as best as [he] could" was not good enough. On September 5, 2006, Mr. Riche arrived for work 2 hours and 15 minutes late. According to Lieutenant Locke, he had "no valid explanation" for being late. She sanctioned him with a letter of reprimand dated September

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8, 2006 and denied him pay for the time he was late for work. She warned him in the letter that any further failures to comply with the conditions set out in the letter of counselling of August 28 could result in "… further disciplinary action up to and including discharge"; see Exhibit E1, Tab 3.

21 The grievor read and signed the letter of reprimand. After signing it, he noted as follows: "Read but not agreed to. Docking pay is reasonable but the reprimand & threat of discharge is overkill & premature"; see Exhibit E1, Tab 3. Lieutenant Locke testified that she did not consider it premature. She felt that "calling in is a very basic employee thing to do … it makes the job of the supervisor much easier… [she] didn't see any reason why he couldn't do it, and he gave [her] no reason why he couldn't call in."

22 Mr. Riche's comment was emblematic of his general response to the employer's concerns about his attendance. He thought that the employer was overreacting. He testified as follows about such letters from the employer:

> *… [they] came quite regularly after the written reprimand … things were starting to break down, and it became almost a daily preoccupation on my part to try to read the employer's policies, to see whether they had a right to give me such letters … I was trying to figure out how to deal with them.*

23 On September 15, the grievor arrived for work 30 minutes after his expected 07:30 start time. He provided no reason for being late. On September 19, he left a voice mail at 07:10 requesting annual leave for that day. When he was told that that violated paragraph c) of his letter of counselling, he went to his workplace to sign the forms to request annual leave for that day. On September 20 and 21, he called in sick and left voice mails instead of speaking directly to Lieutenant Locke, as was required by paragraph a) of the letter of counselling; see Exhibit E1, Tab 4.

B. Meeting with supervisor and union October 5, 2006

24 The grievor met with his supervisors, Ms. Anderson and his union representative on October 5, 2006. The grievor stated that he was suffering from depression and anxiety. He also stated that part of his anxiety stemmed from the closeness with which he felt his attendance was being monitored; see Exhibit E1, Tab 22. He testified that he told those present that he was seeking a referral to an ear, nose and throat specialist to investigate his sleep apnea.

25 As Ms. Anderson explained in subsequent correspondence, "[i]t was at this point that the department became concerned that the employee may be suffering from a medical condition whereby the issues surrounding his punctuality and absences may have been, and continue to be, beyond his control"; see Exhibit E1, Tab 22. In her testimony, Ms. Anderson agreed that the grievor's mention of stress, anxiety and depression sent up"red flags for [her]." She went on to state that she felt that "we might be dealing with something we had to investigate." Accordingly, she recommended a Health Canada assessment, but the grievor's response was that he "didn't want people to know about [his] business." She stated that "he wanted to go to his family doctor instead … and we said, 'Certainly'"; see Exhibit E1, Tab 22.

26 Ms. Anderson also testified in cross-examination that, at that point, the grievor's case could have taken one of two paths. One was that his conduct constituted innocent absenteeism; that is, absenteeism caused by factors not in his control, in which case the question of accommodation could have been pursued. The other path was that it was simply misconduct on his part, in which a disciplinary route could have been followed. Her difficulty was that she and the grievor's supervisors lacked sufficient information to enable them to determine which path to

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take, and they needed the grievor to supply that information. Hence the request that he obtain medical information.

27 The grievor testified that he thought he was treated unfairly at the meeting. He explained that, in previous years in other departments, in his words, if "I didn't wake up in time or I called in sick, no one took exception to the time I called in." He testified that, when Lieutenant Locke said that she "didn't understand civilian human resource issues," he told her that, if he "could manage in Ottawa with two languages and told someone [he] didn't understand one of them, [he] wouldn't be qualified to do [his] job." By that I took him to mean that, as she was unused to dealing with civilians, Lieutenant Locke was not qualified to supervise them.

C. Notice of Investigation relating to fitness to work, December 1, 2006

28 Mr. Riche's compliance with the reporting conditions did not improve over the course of October and November 2006. On December 1, 2006, Lieutenant Locke provided him with a "notice of investigation". She listed 17 days during which he had been absent without permission, sick without calling between 07:30 and 08:00 or late for work; see Exhibit E1, Tab 5. However, before anything else could happen, the grievor went on leave on December 15, 2006. Dr. Wiebe, Mr. Riche's physician, filled out a "Physician's Certificate of Disability for Duty". The certificate contained the following three statements, to which a "yes or no" response was requested:

a. I have been in attendance upon the above named person on or after the date absence began;

b. I have knowledge, satisfactory to me, of the condition of the above named person on or after the date absence began; and

c. In my opinion, the above named person is incapable, by reason of illness or injury, of working at his/her normal occupation.

[Sic throughout]

29 Dr. Wiebe answered "yes" to the first and third statement but left the second unanswered. She noted after the third statement that it was"unknown" when Mr. Riche would be ready to return to work; see Exhibit E1, Tab 8.

30 The grievor explained in his testimony how he went off work. He testified that, by December 2006, the "ardent" way in which his supervisor had been pursuing the reporting conditions had caused him so much stress, anxiety and depression that his "attendance deteriorated until December." He called his union representative, Mr. Phillips, and told him that he did not intend to go to work. Mr. Phillips met with management and arranged a meeting between it and the grievor. It was decided that the grievor would go on leave. As the grievor understood it, he was offered all his sick, marriage, annual and other leaves to which he was entitled under the collective agreement. He also took a year's sick leave in advance. By accepting that last benefit, he was, according to him, "setting [himself] up for financial ruin," because he would have to repay it upon his return to work. (The "financial ruin" issue is discussed later in this decision.)

31 However, the grievor had another reason to take that leave. He testified that he was having problems with his girlfriend (who lived in Ottawa), his divorce and his ongoing estrangement from his daughter. He testified that he decided to go to Ottawa to try to patch up his relationship with his girlfriend.

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32 On December 15, 2006, Lieutenant Locke wrote the following to Mr. Riche: "… [although your] overall attendance at work has been unacceptable, it is recognized that you have been absent from work due to reasons beyond your control." However, she noted that she was having difficulty scheduling workloads because of his irregular attendance. She added that she was concerned that there might be"… an underlying medical situation that needs to be treated before you are able to report for work on a regular basis." Accordingly, she recommended that he consult with his family physician about his "fitness for duty"; see Exhibit E1, Tab 6.

33 On the same day, Captain Hainse, Commanding Officer, wrote to Dr. Wiebe about Mr. Riche's "fitness for work." He asked the doctor whether Mr. Riche was fit for work and, if not, whether there was a"… prognosis as to when you believe he might be fit to return" and, once he returned, whether "there are any limitations in him being able to perform the full range of duties of his position" and whether there were "any job accommodations that might be necessary"; see Exhibit E1, Tab 7.

34 Dr. Wiebe replied to Captain Hainse's letter on December 21. She stated that Mr. Riche had been off work since November 28 and that she recommended he remain off work"… for now and [that he] be reassessed at the end of January 2007." She added as follows (Exhibit E1, Tab 9):

Mr. Riche is struggling with a couple of medical issues, one of which is mechanical back pain. Hopefully this will be well recovered by the end of January. Otherwise this could cause him some restrictions in terms of activity, lifting, sitting and prolonged standing.

He will be accessing some other support resources in December and January that will hopefully assist his return to work and limit his ongoing absenteeism.

35 The grievor testified that Dr. Wiebe's reference to back pain was as follows:

… somewhat misleading because they highlight back pain more than anything else, but that was because the Human Resources people and the supervisor was saying that they didn't want personal medical information, so Dr. Wiebe and I were at loggerheads … she didn't know how to write the report without putting personal information in … and there was no discussion between the supervisor and my medical doctor … so now I was in a situation of distrust with my employer … we were infighting, there was more animosity and innuendo … and so my doctor didn't know what to do, how to write the report.

36 When asked by his representative for examples of what the grievor considered was animosity between him and his employer (and in particular Lieutenant Locke), the grievor said the following:

… before I went off work in December 2006 I had an incident of being sick with cysts … it's not uncommon … I had to go to the hospital, and when I came back I spoke to Locke about leave, and she said 'With you it's always something' … she never shut the door, it was always open … so I lost it, and asked her if she wanted me to pull down my pants and show you … That was the nature of our relationship.

37 The grievor explained that he said that because he felt that she treated him "as a liar" and that, as a professional engineer, he considered that an affront.

38 On January 29, 2007, Dr. Soucy, Dr. Wiebe's maternity leave replacement, filled out a note stating that Mr. Riche could "… go back to full time duties at work as of February 5, 2007"; Exhibit E1, Tab 10. In an attempt to help the grievor with his punctuality issues, the employer adjusted his start time from 07:30 to 07:45 as of January 29, 2007; see Exhibit E1, Tab 21.

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D. Return to work and letter of counselling – February 5, 2007

39 The grievor testified that his relationship with his girlfriend ended in February 2007. Accordingly, he decided to return to Cape Scott "to continue [his] career." He returned to work on February 5, 2007. His frequent absences continued. Further notes were provided to the effect that he missed work on February 13 due to "blistering on feet" and that he was off work on February 15, 16 and 19 due to a "back injury." He was reassessed on February 20 and was found ready to return to work on that day; see Exhibit E1, Tab 11.

40 The grievor testified that, during that time, he was drinking and that, in his words, he had "always been a drinker … the industry I work in we all drink … I suppose I was an alcoholic then … I'd always be a happy drunk … I realize now that my sleep apnea and my drinking might have been a devastating combination." He went on to explain that, before his sleep apnea developed, he never had trouble getting out of bed, even with a hangover. But, he stated, "now I wake up but fall back asleep … this was new to me, this is why I wasn't calling in at the proper time."

41 I should note that all the employer's witnesses were asked about whether the grievor had ever mentioned drinking as a problem to them. They all testified that, although a possible problem with alcohol (along with other possibilities, such as gambling or drugs) had arisen in their minds as a possible explanation for his attendance issues, he had never smelled of alcohol; nor had he or his union representative ever suggested that it was an issue.

42 I also note that, in cross-examination, the grievor testified that, although he was an alcoholic now (as of the hearing), he could not say when he became one. He stated that, in 2006 and 2007, his "major problem was stress … I was heavily drinking then … this is a chicken-and-egg problem, the stress came first, that is my evidence."

43 The grievor testified that the other stressor that arose upon his return to work on February 5, 2007 was the need to repay the advanced sick leave he had received while in Ottawa. He was told that the advance constituted 25 days and that the employer would claw it back out of his pay. The grievor discussed the issue with Lieutenant Commander Tremblay and said that it was "OK" to take two days a month out of his pay. The discussion ended with the grievor believing that only two days per paycheque would be taken, but the pay department ended up taking three days out of every biweekly paycheque. The grievor understood that the advance had to be repaid but did not understand or accept that it had to be reclaimed so quickly. He testified that he "sort of got angry" but that he "had to pull [himself] together because of the clawback." He said that he was not able to improve his attendance until June 2007.

44 In a letter dated February 21, 2007 Lieutenant Commander Tremblay wrote to the grievor. He considered the grievor's failure to report his absence in a timely manner on February 13 and 15 constituted misconduct. Because this was a second disciplinary offence, but also because there were "some mitigating circumstances including your health at the time and also the fact that you did not possess a phone," Lieutenant Commander Tremblay limited the discipline to a letter in the grievor's personnel file; see Exhibit E1, Tab 12.

45 Lieutenant Commander Tremblay testified that the issue was never the fact that the grievor was sick. He stated as follows: "We are always aware that if one is absent due to sickness, that is acceptable …our issue was the fact that he did not report in a timely fashion… he did not follow the code we asked him to follow."

46 On the same day, Lieutenant Locke reissued the letter of counselling to the grievor. In essence, the conditions originally established in August 2006 were repeated. The grievor was advised that a formal review of his attendance would be conducted on April 2. His work hours

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were set to 07:45 to 15:45. She also reminded him of the availability of assistance through the EAP; Exhibit E1, Tabs 13 and 14.

47 The next day, the grievor was late for work. He called at 08:15 to say that he would be late. He started work at 08:45 rather than at the required 07:45. He emailed Lieutenant Commander Tremblay and asked him to excuse his being late. He stated the following: "I know it is lame but I forgot to set my alarm. I attribute it to over tiredness from not sleeping the night before [it] should not be a problem tonight or in the future. Please don't take action as I am trying hard and it will not happen again"; Exhibit E1, Tabs 15 and 16.

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E. Absences from work and suspensions of one and two days February 27, 28 and March 2, 2007: Basis of grievance PSLRB File No. 566-2-6446

48 On February 27 and 28, the grievor was absent from work without permission. On March 1, 2007, Lieutenant Commander Tremblay noted the grievor's conduct on February 22, 27 and 28 and issued a "notice of alleged misconduct" to him; see Exhibit E1, Tab 16. A meeting was held on March 2 to discuss the matter. Lieutenant Commander Tremblay agreed that being sick did not in itself constitute misconduct. He noted that the grievor had medical notes covering his absences during the relevant period. However, in his opinion, the grievor's failure to advise his supervisor that he would be late for work until after his start time on February 22 constituted misconduct. He decided to recommend a one-day suspension; see Exhibit E1, Tab 17. In a letter dated March 5, 2007, Commander Holt concurred with Lieutenant Commander Tremblay's recommendation and confirmed the one-day suspension; see Exhibit E1, Tab 18. The grievor grieved that discipline, and it is one of the two grievances in PSLRB File No. 566-02-6446.

49 Lieutenant Locke testified that she found the grievor's conduct frustrating. She stated the following:

> *The whole time we were trying to get him to show us what he needed by way of accommodation but he never said anything … it was just frustrating when someone can't seem to follow a basic rule … I was not surprised that he received discipline from Commander Holt … in the absence of any need to accommodate someone, you get disciplined.*

50 On March 23, 2007, the grievor was absent from work without permission. On March 27, he was 15 minutes late reporting for work. Lieutenant Locke issued a notice of alleged misconduct; see Exhibit U2, Tab K. An investigation was conducted. On April 4, 2007, Commander Holt concluded that the March 23 incident constituted misconduct, in that the grievor failed to notify his supervisor that day that he would be absent. Commander Holt decided not to pursue the March 27 incident because he stated in the discipline letter that he took the grievor's "stated medical situation into consideration and the fact that [the grievor] obtained a medical note from [his] doctor for the absence of 15 minutes"; see Exhibit U2, Tab L. Commander Holt levied a two-day suspension for the March 23 incident. The grievor grieved that discipline. It is the other grievance in PSLRB File No. 566-02-6446.

51 In the meantime, the employer adjusted the grievor's start time again, moving it to 08:00 on April 2. Lieutenant Locke testified that it was done to accommodate the grievor, who had said that his bus to work was often late; see Exhibit E1, Tab 21.

F. Employer's specific request for a fitness to work evaluation – April 3, 2007

52 On April 3, 2007, Ms. Anderson wrote to Dr. Maggio, of the Occupational Health and Safety Agency at Health Canada, to request a fitness for work evaluation. She detailed the grievor's history since March 2006. She noted that the grievor continued to have attendance problems as

well as difficulty complying with the conditions spelled out in both letters of counselling he had received. She requested information as follows (Exhibit U2, Tab 4):

> … [about the grievor's] *ability to carry out the full duties of his position. Based on your medical assessment, is Mr. Riche fit to carry out the full duties of his substantive position at this time? Are there any medical limitations? Are they temporary or permanent? If he should not be at work presently, when can the Department expect him to return to the full duties of his position?*

53 The assessment was originally set for April 23. The grievor declined to attend: Exhibit U2, Tab 4.

54 Mr. Riche testified that, in April 2007, he "finally got an appointment to see Dr. Smith, an ear, nose and throat specialist."Dr. Smith referred him to "The Snore Shop", "where they do sleep studies."

55 Mr. Riche met with Lieutenant Locke on May 22, 2007. She acknowledged that his punctuality had improved somewhat, but remained concerned about the number of his absences; see Exhibit U2, Tab M.

56 On June 5, 2007, Mr. Riche was issued a "notice concerning attendance" by Lieutenant Locke. In it, she noted that, since his return to work on February 5, 2007, he had been absent 12.5 days due to illness, all of which had been taken as sick leave without pay. She advised that he was required to improve his attendance record. She recommended that he seek assistance privately or through the EAP. She noted that, although Mr. Riche had refused an assessment with Health Canada, it was still open to him; see Exhibit U2, Tab M.

57 On June 13, 2007, the grievor was reported to have called in sick at 11:32. He stated that "[he] had slept in but were *[sic]* not feeling well and were *[sic]* going to be away from work that day"; see Exhibit U2, Tab N. His scheduled start time was 08:00. An investigation meeting was held on June 18. Mr. Riche explained that he had been ill. The employer, in the form of Commander Holt, sympathized but concluded nevertheless that it constituted misconduct, in that Mr. Riche was required to call in sick before his scheduled start time for work. Commander Holt concluded that a five-day suspension was appropriate and advised that Mr. Riche was not to report for work between July 3 and 9, 2007; see Exhibit U2, Tab O. Mr. Riche grieved the suspension.

G. Dr. Maggio's assessment: August 9, 2007

58 At that point, the grievor agreed to the assessment with Dr. Maggio that had originally been scheduled for April 23. On June 22, Ms. Anderson wrote to Dr. Maggio. She updated him with respect to what had happened since her letter of April 3, including the fact that the grievor had recently been disciplined by way of a five-day suspension. She repeated the questions she had posed earlier about the grievor's fitness for work. She also noted the following (Exhibit U2, Tab 4):

> …
>
> … [t]*he manager is requesting very definitive information with regard to Mr. Riche's ability to attend work, on time, on a daily basis, and carry out the full responsibilities of his position. Based on your medical assessment, does Mr. Riche possess a medical condition that precludes him from making rational decisions that affect his continued employment? Is he capable of comprehending the seriousness of his actions and the resultant consequences? In the absence of*

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medical opinion on this matter, the Department has no choice but to pursue counseling and disciplinary action.

However, if this is truly a case of 'innocent absenteeism,' where Mr. Riche, due to a medical condition, cannot control his absences from work, the manager needs to know that in order to properly accommodate him.

59 Dr. Maggio responded on August 9. He noted that he had seen the grievor. However, he stated that, before he could provide"… a definitive opinion we will require further medical information that we have written for." Dr. Maggio stated that from the grievor's history, "… it appears that Mr. Riche has had a number of medical issues that could have resulted in behaviour(s) you have noted in your letter." However, he needed confirmation before coming to a final opinion. He concluded by stating that, based on the information that was available to him, he believed that the grievor "… is fit for his substantive position without restrictions. Whether his past behaviour was a result of medical problems remains to be determined"; Exhibit U2, Tab 4.

60 Lieutenant Locke saw the letter from Dr. Maggio and found it very vague. She noted that nothing stated that the grievor "could not have called in," only that the grievor "had some illness, but that he was fit to work a full day." Nor was any specific accommodation suggested. She acknowledged in cross-examination that she had heard at some point that the grievor had mentioned being depressed, "but never in a way that we could accommodate him … there are people who are depressed but come to work." She also agreed that, at some point, the grievor had mentioned suffering from sleep apnea, but stated that, "lots of people have sleep apnea and come in to work … I never got a note saying that he was unable to call in on time because he was a deep sleeper." She was adamant that the grievor had never asked for an accommodation beyond being allowed to work eight hours from whatever point in the morning that he came in for work. She stated as follows:

… but that is not the way we work … this is not flex hours, because with flex hours you know when an employee is going to come in … it doesn't mean that you can show up whenever you feel like it and work eight hours, long after everyone else has left for home.

61 On July 19, 2007, The Snore Shop assessed the grievor's sleep pattern. In a report dated July 20, Ms. Hanschke, general manager, stated that the grievor's Apnea Hypopnea Index was 27.7 that the normal value was 5 or less, and that anything over 30 was considered severe and should be treated urgently; see Exhibit U2, Tab 4. I should note that the employer's representative objected to the report on the grounds that its author was not present, that it was hearsay from a person whose credentials (and hence status as an expert capable of providing opinion evidence) could not be determined, and that, in any event, its terms and conclusions were unexplained at best. Those were valid points, but in my opinion, they went to weight rather than to admissibility.

62 There were two other difficulties insofar as the grievor's reliance on the report is concerned. First, it did not spell out the connection if any between the grievor's sleep difficulties (if that is what the report documented) and his inability to comply with the obligation to call in his absences or his lateness before his scheduled start times. After all, while waking exhausted after a sleepless or sleep-disturbed night preclude an ability to work that day, it does not also necessarily preclude an ability to advise one's supervisor of that fact before one's scheduled start time.

63 The second difficulty is that the report was not presented to the employer. The grievor testified that he told his employer about the report but that he did not give it a copy because he "was told that they didn't want medical information." Commander Holt testified that the first time

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he heard about the sleep apnea issue from the grievor was at about the time of the sleep report. The grievor mentioned that he had a machine to help him.

64 I should also note that I do not accept the grievor's summary of the employer's position with respect to the amount of detail it wanted. The employer had clearly advised him numerous times that it needed to know whether he had a medical condition that interfered with or limited his ability to report on a timely basis and, if so, how it should consider accommodating any such limitation. It strikes me as unlikely that an employer that asked for information to help it assess an employee's erratic attendance record at the same time would tell the employee that it did not want specific information. If the grievor, as he testified, told his doctor that his employer did not want such specifics, then I am satisfied that the grievor in fact attempted to limit the flow of information that his employer requested. The fact that the grievor did so suggests that he recognized that his many excuses for his inability to comply with the reporting conditions might not hold much weight.

65 The grievor testified that, by mid-2007, he was in financial ruin. He apparently had to move out of his apartment because he could not afford his rent of $700 per month. Because of the clawback of his advanced sick leave, he"didn't have money to keep the standard of living [he] was used to." When he moved out of his apartment, he had to put his furniture in storage but then could not afford paying for it and lost it all. He moved to Halifax to be closer to work. He moved into a rooming house, but he stated that it "was full of people that started a host of other problems … [his] sleep machine [to combat his sleep apnea] got stolen, then [he] moved to Dartmouth, [he] was moving again and again."

66 On October 2, 2007, Dr. Maggio provided his final report and opinion to Ms. Anderson. He stated that he had received the information he had been looking for, and went on as follows (Exhibit U2, Tab 4):

> ...
>
> *As mentioned in our previous letter, Mr. Riche has had a number of medical issues that could have resulted in the behaviour(s) you noted. Mr. Riche and his physician(s) are working through these medical issues.*
>
> *As mentioned previously, Mr. Riche appears to understand the consequences of his missing work and/or arriving to work late.*
>
> *His medical issues have been major stressors in Mr. Riche's life. Anything that your department can do to help relieve stress would be of benefit.*
>
> *We consider Mr. Riche fit for his substantive position without restrictions.*

67 Ms. Anderson testified that Dr. Maggio's report told her that the grievor had medical issues that could have resulted in the behaviour the employer found troubling but that he was fit for work without restriction. At that point, in her view, no medical reason was stopping the grievor from calling in to work or going to work. She was satisfied that from this point forward innocent absenteeism would not be an explanation for any failure on the grievor's part to meet any reporting requirements. That opinion was communicated to Commander Holt.

H. Five day suspension rescinded and issuance of letters of counselling – October, November 2007

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68 Commander Holt considered the Health Canada report at a grievance meeting held on October 5, 2007 with respect to the five-day suspension that had been imposed in July 2007. He took the report into account and decided to allow the grievance and rescind the five-day suspension; see Exhibit U2, Tab O. He noted that, since the report stated that Mr. Riche was considered fit for his position, without restrictions, he anticipated that there would be "some improvement in [the grievor's] attendance at work." He advised that a third letter of counselling,"… reiterating our expectations including [the grievor's] conditions of work will be issued under separate cover; see Exhibit U2, Tab O.

69 Another letter of counselling on attendance and punctuality was issued on October 11, 2007. Essentially, it reiterated the expectations that had been first set out in August 2006, with some slight modifications, as follows (Exhibit U2, Tab P):

> a. *When sick, you are to notify your supervisor before your scheduled arrival in the office. You are to speak to Lt. (N) Locke personally or leave a message … If she is not available, you are to call Lt. Cmdr. Tremblay…*
>
> b. *When you call in sick I will require a doctor's note (sick leave) covering each period of sick leave you take.*
>
> c. *All annual leave must be requested, with the proper form, in advance, calling in late is not acceptable; and*
>
> d. *You are to work the hours you agreed to work on the Hours of Work form. Namely, 0800-1600, Monday through Friday.*

70 In his testimony, Commander Holt explained as follows the importance in his opinion of the requirement that the grievor had to call in when he was going to be late or absent:

That section of the department is under a heavy work load … there is a lot of shuffling that had to be done when someone does not show up, especially if there is no advance warning … if you do have notice you can take a look at the employee's priorities and re-allocate them to someone else… it was just about maintaining efficiency in the office …but there was a secondary aspect to it, by this stage, because within the department there was some discontent with staff because it was in continual turmoil with him not reporting or coming in on time … so it was about the smooth running of the office.

71 A fourth letter of counselling was provided on November 6, 2007. The only changes to the expectations were to the contact person and a requirement that, when Mr. Riche called in sick, he was required "to obtain a doctor's note at the onset of [his] illness rather than upon [his] return to work"; see Exhibit U2, Tab Q.

72 On November 19, 2007, the grievor emailed Ms. Anderson. The subject line was titled, "Request for Accommodation under TB Policy - Duty to Accommodate." He stated that he had read the employer's policy manual about accommodation, and he stated that he felt that he qualified for it. He asked her to consider his email "… a formal request for redeployment out of this facility to end the unfair application of administrative and disciplinary sanctions against [him] because of a sickness that was not [his] fault and is prolonged by the actions that management has taken against [him]"; see Exhibit E3.

73 Ms. Anderson replied to his email on November 22. Dealing with his request for redeployment, she noted that managers generally used it to fill vacant positions. Turning to his request for accommodation with respect to his current position, she advised him as follows to discuss the issue with his manager, Lieutenant Commander Tremblay (Exhibit E3):

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For example, if you are finding it difficult to maintain a 37.5 hour work week, perhaps an accommodation could be made that you work part time instead of full time. Although your request for accommodation need not be in writing, your request should be very clear and you should state very specifically the accommodation you believe you require.

74 Ms. Anderson also informed the grievor that the duty to accommodate "… does not preclude normal administrative action from being taken as a result of not following specific directions provided to you by your supervisor"; see Exhibit E3.

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I. Subsequent absence and three day suspension: basis for grievance in PSLRB File No. 566-02-3880

75 No evidence was adduced that the grievor followed up in the relevant time with any "very clear" request.

76 On November 15 and 16, 2007, Mr. Riche was absent from work without, in the employer's view, acceptable notification as per the letter of counselling; see Exhibit U2, Tab R. Mr. Riche and his union representative met with Commander Holt, Lieutenant Commander Tremblay and Ms. Anderson on November 25.

77 The grievor testified the absence happened because of the following:

… my phone was not working … I gave this information to Holt and Tremblay … my service provider had problems … I was able to make an emergency call to my service provider, but I was not able to call out, it was happening all the time at that time with Rogers [Communications, his service provider].

78 At the hearing, the grievor elaborated on his difficulties. He explained that the root issue was the following:

...

… my inability to wake up … I was having this issue with not being able to wake up and stay awake … it was mostly related to sleep apnea … and a mitigating factor was that I was still drinking and had depression … it could be that at one point I said that my antidepressants may have been a factor, but I believe today it was sleep apnea.

79 Commander Holt testified that he had some difficulty with the grievor's explanation that his phone service had been disrupted, since the grievor had been able to place a call to his service provider. On December 11, 2007, Commander Holt issued a three-day suspension for Mr. Riche's failure to call in during his two-day absence in November 2007; see Exhibit U2, Tab S. The grievor grieved the suspension. It is the grievance in PSLRB File No. 566-02-3880.

80 On November 26, 2007 Dr. Karen MacDonald of Health Canada wrote to Ms. Anderson. She advised that she had been contacted by the grievor on November 20 "further to Dr. Maggio's assessment of 2 October/07." She went on to explain that Dr. Maggio was on leave and that she would look after the file in his absence. She noted that Mr. Riche "has expressed further concerns and I feel in order to address these as I have not been involved with this case, I will require a specialist assessment" which had been scheduled for January 7, 2008: Exhibit E1, Tab 30.

81 On February 1, 2008 Dr. MacDonald wrote to Ms. Anderson. Her comments and observations are in my opinion instructive and I cite them in their entirety:

Further to my letter of 26 November/07, I have now received the specialist's report regarding the appointment date of 7 January/08. This referral had been arranged as a result of Mr Riche contacting our office late November/07 with concerns. As I was not involved previously with Mr Riche's fitness for work medical of 8 August/07, the specialist referral was arranged to further my understanding of this case and Mr Riche's situation.

Overall, Mr Riche is considered fit for work with no work limitations.

He has had health difficulties in the past year as a result of his stress issues. The problem has been one of a vicious cycle. His stress issues lead to medical problems which lead to work-related problems which lead to more stress issues.

He does appear to understand the consequences of his missing work and/or arriving late to work. He has shown that he can improve his attendance to acceptable levels while he has his health issues under better control. It is recommended that he be given another opportunity to prove himself, however, obviously he is responsible for deal with his health issues and he is required to abide by the collective agreement and rules regarding hours of work, reporting sick, etc.

A lot of his difficulties are as a result of personality and his means of reacting to a situation rather than using more effective coping strategies.

If his same pattern of behaviour continues, a further fitness for work evaluation is not indicated but rather this would need to be handled as a work performance issue through your usual administrative protocols: Exhibit E1, Tab 32.

82 On March 7, 2008 Commander Holt sent the grievor a Notice of Alleged Misconduct. He noted that the grievor had been "absent from work without permission" over the period of February 8 to 12, 2008. He advised that a meeting with the grievor would be set up, and that he had a right to have a union representative present.

J. Filing of third grievance on March 14, 2008: PSLRB File No. 566-02-04051

83 On March 14, 2008 the grievor filed the grievance in PSLRB file 566-02-4051. In his grievance he disputed "the dispensation of disciplinary administrative conditions put in place in September 2006." The substance of this grievance relates to allegations of harassment in the imposition of conditions which led to the above disciplinary suspensions. I set his grounds out in their entirety:

1. *That the conditions have been applied in error based on suppositions contrary to the determination by Health Canada in February of 2007, that the employee was indeed sick and had stressors in his life that could have caused his behaviour in 2006.*
2. *That the conditions have been too strenuously applied resulting in unnecessary levels of animosity and mistrust between employee and managers. Evidence of this is a matter of public record in that the conditions have been subject to many revisions over the last year and a half.*
3. *That the process has been poorly administered at times resulting in the public discussion of Protected A information of the employee causing public embarrassment and further animosity between managers and emloyee.*
4. *That the process has created undue hardship for the employee and employer in lost time and money. The result of these hardships has been to produce stress in both the managers and employee thus contributing to the circular reactive stress*

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> *situation created by having to spend valuable work hours on responses to and meetings to make defenses and discuss matters relating to the process.*
>
> 5. *That the stress created by the situation has resulted in Harassing incidents. Confrontational meetings between managers and employee have degraded to harassing situation that resulted in comments and accusatory remarks from both employee and managers because of an untenable situation caused by the process parameters that do not allow for adjustments to accommodate and facilitate an amenable situation for all.*
>
> 6. *That the stress created between management and employee has not resulted in a corrective action, as is the intention of the process, but has resulted in a recurring reactive discussion that neither managers nor employee can perceive as corrective. The damage to both the unit's production and the employee's financial position are punitive in their results and therefore stem from reaction to perceived punitive conditions.*
>
> *The following [sic-preceding] grounds define a need for a comprehensive review of this process to design a more contemporary set of criteria and guidelines that are more in line with Treasury Board Guidelines for the corrective treatment of these types of illnesses and their manifestations in the workplace. This process has resulted in a harassing situation between employee and managers and therefore is not corrective in its result.*

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84 There was testimony and some documents concerning the period after March 14, 2008: see, for e.g., Exhibit U2, Tabs T, U, 4, 6 and 7. While I permitted the evidence to go in at the time I was not in the end persuaded that any of it was relevant or should be considered when evaluating the issues raised in the grievances before me. The onus was on the employer to establish the merits of its decision to discipline the grievor based on the information before it at the time. The reporting conditions imposed by the employer in August 2006, and the discipline it imposed in March, April and December of 2007, were based on events leading up to those dates, not events–or the relationship–after those dates. For example, the reporting conditions that were imposed in August 2006 were either reasonable at the time or they were not. If they were reasonable, evidence that they became unreasonable after March 2008 would not make them retroactively unreasonable. Such evidence might ground a new grievance, but it would not be relevant to the issues raised by the grievance that was filed.

85 Second, there is the question of balancing the probative weight or value of such evidence with the cost in time of considering it. The grievance was filed in March 2008. The hearing took place in October 2012, more than four years after the grievance was filed. For me to consider evidence of the ongoing relationship between the parties after the grievance was filed, when such evidence had limited if any relevance to the events complained about in the grievance, would impose a huge administrative burden on the parties as well as the Board. It would also be unfair to the grievor because it would permit the employer to bolster what might be a weak case prior to March 2008 with information that it did not have at the time it decided to impose the discipline that it did.

86 Given the above I was not persuaded that evidence of the relationship between the grievor and his managers was relevant to the grievances; or that, if it had some limited relevance, it was anything more than gilding of a lily already before me. The employer had to establish the merits of its decision to discipline the grievor based on evidence available to it at the time, not evidence of events that transpired after the grievance was filed.

IV. Summary of the arguments

A. For the employer

87 The employer's representative began with the harassment grievance. He agreed that article 44 of the collective agreement barred certain types of harassment, but only "by reason of … disability." In this case, the grievor had failed to establish that he suffered from a disability. A bald assertion of harassment does not amount to proof of harassment "by reason of" a disability; nor does it establish a *prima facie* case; see *Dawson v. Canada Post Corporation,* 2008 CHRT 41, at para 68 and 69. And, even for a *prima facie* case, the onus remains on the complainant to prove on a balance of probabilities that harassment based on disability occurred; see *Ontario (Director, Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, at para 119.

88 The employer's representative submitted that there was no evidence of harassment by reason of a disability. There was not even evidence that the ailments the grievor complained of – stress, depression, drinking and sleep apnea – were so bad as to prevent him from complying with the reporting conditions.

89 Nor was there any evidence of constant harassment by way of an ardent application of the reporting conditions, often, many months passed with nothing being said or done from the employer, and, when it did or said something, it was simply in response to a failure on the grievor's part to comply with the reporting conditions. Indeed, on at least one occasion, the employer reversed an earlier decision to impose discipline once it received supporting medical information about the grievor.

90 Turning to the allegation that the employer had failed to accommodate the grievor, the employer's representative submitted that the grievor had failed to establish that he suffered from any disability. There was no medical opinion, report or evidence with respect to his sleep apnea, his alleged alcoholism or his depression. The grievor might have been depressed or anxious, but those are conditions experienced by many if not most people in ordinary course. Depression alone does not constitute a disability, at least in the absence of medical evidence supporting a conclusion that it is so severe as to be disabling. Moreover, the Health Canada assessment had concluded that the grievor was fit for duty. In short, there was no evidence explaining or justifying the grievor's inability to comply with the requirement that he notify his employer beforehand that he would be late or to call in when he was sick. Nor was there any evidence that a physical or mental illness or condition prevented the grievor from getting to work on time or, when he could not, from picking up the phone to advise his supervisor of that fact.

91 An employee seeking accommodation also has a duty to co-operate with the employer by providing some information as to the nature and extent of the alleged disability so that the employer can determine any necessary accommodation; see *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970. The grievor received the initial letter of counselling, which set out the reporting conditions at issue, in August 2006. He objected to them not because he could not comply with them or because he did not understand them. Rather, he objected because he thought they were overkill, premature or without legal support.

92 The employer's representative concluded by stating that there was no discrimination, no harassment and no duty to accommodate. That left only the question of the discipline imposed when the grievor failed to comply with the reporting conditions.

93 Was there cause for discipline? The employer's representative submitted that there was. The grievor's repeated failure to comply with the reporting conditions, which were to call when he was going to be late or when he could not come in because of illness, amounted to insubordination. He had been issued with clear conditions (that is, orders), which were reasonable and authorized and that he understood. He did not comply with those conditions.

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Accordingly, he was insubordinate by failing to follow those orders; see *Focker v. Canada Revenue Agency,* 2008 PSLRB 7, at para 103. Discipline was appropriate.

94 Was the discipline excessive? The employer's representative submitted that discipline imposed by the employer followed the principles of progressive discipline. The employer moved from a letter of warning to a one-day suspension and then to two- and three-day suspensions. The discipline imposed was well within the type of discipline imposed in similar cases; see *Cloutier v. Treasury Board (Department of Citizenship and Immigration),* 2007 PSLRB 42, and *Rioux v. Treasury Board (Canada Border Services Agency),* 2011 PSLRB 32.

95 Finally, since there was cause for discipline, and since the discipline imposed was not excessive in the circumstances, I had no jurisdiction to substitute a different penalty.

96 As a result, the employer's counsel submitted that I should dismiss all the grievances.

B. For the grievor

97 The grievor's representative submitted that, with respect to the suspensions, the onus was on the employer to establish that the grievor had been insubordinate. He did not contest that the reporting conditions were clear or that they were authorized or that the grievor did not understand them. Rather, the issue was whether the grievor's illnesses constituted a legitimate excuse or justification for his failure to comply with the reporting conditions.

98 Both Lieutenant Commander Tremblay and Commander Holt believed the grievor when he said he was sick or that he had slept in. In ordinary course, being sick or sleeping in would constitute a defence to a charge of insubordination; see *Buckwheat v. Treasury Board (Canada Border Services Agency),* 2009 PSLRB 156, at para 55. The fact that the problem was repeated was a function of the fact that the grievor did not know why he could not wake up on time or why he could not correct the problem.

99 That leads to the issue of the grievor's alleged alcoholism. The union's representative conceded that (as he had to, given the grievor's own testimony) there was no direct evidence that the grievor was an alcoholic at the relevant time. However, he submitted that I could make that finding based on the evidence before me.

100 There was also the grievor's sleep apnea. It was clear that he had sleep apnea. It was clear that that was why he could not get up on time. He was not deliberately flouting the reporting conditions. It was equally clear that he was trying to deal with and correct the problem. He was not successful, but his failure was not deliberate.

101 The union's representative submitted that I should also consider the stress and depression that the grievor was under. Both the Health Canada assessment and Dr. Wiebe's reports alluded to medical problems that interfered with the grievor's ability to comply with the reporting conditions. He was not culpable. He was not insubordinate.

102 In the alternative, if I were to conclude that the grievor had been insubordinate, I should find that the discipline was excessive. In *Swinimer v. Treasury Board (National Defence),* PSSRB File No. 166-02-20756, [1991] C.P.S.S.R.B. No. 44, the adjudicator substituted a three-day suspension for a seven-day suspension for an employee who had failed to show up for an overtime assignment because of alcohol-related issues when the employee subsequently admitted that he was in fact an alcoholic, on condition that he seek treatment for the condition. The union's representative submitted that I ought to substitute a letter of reprimand for the one-day suspension, a one-day suspension for the two-day suspension and a two-day suspension for the three-day suspension.

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103 Turning to the harassment grievance, the union's representative agreed that, under the collective agreement, harassment, to be grievable, had to be "by reason of" a disability. However, I did have jurisdiction if that harassment related to discrimination under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, or article 44 of the collective agreement.

104 The union's representative conceded that the onus was on the grievor to establish a *prima facie* case of discrimination. It could be established if he could show the following:

a. that he was singled out for discriminatory conduct; or
b. that an administrative condition applicable to all employees, because of his physical and emotional issues, had an adverse impact on him alone.

105 In this case, the employer noticed that the grievor was experiencing difficulty coming into work on time or at all. It became aware that, at least in October 2006 if not before, he was suffering from depression and anxiety. He also made an informal request for accommodation, by requesting that he be allowed to work late on the days on which he arrived late. Given those facts, the employer had a duty to make further inquiries of the grievor to determine what the problem was and how it could be accommodated; see *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 33 and 2011 PSLRB 110. Moreover, the employer contributed to the grievor's anxiety and depression by demanding the repayment of the advanced leave payments so quickly. It could have sought a more lenient repayment schedule that would not have been so taxing on the grievor.

106 The union's representative concluded by seeking the following remedies with respect to the harassment grievance:

a. the return of the sick leave clawback to the grievor;
b. the payment of damages for the financial stress caused to the grievor by the accelerated clawback;
c. if I find that discrimination occurred, the payment of damages for pain and suffering to the grievor that, following *Stringer*, should be set at $10 000.00; and
d. the payment of additional damages of $10 000.00 due to the employer's wilful discrimination.

C. Employer's reply

107 The employer's representative distinguished *Stringer* on the grounds of a recognized disability (deafness) that the employer had clearly and wilfully refused to accommodate in a reasonable fashion.

108 Turning to the financial stress associated with the clawback, the employer's representative pointed out that there were many stressors in the grievor's life. He accepted the sick leave when it was offered to him and cannot complain that he was required to pay it back. Nor was there any evidence (other than his word) that he was so financially destitute at the time of the required repayment.

V. Reasons

109 Before considering the disciplinary suspensions I think it is necessary to say something about the burden of proof in cases where illness is offered as an explanation for what otherwise might be considered insubordinate conduct.

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110 The employer bears the burden of proof in discipline cases. An employee who fails to turn up for work on time or at all might be subject to discipline for insubordination. But if the employee says that he or she was sick the question then becomes whether the employer has to prove not just that the employee did not show up for work, but that he or she was not sick.

111 The grievor's representative argued that the onus was on the employer to prove that the grievor was not sick in order to justify its decision to discipline him for failing to comply with the reporting conditions. He relied upon the decision in *Buckwheat v. Treasury Board (Canada Border Services Agency)* 2009 PSLRB 156 in support of that submission. If the decision in fact goes that far then I must respectfully disagree with it.

112 In *Buckwheat* the grievor was a customs inspector at the Ambassador Bridge. She and a number of other inspectors requested a French language refresher course. It was denied. The grievor then entered into a job-sharing arrangement which enabled her to work two shifts a week. She made every effort to work only on week-ends so as to accommodate her child-custody arrangements. The employer then decided to implement a two-day French language refresher course that was to take place during the week. After being advised that she was expected to take the course she wrote to her employer to say that she wanted to relinquish her bilingual status in part, she said, because the course was going to impinge on the time she had committed to her family. She did not tell management that she would not be attending the course, and in fact did not attend. When her supervisor later learned she had not attended he decided to give her the benefit of the doubt and not impose discipline. However, he told her that she could not relinquish her bilingual status because it was part of the terms and conditions of her employment, and that she had to attend the course when it was scheduled for September 1-2. She said that she would make every effort to attend. However, on the day she was to attend she called in sick, saying that she had stomach flu. When her supervisor questioned her about this she stated she would get a doctor's note. She obtained a note from a walk in clinic on September 7 which stated that the grievor "was seen today stating that she missed work …due to vomiting and diarrhea:" para 21 of the decision.

113 The employer did not accept the doctor's note, primarily because the doctor had not treated the grievor – he or she was only repeating what the grievor was saying several days after the fact. The employer imposed a one-day suspension, which the grievor challenged.

114 At issue before the adjudicator was whether or not the grievor was sick on September 1-2. The employer's position was that it did not believe that the grievor was sick those days. The doctor's note did not prove that she was sick. The grievor's position, on the other hand, was that she had been sick and that being sick did not provide just cause for discipline.

115 Adjudicator Mackenzie upheld the grievance. He concluded that the employer "had only suspicions and no evidence of insubordination:" para. 48. He went on to say that in a discipline case

> *[t]he burden rests on the employer to prove misconduct. In essence, the employer is required to prove that the grievor was not sick on the days in question. Discipline cannot be imposed on the basis of suspicions. The employer is required to have some evidence that the employee was not sick to justify imposing discipline. I find that the employer has not met its burden of proof. Therefore, the employer did not have just cause to impose discipline:* para. 55.

116 In my opinion Adjudicator Mackenzie could not have meant by this statement that the onus of establishing the cause of the employee's absence lay solely on the employer. If he did mean to say this then I must respectfully disagree. I say this because the answer to the question of who bears the onus of proof of any particular fact always depends upon who it is that needs to establish that fact in order to make out their case. This is particularly true when the fact in

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question is something that is solely within the knowledge (and ability to prove) of the person who is asserting the fact in question.

117*Buckwheat* was a case in which an employee failed to show up for a work at the time and place directed by the employer. The employee was aware of the employer's direction in time for her to be able to comply. That being the case, her failure to attend the refresher course was on the face of it insubordination that could justify discipline. I say this because subject to any relevant provisions in a collective agreement, an employee is required as part of his or her contract of employment to show up for work at the appointed time and place: *Halfacree v. Deputy Head (Department of Agriculture and Agri-Food)* 2012 PSLRB 130 at para. 208. Failure to show up for work on time or at all is on the face of it a breach of that obligation, and one that could amount to just cause for discipline.

118 An employee who wants to avoid that result must establish that they were absent for a non-culpable reason–in this case, illness. If at the end of the day the trier of fact is satisfied that the employee was sick then in ordinary course discipline would not be justified. If, on the other hand, the employee did not establish that he or she was ill at the time then discipline could be justified. Of course, the overall onus of establishing just cause for discipline always lies on the employer and never shifts. But that does not mean that the employer has the onus of proving facts not relevant to its case–or disproving facts relevant to the employee's defence. Rather, the onus of proving any particular fact falls on the party asserting it to be both relevant and true. Since illness is a defence to an allegation of insubordination in the case of an employee who fails to show up for work, the onus of establishing that particular fact falls on the employee.

119 The amount of information or evidence that the employee must provide in order to substantiate his or her explanation will depend upon the facts and circumstances of each case. So, for example, a one day illness may need no more than a verbal explanation or a doctor's note to satisfy the onus of proof. On the other hand, if the failure to report on time or at all is repeated and beyond the normal vicissitudes of working life the employee may have to provide more or better information in order to prove that they are not showing up for work as the result of a non-culpable cause.

120 Turning then to the grievances before me, if the reporting conditions were reasonable then the grievor's failure to comply with them may be just cause for discipline. The onus of establishing the reasonableness of the reporting conditions and that the employer had just cause to discipline the grievor for any failures to comply with those conditions lay on the employer. On the other hand, the onus of establishing that the grievor did not or could not comply with those conditions was because he was sick or disabled lay on him.

A. The discipline grievances

121 I will deal first with the disciplinary suspensions of March 5, 2007 (one day) and April 4, 2007 (two day) in PSLRB File No. 566-02-6446 and of December 11, 2007 (three day) in PSLRB File No. 566-02-3880.

122 As a general rule, an adjudicator considering a discipline grievance must consider the following three questions:

a. Were there grounds for discipline?

b. If so, was the penalty imposed by the employer excessive in the circumstances?

c. If so, should a more reasonable penalty be substituted?

1. Were there grounds for discipline?

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123 Dealing with the first question, the employer's three disciplinary decisions stemmed from the grievor's failure to comply with the reporting conditions first imposed on him by the employer's letter of counselling in August 2006 and repeated from time to time later on.

124 To answer the first question, I must determine whether the reporting conditions were reasonable exercises of the employer's right to manage operations in the workplace. If they were not, then discipline for breaching such conditions would not be appropriate.

125 There is no doubt that the reporting conditions were more stringent than those imposed on the grievor's co-workers. But, by August 2006, the grievor had established that he was not conducting himself in the same manner as his co-workers. The grievor had been late (often by two hours or more) eight times in a little over five months. During the same period, he had been absent due to some undisclosed illness 21 times and had taken an additional 9 days of different types of leave. The grievor had offered no explanation for why he could not get to work on time or why he had to take so many days off. Perhaps more importantly, he also did not explain why he could not notify his supervisor before his expected start time that he would be late or absent due to illness. The employer recommended that the grievor go to EAP and seek medical advice early on. Notwithstanding this, the grievor did not provide a sufficient explanation as to why he could not report on time.

126 Faced with such a departure from the norm, the employer was, in my opinion, entitled to impose the reporting conditions. In the absence of an explanation from the grievor, his supervisor had no way of knowing whether the frequent tardiness and absences were the following:

a. simply the usual random incidents of working life;

b. a sign that the grievor was struggling with issues that were beyond his control and that precluded or limited his ability to comply with the reporting conditions; or

c. a sign that the grievor could not be bothered to comply with the reporting conditions.

127 The reporting conditions made it clear to the grievor that the employer needed him to comply with what is, after all, a basic obligation of any employee – to show up for work on time or to explain why that is not possible. They made it clear that the employer took that obligation seriously and that it was prepared to impose discipline if it were not done.

128 The conditions were not harsh or difficult to satisfy. They were reasonable, and linked to the requirements of the workplace. They were also imposed in good faith. Most people set their alarms for a time that enables them to get to work on time. Had the grievor followed that principle, he would have known when he was running late before he left for work and hence would easily have been able to call his supervisor to alert her to the fact that he would be late. Similarly, people do not always go to bed knowing that they will be sick the next day. They set their alarms in normal course, only to realize upon waking that they are too sick to go in. Since they have set their alarms in normal course, they will discover that they are sick well before their start times and hence will be able to give adequate notice. The same thing should have happened for the grievor, but it did not.

129 The grievor offered in his defence the fact that he was depressed, stressed, suffered from sleep apnea or drank too heavily on any given night. He stated that the employer knew or should have known that he was suffering from those conditions and should not have imposed the reporting conditions or, having imposed them, applied them so strictly. He suggested that the employer discriminated against him by refusing to consider those conditions.

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130 The difficulty is that the grievor's argument confuses an ailment with a disability. Depression and stress are commonly experienced by many people in the course of their working lives. Neither is, by that fact, disabling. The same can be said of sleep apnea. The fact that one experiences such conditions does not establish a *prima facie* case of disablement or, all the more so, a *prima facie* case of discrimination based on a disability. Needed in this case was evidence that the conditions were so bad that they disabled or at least limited the grievor's ability to comply with the reporting conditions. But the grievor offered no such evidence other than the conditions themselves.

131 The importance of managing attendance is not eliminated by the mere assertion that one has an illness. Not every physical or emotional ailment amounts to a disability requiring accommodation. Some ailments – such as depression, emotional stress or headaches or, in Mr. Riche's case, sleep apnea – may impact a person's life without necessarily making it impossible for them to comply with the usual expectations of working life. For example, depression may be mild, moderate or totally disabling. The severity of its impact will depend upon the severity of the cause, the person's psychological makeup and the steps he or she takes to combat it. It is not a sufficient excuse on the part of an employee to justify his or her repeated tardiness or frequent absences by saying, "I'm depressed", or, "I had a headache." Something more is required to enable the employer to know that the ailment is truly disabling, that is, something beyond the control of the employee as opposed to simply an excuse. In part, that is the reason the jurisprudence emphasizes the obligation on the part of the employee seeking accommodation to explain the nature of the problem and to co-operate in its treatment. Without such an explanation, the employer has no way of knowing whether the ailment is severe enough to amount to a disability or what to do about it by way of an accommodation if so required.

132 The grievor's submission also overstated the nature and extent of an employer's duty to accommodate. As a general rule, the duty to accommodate arises for issues that an employee cannot control. A paraplegic cannot walk up stairs. An alcoholic cannot physically or psychologically resist the lure of alcohol. Such employees are not able to perform the tasks expected of them without outside help. That is the meaning of "disabled." Hence, the duty to accommodate. But employers are not under a duty to accommodate issues that an employee is able to control. If the employee habitually sleeps through his or her alarm, then he or she must get a second clock, put their single alarm clock across the room where it cannot easily be reached or go to bed earlier. All those steps were within the grievor's control. There was no evidence that he tried any of them. In the absence of such evidence, he could not establish that the reporting conditions were outside his control. And, if he could not do that, he could not establish that he was disabled from being able to give timely notices of his latenesses or absences.

133 The medical evidence stated that the grievor was fit for work without restriction. Vague references in some of the medical reports to"medical issues" in the past did not establish that those issues, whatever they were, were disabling. Nor did they establish that the grievor was unable to give timely notice that he would be late or absent.

134 Of course, the grievor stated that, from time to time, he simply slept through his alarm or, perhaps, was woken up but then fell back asleep again. That excuse may apply the first or second time it happens. But if the problem repeats itself as often as the grievor suggests it did, the solution would have been to buy a second alarm clock, put the single alarm on the other side of the room, to stop drinking earlier in the evening or go to bed earlier.

135 I should note that the grievor's references to being a "heavy drinker" or a "happy drunk" do not in my mind establish that he was, at the material times, an alcoholic. Had there been evidence that he was in fact an alcoholic, there might have been some substance to the grievor's submission that the reporting conditions were unreasonable in the circumstances. However, there was no such evidence. The grievor stopped short of stating that he was an alcoholic in

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2006 and 2007. Nor was there any independent evidence from his family physician or anyone else that he was an alcoholic. In addition, there was the consistent evidence of the employer's witnesses to the effect that they had never detected any signs of drinking by the grievor.

2. Was the penalty imposed by the employer excessive in the circumstances?

136 The imposed discipline was progressive, moving from one to two to three days of suspension. It was imposed in the context of a larger history of warnings, meetings and other discipline, one of which the employer in fact rescinded once the grievor presented supporting medical information. In my opinion, none of the three penalties was excessive.

3. Should a more reasonable penalty be substituted?

137 I do not need to answer this question given my reasons stated earlier.

138 Accordingly, I am satisfied that the grievances in PSLRB File Nos. 566-02-3880 and 6446 must be dismissed.

B. The harassment grievance – PSLRB File No. 566-02-4051

139 Given the findings and reasons set out earlier, it should be clear that I was not satisfied that the imposition of the reporting conditions constituted "harassment … by reason of … disability," as per article 44 of the collective agreement. There was no disability. The reporting conditions were reasonable expressions of the employer's right to manage the workplace and its employees. The fact that the grievor did not agree with those conditions did not make them harassment.

140 Accordingly, I must dismiss this grievance as well.

141 For all of the above reasons, I make the following order:

VI. Order

142 The grievances are dismissed.

April 2, 2013.

Augustus Richardson,
adjudicator

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