PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF AN ARBITRATION UNDER THE PUBLIC SERVICE LABOUR RELATIONS ACT, RSNB 1973, c P-25

IN THE MATTER OF A GRIEVANCE BETWEEN:

NEW BRUNSWICK NURSES UNION and MÉLISSA FERRON
UNION AND COMPLAINANT

AND:

TREASURY BOARD represented by the VITALITÉ HEALTH NETWORK (ZONE 6)
EMPLOYER

APPEARANCES:

FOR THE UNION:
Me Joël Michaud, K.C. and Me John MacCormick (for the first three hearing days)

FOR THE EMPLOYER:
Me Justin Weiss

ARBITRATOR:
Michel Doucet, C.M., O.N.B., K.C., Ad.E.

HEARING DATES AND LOCATION:

Bathurst, NB, April 16, 17, and 18, and August 7 and 8, 2024

DATE OF DECISION:

October 23, 2024

A. INTRODUCTION

1. On October 12, 2022, the New Brunswick Nurses Union ("the Union" or "NBNU") and Mélissa Ferron ("the complainant") filed a grievance alleging that the Vitalité Health Network (Zone 6) ("the Employer" or "Vitalité") violated the collective agreement between the NBNU and the Treasury Board, Nursing Group: Part III ("the collective agreement"). More specifically, they allege that the Employer violated Article 7 of the collective agreement as well as the Human Rights Act, RSNB 2011, c 171 ("HRA") when it removed the complainant from her accommodated position in Public Health.
2. No objection was raised regarding my jurisdiction to hear this grievance.
3. The documents filed in evidence by the parties are listed in the appendix.

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4. The Union called the following witnesses:

- The complainant;
- Tamy Lavigne, public health nurse ("TL");
- Shirley Avoine, labour relations officer for the Union ("SA");
- Paulette Lévesque, psychologist and expert witness ("PL" or "the psychologist"); and
- Théophane Albert, father of the complainant ("TA").

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5. The Employer called the following witnesses:

- Annie Roussel, currently Assistant Director of Public Health, and at the relevant time supervisor of Public Health for the Acadian Peninsula ("AR");
- Sophie Robichaud, currently legal counsel to the Vice-President of Human Resources, and at the relevant time HR business partner ("SP");
- Shanie Roy, disability management advisor ("SR"); and
- Jennifer McBrearty, Director of Labour Relations and HR Business Partners ("JM").

B. FACTS

(a) The complainant

6. The complainant obtained her nursing degree in 2011. Immediately after graduating, she began working at the Chaleur Regional Hospital in Bathurst ("Bathurst hospital"). The Bathurst hospital is part of the Vitalité Health Network.
7. During her years at the Bathurst hospital, she held various positions and worked in different departments. According to her testimony, at hiring she held a full-time position (1.0), but at some point, in order to balance work and family, she chose—as is common among nurses—to accept a 0.6 full-time equivalent position. Although this schedule

provided flexibility, she stated that she continued to work thirty-six (36) hours per week by regularly working overtime.

8. According to the complainant, in 2017 she was asked to assist in establishing a child psychiatry unit at the Bathurst hospital. The establishment of this unit took approximately one year.
9. In April 2020, she left the child psychiatry unit to work for several months on the creation of a "COVID" unit. She then returned to child psychiatry.

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10. On July 13, 2020, while working in the child psychiatry unit, the complainant was violently assaulted by a patient. Few details of this assault were presented at the hearing. However, I note that the Employer did not dispute that the attack was violent and that it caused serious medical consequences, forcing the complainant to take one month of leave.
11. The complainant returned to work on August 15, 2020 and continued working in the child psychiatry unit until November 2020. In November 2020, on an unspecified date, another incident involving the complainant and a psychiatrist occurred. No details of this incident were presented at the hearing. Again, the Employer did not contest that this incident occurred and that it caused medical problems for the complainant. Following this incident, her family physician placed her on sick leave. This leave continued until her return to work in March 2022.

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12. In April 2021, at the request of Blue Cross/Medavie, her disability insurer, the complainant consulted a psychiatrist. According to her testimony, on December 7, 2021, the psychiatrist asked her to attempt a return to work, but it "was not successful" because she "had a major panic attack." Other than her testimony explaining that the psychiatrist prescribed medication for recurring "nightmares" of the assault, no report from the psychiatrist was filed in evidence.
13. In November 2021, the complainant began seeing PL, a psychologist. I will return later in this decision to the psychologist's testimony. The complainant testified that at that time she did not fully understand her symptoms. With the psychologist, she began psychotherapy sessions. Following these sessions, she explained that the prognosis for returning to work was good.

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14. The return-to-work plan initially provided for a "gradual return" near the end of January 2022, with accommodations including that she not be required to return to the child psychiatry unit and that she no longer work with the psychiatrist involved in the incident. There was also a temporary restriction regarding her work location: her gradual return to work was to take place somewhere other than the Bathurst hospital.

(b) Search for accommodation

15. On December 10, 2021, a position in "Public Health – Tracadie" was posted. According to the evidence, this position had been vacant for one year. The description of the position is as follows:

Registered Nurse (RNCA) – Public Health – Tracadie
Acadie-Bathurst ~ Vitalité Health Network
Bargaining unit: NBNU
Zone: Zone 6 – Acadie-Bathurst
Facility: Public Health – Tracadie
Department: Public Health
Classification: Registered Nurse Class A (RNCA)
Status: Permanent full-time
FTE: 1.0
Expected start date: January 2022

Working hours:
8-hour shifts – Monday to Friday
Possibility of evening and weekend work

JOB SUMMARY:

The successful candidate will use a population health approach and the determinants of health in planning activities related to health promotion and disease and injury prevention. The individual will work within a multidisciplinary team and provide various public health nursing services to individuals and groups. The individual must also establish partnerships, collaborate in community development, and act as a resource person for colleagues, professionals, and community organizations. The individual will work within programs such as "Healthy Families, Healthy Babies," immunization, communicable disease control, and health promotion.

REQUIREMENTS:

- Member in good standing of the Nurses Association of New Brunswick
- Bachelor of Nursing
- Minimum three years of nursing experience demonstrating:
    - Ability to apply epidemiological principles
    - Ability to use a population health approach
    - Ability to adapt health promotion strategies
    - Ability to build community partnerships
    - Ability to facilitate groups
- Current CPR certification

- Willingness to complete required training
- Computer skills (Microsoft Office)
- Organizational skills
- Strong communication and interpersonal skills
- Good judgment, leadership, initiative, creativity, adaptability
- Ability to travel within the Vitalité territory and province
- Valid driver's licence
- Ability to work independently and in a team
- Physical ability to perform duties
- Good work record (performance and attendance)
- Adherence to professional ethics and organizational values
- Respect for confidentiality rules

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16. Public Health is responsible for the following programs:

1. Healthy Families, Healthy Babies
2. Immunization
3. Communicable disease control
4. Health promotion

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17. Public Health in Region 6 has offices in Bathurst, Tracadie, Caraquet, and Shippagan. Isabelle Caissie supervises the Bathurst office and AR supervises the Acadian Peninsula offices. AR works out of Tracadie. Both report to Nancy Bastarache, Director of Public Health for the Vitalité network.

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18. Public Health in the Peninsula employs seven nurses in Tracadie, three in Caraquet, and four in Shippagan, along with additional staff.

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19. The job summary for the Public Health nurse states:

    As a member of a multidisciplinary team, the nurse may work in programs such as Healthy Families, Healthy Babies, immunization, communicable diseases, sexual health, and school health programs.

The nurse applies nursing and health sciences knowledge to provide public health services, improve health behaviours, and support individuals, families, and groups through various interventions and initiatives.

The nurse uses a population health approach and considers determinants of health in planning activities related to health promotion and prevention. This requires specific knowledge and skills in public health, including surveillance, health promotion, population health assessment, and disease and injury prevention.

The nurse must build partnerships, collaborate with the community, and act as a consultant to colleagues and organizations.

20. AR added that nurses may also be required to manage teams in immunization and health promotion programs, facilitate community groups, and that it is impossible to work in the Tracadie office without being able to work in immunization clinics.
21. TL, a public health nurse and vice-president of the Union's local in Bathurst, testified that she works mainly in the immunization and communicable disease control programs. She explained that the immunization program is responsible for mass immunization clinics and school immunization clinics. School immunization clinics take place approximately twice a year. TL, who has worked in Public Health since 2018, stated in her testimony that she had never been asked to supervise employees.
22. In her testimony, the complainant explained that before returning to work, she had communications regarding her medical situation with Dany Mallet ("DM"), who at the relevant time held the position of Disability and Attendance Advisor with the Employer. DM was the person responsible for the complainant's file for the Employer. He was also in communication with Renée Chiasson ("RC"), the rehabilitation advisor at Blue Cross/Medavie, and with PL, the psychologist, regarding the complainant's file. Unfortunately, DM was not called to testify and no explanation was provided for his absence.
23. The complainant testified that she discussed the posted Public Health position with DM. The date of that exchange was not specified, but since the position was posted on December 10, 2021, it can be assumed that the exchange took place around that time. The complainant explained that during that exchange DM told her that he was aware of her "restrictions" and that the manager of the position had raised questions about them, particularly regarding the restriction related to "acute care." The complainant explained that her union representative at the time, Chantal Lafleur ("CL"), asked DM to "freeze" the position until he obtained clarification about the complainant's situation.
24. The issue of the restriction concerning "acute care" was raised in an exchange of letters on December 20, 2021, between the psychologist and RC. In that letter, the psychologist was responding to an email from RC dated December 14, 2021, in which RC requested clarification regarding restrictions related to "acute stress at work." In her letter, the psychologist wrote: "I recommend that [the complainant] return to a work environment

where she will not be exposed to acute stress. This means that she will not have to respond to a code white or during emergency measures." The psychologist also added: "[The complainant] cannot work in a setting such as the emergency department or intensive care, nor supervise employees."

25. Ultimately, the complainant applied for the Public Health position. Her interview for that position was scheduled for January 13, 2022. The complainant testified that she received a call from AR the day before the interview. The purpose of that call, as the complainant said she understood it, was to discuss the position and explain the different Public Health programs to her. According to the complainant, during that call AR gave a brief description of the various programs offered by Public Health, but mainly emphasized that the position was "difficult," that it required the nurse to work many overtime hours, sometimes travel "on dirt roads," deal with difficult clients, and make decisions when no physician was on call.
26. The complainant explained that she had the impression during that call that the supervisor was trying to discourage her from applying. She added that the supervisor's tone of voice "was direct, cold, and tactless." The complainant added that the information conveyed to her during that exchange was negative and that the supervisor even told her at one point that if she was not interested in the position she could withdraw her application. According to the complainant, that call lasted five to seven minutes.
27. As for the complainant's hiring, AR testified that in December 2021 DM contacted her to say that he had a candidate for the posted position. AR said that she asked DM whether the candidate had any "restrictions," and he replied that she had none for the Public Health position. AR testified that, to her knowledge, communications concerning the "restrictions" were taking place between DM and Blue Cross.
28. AR explained that Suzie Haché ("SH") from Human Resources, who was responsible for staffing, subsequently contacted the complainant and asked her to get in touch with the supervisor one or two days before the interview so that the latter could explain the Public Health programs and role to her. AR explained that this "pre-interview" is a practice specific to Public Health. She added that Public Health managers consider it essential to speak with nurses coming from the hospital environment in order to familiarize them with the type of work they will have to do in Public Health. AR explained that the purpose of that call is to allow nurses who wish to come work in Public Health to make an "informed choice."
29. According to AR, it was the complainant who contacted her in the afternoon of the day before the interview. She explained that during that call she used the same guide she uses for all other interviews of that type. On cross-examination, she explained that this guide had been developed by her and her predecessors in the supervisor position. For AR, there was nothing special about that call; it was "the same as all the other calls of that kind" that she had made with other nurses.
30. On January 13, 2022, the complainant's interview took place in the presence of AR, IC, and SH. Immediately after the interview, the position was offered to the complainant. AR described the complainant's interview as an "excellent interview."

(c) Gradual return to work

31. On March 7, 2022, DM wrote a letter to the complainant stating:

Due to a medical condition, you have been absent from work for an extended period. Your treating medical team indicates that you have permanent restrictions. In such circumstances, we will make efforts to accommodate you pursuant to article 7.03 of the nurses' collective agreement, part III.

As discussed during our telephone conversation of December 21, 2021, with the agreement of your union representative, we are currently able to offer you a permanent full-time position as a Registered Nurse in Public Health RNCA.

This will be a final accommodation.

32. In this letter, DM refers to the "treating medical team." Since he was not called to testify at the hearing, it is impossible to determine what he meant by that expression. In her testimony, PL explained that, for her, the "treating medical team" included, in addition to herself, the complainant's family physician and psychiatrist. It may therefore be assumed that DM was referring to the same people.
33. The complainant explained that a first version of this letter had been sent to her, but because it contained errors, DM had been asked to correct it and return it to the complainant for her signature. In the first version of the letter, the phrase "this will be a final accommodation" did not appear. The complainant explained that she had not requested that addition and that DM had not drawn it to her attention when he returned the letter to her for signature.
34. On March 27, 2022, the complainant's psychologist sent a letter to RC entitled "revised return-to-work schedule." The complainant explained that this letter followed a conversation she had with her psychologist before her gradual return to work, during which she had asked whether the Employer properly understood the nature of her restrictions. She said that her psychologist then told her that she had had a discussion with DM, had explained the complainant's situation and restrictions to him, and that he appeared to understand them well.
35. In her March 27, 2022 letter, the psychologist recommended that the gradual return to work be done, as much as possible, by telework for the "training" portion and that for the rest the complainant be allowed to work in "hybrid mode," that is, that "when necessary" she could "go to work for meetings, observation, or practical work."
36. On May 23, 2022, the psychologist wrote a letter to AR and DM. This letter was in response to a request from the Employer seeking "confirmation [from] the medical team regarding the maximum number of hours" the complainant could work during clinics. In that letter, the psychologist indicated that, following consultation with the family physician, they recommended that she begin by working a maximum of four (4) hours during those clinics, gradually increasing to full-time by June 5, 2022.
37. With respect to her training, the complainant explained that she completed online training. On May 30, 2022, she obtained her vaccination certification and began participating in vaccination clinics in various locations, except Bathurst. In the comments section of the evaluation grid for her vaccination certification, the evaluator had only positive comments about the complainant. For a reason not explained at the hearing, the

complainant also had another assessment of her immunization skills on June 28, 2022. According to the comments of the same evaluator, that assessment also appears to have gone well.

38. On June 9, 2022, the complainant had what she described as a "pre-evaluation" with her supervisor. According to the complainant, her supervisor then told her that she felt "manipulated" by the various medical requests being presented to her. It appears that from that moment onward the relationship between the complainant and her supervisor deteriorated to the point that it became necessary to organize a meeting to address the matter.
39. The supervisor testified that although the complainant was progressing well in her new position, there were certain things she needed to improve. According to the supervisor, the purpose of the June 9 meeting was therefore to discuss those "improvements." The supervisor explained that the meeting did not go well and that at one point the complainant simply left. The next day, the complainant did not report to work and, according to the supervisor, she sent an email to the other Tracadie employees in which she "disclosed confidential information." That email was not entered into evidence.
40. At the hearing, the complainant testified that she had the impression that her supervisor did not understand the gradual return-to-work process. She added that her supervisor never asked her what her restrictions or limitations were.
41. In light of the tense situation between the complainant and the supervisor, it was decided to organize a meeting to try to restore the relationship.

(d) Meeting of June 30, 2022

42. In addition to the complainant, the participants at this meeting were JM, AR, CL, and SA. The notes taken by SA during this meeting were entered into evidence. According to those notes, AR acknowledged at the outset that the June 9, 2022 meeting had not ended well. She added that she had used the same approach with the complainant that she uses with all other employees, but that she now realizes that this approach may not be appropriate for everyone.
43. Still according to SA's notes, the complainant stated that since her gradual return to work there had been nothing positive in her relationship with her supervisor. She added that her supervisor told her she felt manipulated when she brought her medical notes. The complainant also said that she was not used to her supervisor's management style, which she described as "military," and that she had the impression that the supervisor had a preconceived opinion of her. The complainant added that she found the supervisor's comments during the June 9, 2022 "pre-evaluation" to be "harsh" and very negative. Finally, the complainant stated that the January 2022 pre-interview had not only left her perplexed, but had also disturbed her.
44. For her part, AR testified that at the June 30 meeting she spoke first to apologize for how she had reacted at the June 9 meeting. She then explained that when she first saw the complainant's file, she thought she had just acquired "a rare gem" for her department. AR acknowledged that things began to go wrong when she "received the sick note." She added that she was unhappy with the situation and not with the complainant.
45. As for her conversation with the complainant on the day before the interview, AR explained that she followed the same process with the complainant that she follows with

all employees starting in Public Health, in order to make them aware of "the reality of the job."

46. The supervisor also testified at the hearing that she twice asked the Union to extend the complainant's probationary period. She explained that this request was made in order to allow the complainant to perform at least seventy-five (75) percent of her duties as a Public Health nurse. According to her, although the complainant was competent in immunization, she would have liked to see the probationary period extended for the "Healthy Families, Healthy Babies" program. The Union opposed this request for an extension. The parties therefore agreed that probation would end on July 15 as scheduled.
47. At the end of the June 30, 2022 meeting, the complainant and the supervisor acknowledged, according to SA's notes, that they could "learn to work together." However, on July 6, 2022, the complainant submitted to the Employer a medical note from her family physician placing her off work. This note, which was rather brief, stated: "This patient should not work/school for two weeks due to medical reasons: DUE TO HARRASMENT IN THE WORK PLACE."

(e) Harassment complaint

48. On July 18, 2022, the complainant filed a harassment complaint against AR and JM. That harassment complaint was not entered into evidence at the hearing. Isabelle Moreau ("IM"), an HR business partner for Vitalité who works in Edmundston, was mandated to conduct the investigation into this complaint. As part of the investigation, she met with the complainant in the presence of a union representative. She also met with JM and AR.
49. On July 29, 2022, IM wrote to the complainant informing her that the evidence gathered during her investigation did not meet "the definitions of workplace harassment, as defined in the Vitalité Health Network Workplace Harassment Policy […], as well as in the [HRA]." She also added that the elements presented by the complainant to justify her complaint related to employee performance management and did not constitute workplace harassment. The complaint was therefore declared unfounded. At the end of her letter, IC wrote:

> *As we mentioned to you during our meeting of July 29, 2022, we strongly recommend a mediation/conflict management process between you and your manager in collaboration with Mr. Ghislain Poirier's team, Conflict Management and Organizational Climate Advisor at the Vitalité Health Network. Until this process begins, you may continue working under the supervision of Ms. Isabelle Caissie. Ms. Caissie will ensure follow-up with you regarding the beginning of meetings with the conflict management and organizational climate team.*

50. In her testimony, the complainant indicated that she was pleased there would be follow-up.

51. The supervisor explained that she had agreed to participate in the mediation process. She added that, since this could not take place at that time because the mediator was unavailable, she had continued working from home because she had been prohibited from being in contact with the complainant. She testified that she had never refused to work with the complainant and that throughout her relationship with the complainant she had only been doing her job as a manager. AR also added that she had not been involved in the decision to remove the complainant from her position.
52. Ultimately, because of the Employer's decision to remove the complainant from her Public Health position, the mediation never took place.

(f) Meeting of September 13, 2022

53. On August 24, 2022, the psychologist completed, at the complainant's request, a "Functional Assessment Form (FEF)" required by the Employer. In that form, she indicated that the complainant was "fit to return to full-time work while respecting the restrictions already established and accepted by the employer: permanent restriction from her pre-disability position and from working with a certain psychiatrist […] and a temporary indefinite restriction from returning to Bathurst hospital."
54. The complainant's return to work was scheduled for September 6, 2022 at Public Health in Bathurst. During an exchange with IC, the supervisor of Public Health in Bathurst, before her return to work, the complainant was informed that she had to go to the maternity ward at Bathurst hospital to continue her training in the "Healthy Families, Healthy Babies" program. The complainant said that she immediately objected because of the restriction that she was not to work at Bathurst hospital. According to the complainant, IC told her that neither AR nor DM had informed her of such a restriction. The complainant said that she immediately contacted her psychologist to inform her of the situation and, in addition, on September 3, 2022, sent a very long email to DM, copying her psychologist and RC, in which she expressed her frustration regarding the handling of her file.
55. On September 3, 2022, the psychologist also sent the following letter to DM:

> *SUBJECT: ADDITION TO THE FEF FORM – MÉLISSA FERRON*
>
> *Mr. Mallet,*
>
> *I am writing this letter with the verbal consent of my client, Ms. Mélissa Ferron, and in my capacity as psychologist. I hope that you will have time to intervene before the situation deteriorates further.*
>
> *This letter is an addition to the Functional Assessment Form (FEF) regarding the restrictions previously submitted. Ms. Ferron's restrictions and accommodation requests date back to November 2021. Ms. Ferron's care team, supported by the union, formulated the restrictions and, to my*

knowledge, they were accepted since Ms. Ferron obtained a position outside Bathurst hospital.

I do not understand why Ms. Ferron continues to find herself in situations of ongoing conflict.

Ms. Ferron suffered a psychological injury at work, diagnosed by professionals on her care team (physician, psychologist, and psychiatrist). To my knowledge and based on the documentation received, her employer accepted the recommendations and restrictions established by the care team.

Here are the recommendations submitted and presented to the employer (you should have a copy of all letters submitted to Blue Cross in Ms. Ferron's file):

Recommendations:

Obtain employment outside Bathurst hospital and where the work environment is respectful, caring, and safe, with one specification: department (room not narrow and not locked with a key).

Permanent restrictions:

Not be responsible for / head of a team.

Not participate in Code White and Code Blue calls.

Not work in acute care, such as Emergency, Intensive Care, or in an acute crisis environment.

Temporary indefinite restrictions:

Not work at or go to Bathurst hospital. This restriction remains temporary, indefinite, and in force.

Since Ms. Ferron is to return to work on September 6, 2022, I believe a meeting would be appropriate with the persons concerned in order to clarify all misunderstandings; otherwise you risk having more and more problems due to the existing conflicts.

I hope this information will be useful to you and that you will intervene as soon as possible.

56. On Friday, September 9, 2022, DM informed the complainant that a meeting to follow up on her file was scheduled for September 12, but since the complainant was off that day, the meeting was postponed to September 13. In an email to SA, DM clarified the purpose of the meeting somewhat, stating that it was to discuss the "new restrictions."
57. In her testimony, JM explained that following the psychologist's letter of September 3, 2022, DM was responsible for obtaining more information from Public Health regarding the "new restrictions." She added that there were already Public Health employees at that time who were being accommodated for "limitations" concerning staff management and that "for us it was becoming difficult to accommodate the complainant when there were already employees being accommodated for the same restriction." She added that the Employer had tried to "see whether it was possible to leave the complainant in that position with her restrictions," without however giving further details as to what had been done in that regard.
58. As for the September 13 meeting, it began at 8:00 a.m. and was held at the Public Health offices in Bathurst. In addition to the complainant and DM, SR, currently legal counsel to the Vice-President of Human Resources at Vitalité, but at the relevant time an HR business partner, IC, TL, and SA were also present.
59. DM began the meeting by explaining that SR was participating in the meeting in her capacity as an HR business partner and not as a lawyer. He then distributed a letter addressed to the complainant and proceeded to read it aloud. In that letter, DM wrote:

    Following receipt of your new permanent work restrictions received on September 4, 2022, you are no longer able to perform your work duties in your current service. Given your permanent restrictions, it is impossible for us to offer you accommodation in your current service without worsening your medical condition.

    Your employment with the Tracadie Public Health service will therefore end on September 13, 2022, and your disability management advisor will work with you and your health professionals to offer you accommodation that respects your medical condition.

    A follow-up meeting will be scheduled within a few days in order to take note of the progress of your file and decide on the subsequent steps.

60. JM testified that she was not involved in drafting that letter. She "assumed" that DM drafted it. She acknowledged, however, that she had participated in a discussion with Joanne Savoie ("JS"), Acting Director of Labour Relations, and Réjean Bédard ("RB"), her predecessor in the position she currently holds, concerning the steps to be taken in

this file. JM added that the decision to remove the complainant from her position had been made by Labour Relations management and that she agreed with that decision. According to her, the decision was made because of the "new restriction" of "not being responsible for / head of a team."

61. Returning to the September 13 meeting, after DM read the letter, SA said she asked him which "new restrictions" he was referring to. DM replied that it was the restriction of not being "responsible for or head of a team." SA then asked whether there were other restrictions causing problems, and DM did not respond to her question. She subsequently asked him to put in writing the reasons why that identified restriction prevented the complainant from performing her duties in her Public Health position.
62. Having received no response from DM to her request for clarification, SA sent him an email on September 16, 2022 reiterating her request. That same day, DM sent his reply, which essentially repeated the job description of a Public Health nurse. In response, SA asked him when, in his view, the restriction of not being responsible/head of a team had arisen. DM replied that this information had been sent to him over the weekend of September 3, 2022 and that he had reviewed it on September 5, 2022.
63. On cross-examination, SA stated that she did not understand what DM meant when he referred to a "new limitation." In her view, the fact that the complainant could not be responsible/head of a team was not a "new limitation." She added that the fact DM said he would seek a new accommodation for the complainant no longer mattered because, given what had occurred, she had lost confidence in him.
64. SA also said that she asked DM during the September 13, 2022 meeting what the complainant should do, since she had just been removed from her position, and he replied that she should stay home. She also asked whether he, as disability management advisor, would continue handling the complainant's file, and he answered yes. However, she later learned that the file had been transferred to SR, the disability management advisor for Zone 1B.
65. The complainant explained that following DM's reading of the letter, she "cried her life out." She added that immediately after the meeting, she went in a state of crisis to her family doctor's office. Her doctor then issued the following medical note: "This patient should not work for 2 months due to medical reasons." The note does not specify those reasons. The complainant also explained that she contacted her psychologist to inform her of what had occurred.
66. After September 13, 2022, the complainant did not return to work, either at Vitalité or with any other employer.
67. According to the complainant, the Employer's decision to remove her from her Public Health position had a significant impact on her personally, on her family, and financially. She added that she felt her "dignity and confidence" had been taken away. Financially, she explained that, in addition to having exhausted her sick leave bank, the long-term disability payments she received amounted to only two-thirds of her 0.6 salary, which was well below what she earned when working full-time. She also stated that she had to rely on financial support from her family, as at the same time her spouse was also off work due to a workplace injury. She explained that she still intends to return to work when she is able, but added that she will not return to work for the Vitalité Health Network, in which she no longer has confidence.

68. The impact of the decision to remove the complainant from her position was also corroborated by her father's testimony.

(g) Subsequent events

69. On October 6, 2022, the complainant's file was transferred to SR, disability management advisor for Zone 1B. No reason was given for this transfer other than that SR received a call from her manager asking her to take over the file. She added that her manager told her to "prioritize this file" and to find an accommodation for the complainant.
70. SR explained that from that point she had access to the complainant's file in the "PARKLANE" system, which allowed her to review "her restrictions and limitations." She stated that she relied on the complainant's permanent restrictions to carry out her mandate. She added that she knew the complainant had previously been accommodated in Public Health in a full-time position and that, based on her understanding, that accommodation had not worked.
71. On cross-examination, she explained that her approach in such a case is to refer to the most recent document, which in the complainant's case was the September 3 letter from the psychologist to DM. She also explained that the Employer does not have access to documents sent to the insurer, but that Medavie provides them with the relevant information contained in those documents. She acknowledged that communications from Medavie to the Employer should normally appear in the PARKLANE system. However, no such correspondence was produced at the hearing.
72. After gathering this information, she said she had a discussion with DM to learn what steps he had taken in the file. The date of this discussion was not specified. On cross-examination, she added that she had asked DM questions to understand what had occurred in the file in recent months. She stated: "I understood that the failure was due to conflicts between the new and old limitations."
73. When asked on cross-examination whether she had considered recommending removing supervisory duties from the Public Health position in order to accommodate the complainant, SR replied: "Since the employee had already been removed from the position, I assumed that those discussions had already taken place." She added that it would be logical for such discussions to have occurred before the file was transferred to her, and that it is something she would have done had she been responsible for the file at that time.
74. SR explained that following her review, she was able to identify, with "professional practice," a position that met the complainant's restrictions. She said she attempted to contact the complainant to inform her, but without success. On October 11, she received a voicemail from the complainant asking her to communicate with SA going forward, as she was on sick leave.
75. SR stated that she contacted SA on October 12 to discuss the complainant's file. She added that during that meeting she explained that she had found a temporary accommodation for the complainant until June 2023 and that although "it was not perfect, it was a start."
76. On October 13, 2022, SR sent an email to SA requesting that the complainant's treating physician complete a "Functional Assessment Form." She explained that this form would allow her "to take the necessary steps to facilitate her return to work with modified

duties, to proceed with accommodation, to authorize a gradual or full return to work, or to justify the continuation of her medical leave." This form was completed by the psychologist on November 4, 2022. In the section "Recommendations of the member of the care team," the psychologist wrote: "I certify that [the complainant] is unfit to return to work due to her medical condition."

77. On October 20, 2022, SR sent a letter to the complainant informing her of the possibility of a temporary accommodation within "professional practice for the review of policies and procedures" at Vitalité. She added at the end of her letter: "The employer is still working to find you a permanent accommodation in a position that respects your limitations and restrictions. Note that the employer is not required to create a new position." Regarding the fact that the position she proposed was at 0.6, SR explained that when she had discussed the matter with her manager, he had told her that in January 2022 the Employer had made an error by accommodating the complainant in a full-time position.
78. That same day, SR received a letter from the complainant's psychologist stating: "Given [the complainant's] psychological condition, we recommend that you not communicate with her at this time. If necessary, please consult Ms. Shirley Avoine for any questions relating to her employability."
79. Consequently, on October 27, SR wrote to the complainant: "Given that you are currently off work until November 13, 2022 inclusive, your disability file will be addressed upon your return to the workplace." She also added that the Employer was still working to find her a permanent accommodation consistent with her limitations and restrictions.
80. The complainant acknowledged that she was aware SR was continuing efforts to find her an accommodation and that she had received the October 20, 2022 letter. She added that she had discussed it with her union representative, SA, who advised her to "forget about it" during her sick leave. SA testified that she had asked the Employer to wait until the complainant returned from sick leave before proposing another accommodation.
81. On June 29, 2023, the complainant sent an email to SR informing her of her decision to resign from her employment with Vitalité. In an email dated July 3, 2023, addressed to Dr. France Desrosiers, President and CEO of the Vitalité Health Network, with copies to TL, CL, AR, and IC, the complainant confirmed for a second time her decision to resign. The tone of that very long email clearly established an irreparable breakdown of the employment relationship between the complainant and her Employer. The complainant explained that she wrote that email while in a state of "distress" caused by the fact that she had received no "updates" from the Employer's Human Resources.
82. There is no evidence that the complainant subsequently expressed any desire to withdraw her resignation.

(h) Expert witness

83. PL is a psychologist and member of the College of Psychologists of New Brunswick and the Canadian Psychological Association. From 1983 to 1987, she worked as a psychometrician for the Psychological Service at the Université de Moncton. From 1987 to 2004, she worked at the New Brunswick Community College in Dieppe, where she helped establish student services and served as Coordinator of Cooperative Education and Continuing Education. From November 2006 to February 2011, she served as Divisional

Psychologist for the Royal Canadian Mounted Police, "J" Division (New Brunswick) and "H" Division (Prince Edward Island). After her time with the RCMP, she entered full-time private practice.

84. PL explained that her private practice evolved over time. Initially, she focused mainly on therapy and assessments, but later developed what she described as "a certain expertise" in trauma treatment. This led her to work with various tribunals, including family law and criminal matters. She also worked on cases involving psychological assessments related to fitness for work, return to work, and employee issues such as burnout and relational problems. She stated that she is often retained by insurance companies to assess their clients.
85. Her curriculum vitae also indicates that she is a member of the International Association of Trauma Professionals. She explained that this association includes individuals working in trauma, a psychological condition recognized in the DSM-V as post-traumatic stress disorder (PTSD). She stated that this diagnosis is given to individuals exposed to traumatic events and can be made by psychologists, psychiatrists, or physicians, although physicians tend to avoid this area as they consider it more related to psychology or psychiatry.
86. Her CV also indicates training in EMDR (Eye Movement Desensitization and Reprocessing), which she described as a specialized technique for treating PTSD. She completed a series of online courses and continues in ongoing professional development. She also uses cognitive behavioural therapy (CBT), including a branch specialized in trauma.
87. Based on PL's experience, Union counsel requested that she be qualified as an expert in psychology relating to employment, trauma, and PTSD. Employer counsel did not cross-examine her on her qualifications and did not object. The request was granted and she was recognized as an expert.
88. The Employer initially objected to the admission of a report dated April 7, 2024 prepared by PL. In a ruling dated May 24, 2024, the report was admitted, with the Employer permitted to recall the psychologist if needed. At the resumed hearing on August 7, 2024, the Employer no longer objected and did not seek to recall her.
89. PL testified that she first met the complainant shortly before January 26, 2021. The complainant had contacted her office saying she was "going through a difficult time." Given that she was a nurse and that PL worked frequently with the medical system, she agreed to see her. PL also explained that normally she does not interact directly with employers in such cases, with communication usually occurring through the treating physician or insurer. She stated that she did not expect to be as involved with the Employer as she was in this case.
90. Following the first meeting, on January 26, 2021, the psychologist wrote to Tina Bullen ("TB"), then disability management advisor at Bathurst hospital, stating: "Given [the complainant's] psychological condition, we recommend that you not communicate with her at this time. If necessary, please consult the family physician." She explained that no diagnosis had yet been made at that time, but she was beginning to form an opinion based on the complainant's account.
91. The letter also stated that she would not complete the Functional Assessment Form at that time. It further stated that the complainant was "unfit to return to work in any capacity"

due to a “psychological injury at work” that restricted her ability to return safely to her position or any alternative position due to severe emotional and functional limitations.

92. The Functional Assessment Form was eventually completed on June 11, 2021. The psychologist explained that she did so exceptionally because the complainant’s physician refused, considering the issues to be cognitive and mental health-related rather than general medical. Vitalité did not contest that the form was completed by the psychologist nor its contents.
93. In the form, the psychologist indicated that the complainant’s cognitive limitation was “severe.” She explained that trauma can cause “brain fog,” affecting processing speed, decision-making, and expression. “Severe” means it significantly affects daily functioning.
94. Regarding “ability to give instructions,” she assessed it as “moderate,” meaning inconsistent and closer to unfit.
95. For “multitasking,” she assessed it as “severe,” explaining that such individuals may feel overwhelmed.
96. For “memory, comprehension, communication,” she assessed it as “moderate.” Stress management was assessed as “severe,” with trauma causing hypervigilance and difficulty trusting others.
97. Regarding return to work, she referred to her attached letter stating that the complainant lacked the mental and physical capacity to handle daily stress and had diagnoses of PTSD and major depression.
98. She stated the complainant was unfit for work because she had not reached optimal treatment and still had triggers. PTSD treatment requires time and identification of triggers.
99. She recommended a very gradual return to work, not before six months.
100. Therapy continued through 2021. On November 20, 2021, she wrote to Medavie addressing questions about return to work.
101. She recommended a gradual return in late January 2022, permanent restrictions from the pre-disability job, and a temporary restriction from Bathurst hospital, which remained a triggering environment.
102. On December 20, 2021, she clarified restrictions, including no acute care, no emergency response, and no supervision of employees.
103. She explained that the supervision restriction related to managing staff, which the complainant could not do due to interpersonal difficulties.
104. She confirmed that this meant not being responsible/head of a team.
105. On March 6, 2022, she confirmed return to work could begin the week of March 14, focusing on whether restrictions would be accommodated.
106. She recommended telework and hybrid arrangements.
107. She suggested mentorship (“pairing”) to support the complainant.
108. On March 27, 2022, she expressed concern about misunderstandings despite prior discussions with DM.
109. She explained that return dates were adjusted after discussions with the care team.
110. She stated that DM had told her he knew little about the file and she explained the trauma and restrictions.
111. She confirmed a recommendation of maximum four-hour shifts initially.
112. She had no contact with the Employer between May 23 and June 20, 2022.

113. On June 20, 2022, she wrote to multiple parties expressing concern about misunderstandings and stating there had been no manipulation by the complainant.
114. She testified she was concerned about the Employer's conduct and the complainant's vulnerability.
115. She acknowledged she had not spoken directly with the supervisor and relied on the complainant's account.
116. On August 24, 2022, she confirmed the complainant was fit for full-time work subject to restrictions.
117. In early September, she was informed the complainant was being asked to return to Bathurst hospital and attempted to intervene.
118. On September 3, she reiterated restrictions in writing.
119. On September 13, she learned the complainant had been removed from her position and did not understand why, as there were no new restrictions.
120. In her April 7, 2024 report, she stated that the loss of employment had significant negative physical, psychological, and financial impacts, worsening anxiety and depression.
121. She added that she was not surprised the complainant had not returned to work, as the Employer's decision was extremely difficult for her to understand and accept.

122. When asked on cross-examination why she had not forwarded all of her communications to the Employer, the psychologist replied that RC had told her it would be preferable for her (RC) to handle matters relating to restrictions and accommodation, and that she would communicate the information to the Employer.

C. Arguments of the Parties

a) Union's Arguments

> The Union's theory is as follows: *the Employer terminated the complainant's employment in Public Health on the basis that it could not accommodate what it considered to be a new restriction, but in reality, the Employer's decision was retaliatory in response to the harassment complaint she had filed against AR and JM. It adds that removing the complainant from her position also gave the Employer the opportunity to get rid of an employee it considered to be "a problem."*

123. The Union submits that the evidence showed that transitioning from a hospital nurse to a Public Health nurse is a significant change requiring many hours of training and familiarization. It adds that the Employer's witnesses acknowledged this, noting that such a change justified a pre-interview so the nurse would understand what to expect

before accepting a Public Health position. The Union argues that, given this, the Employer should also have considered that the complainant was entering this new role after nearly two (2) years of absence and after experiencing significant trauma.

124. Despite the complainant's vulnerability, the Union submits that her adjustment to the new position was progressing well. However, given her mental condition, she needed guidance and support. Instead, the Union maintains that the Employer imposed a return-to-work date different from that recommended by her medical team and challenged her medical restrictions.

125. The turning point, according to the Union, was the letter of September 13, 2022, in which the Employer informed the complainant that "given your permanent restrictions, it is impossible for us to offer you accommodation in your current department without worsening your medical condition." Given her condition, the Union argues that the Employer should have foreseen the devastating impact of removing her from her position. It adds that the trauma was exacerbated by that letter.

126. The Union therefore submits that the Employer's actions constitute violations of Articles 7 and 32.01 of the collective agreement, as well as a violation of subsection 4(1) of the Human Rights Act and the duty to accommodate arising from both the agreement and the law. It seeks general damages of approximately forty thousand ($40,000).

127. With respect to special damages, the Union argues that the complainant's past financial losses must be considered. It submits that the Employer's decision prevented her from working from September 13, 2022 to the present. Given that the insurer may need to be reimbursed for benefits paid, the Union requests an order requiring the Employer to compensate her for past financial losses. It further asks that the quantum be determined by the parties, or failing agreement, by the arbitrator.

128. The Union also requests that compensation be based on a full-time position. It argues that although disability benefits were calculated on a 0.6 position, the evidence showed that the complainant effectively worked full-time hours. Her reduced status was for scheduling flexibility, a common practice among nurses. Therefore, her true financial loss reflects a full-time position.

129. Regarding the Employer's argument that she is not entitled to future losses due to her resignation, the Union submits that this is not supported in law. It argues that damages should reflect the salary and benefits she would have received until retirement, subject to reasonable contingencies such as possible resignation or termination.

130. The Union estimates that the complainant had approximately twenty (20) years of remaining working life. After applying reasonable contingencies, it argues she should be compensated for five (5) years of future loss, plus two (2) years of past loss.

131. The Union also asks that an adverse inference be drawn from the Employer's failure to call DM as a witness.

132. Regarding accommodation, the Union acknowledges that initial efforts were made but deteriorated quickly. It argues that the Employer pressured the complainant to return earlier than medically recommended and to increase her hours unnecessarily, given that the accommodated position had been vacant for a year.

133. The Union submits that before removing her, the Employer should have met with the complainant, her psychologist, and her union representative to discuss the alleged "new restriction." Instead, it "seized the opportunity" to dismiss her without considering her trauma.

134. It further argues that the restriction against being responsible or a team leader was not as problematic as claimed, since such duties arose only occasionally in Public Health.
135. The Union maintains that the Employer failed to prove undue hardship and did not conduct any serious analysis of whether duties could be modified or reassigned.
136. In response to the Employer's claim of lacking information, the Union argues that there was clear evidence of close communication between the Employer and the insurer.
137. It also submits that the Employer had a duty to seek clarification if restrictions were unclear, and failed to do so.
138. Accordingly, the Union asks that the grievance be allowed and that compensation be awarded.
139. The Union relied on various case authorities.

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b) Employer's Arguments

141. The Employer denies the allegation of retaliation, stating there is no evidence supporting it and that its decision was based on a new restriction incompatible with the position.
142. It also rejects the claim that it sought to "get rid of a problem," pointing to its efforts to find alternative accommodation.
143. The Employer argues there is no medical evidence preventing the complainant from returning to work and that she chose to resign.
144. It acknowledges the psychological injury but states that in January 2022 it was aware of only two restrictions: inability to work at Bathurst Hospital (specifically pediatric psychiatry) and inability to respond to "code blue" or "code white."
145. It argues that the restriction against supervising staff only emerged in September 2022 and that it had no prior knowledge of it. Given that Public Health required leadership duties, it removed her to respect medical restrictions and began searching for alternatives.
146. It submits that financial losses were mitigated by the accommodation offered in October 2022.
147. The Employer frames the issues as whether the complainant was required to accept the October accommodation and, if not, what damages apply.
148. It argues that it fulfilled its duty to accommodate and that the complainant failed to participate properly by rejecting a reasonable offer.
149. Alternatively, if liability is found, it submits damages should be lower than in Poirier, since there was no dismissal and alternative accommodation was pursued.
150. It argues that any harm was temporary due to the new accommodation offer.
151. It therefore asks that the grievance be dismissed or damages reduced.
152. It relies on several authorities.

D. Relevant Collective Agreement Provisions

153. The relevant provisions include Article 7 (Discrimination), which prohibits discrimination and requires reasonable efforts to accommodate employees unable to perform their duties due to disability.

E. Issues

154. The issues are:

(1) Was the duty to accommodate fulfilled?
(2) If not, what remedies is the complainant entitled to?

F. Analysis

(1) Preliminary Comments

155. Arbitrators are generally less strict than courts regarding admissibility of evidence, but must still ensure it is reliable and complete.
156. Both parties were represented by experienced counsel; however, it is necessary to comment on missing evidence.
157. Failure to call a key witness may justify an adverse inference. The parties are responsible for deciding which persons they wish to call as witnesses. However, where a party decides not to call a witness who could have provided important evidence, the evidentiary record may remain incomplete, and in such circumstances the arbitrator may exercise discretion and draw an adverse inference from the absence of that witness.

The general rule concerning adverse inferences is well explained in the decision of the New Brunswick Court of Appeal in *Doiron v. Haché*, 2005 NBCA 75:

The general rule concerning adverse inferences is stated by John Sopinka, Sidney N. Lederman and Alan W. Bryant in *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), at paragraph 6.321:

[TRANSLATION]

> *In civil cases, an adverse inference may be drawn where, in the absence of an explanation, a party to the litigation does not testify, does not provide affidavit evidence on a motion, or does not call a witness who would have knowledge of the facts and who would be presumed to be disposed to assist that party. Similarly, an adverse inference may be drawn against a party who fails to call*

a key witness whom only that party can call and gives no explanation. Such an omission amounts to an implied admission that the evidence of the absent witness would have been harmful to that party's case, or at least would not have supported it.

The general rule dates back at least to Blatch v. Archer (1774), 1 Cowp. 63, 98 E.R. 969: see R. v. Jolivet, 2000 SCC 29, [2000] 1 S.C.R. 751, at paragraph 25. However, in the context of a civil case, Lévesque v. Comeau et al., [1970] S.C.R. 1010, is often cited in support of this principle. In that case, the sole issue was whether a motor vehicle accident had caused deafness that manifested itself only two months after the accident. The trial judge held that the plaintiff had not established a causal link between her condition and the accident. Our Court and the Supreme Court affirmed that decision. Justice Pigeon, writing for the majority of the Supreme Court, emphasized that the only medical expert called by the plaintiff had been unable to say that the accident was the probable cause of the deafness. He added, at pages 1012 and 1013:

That is not all. The appellant Lola Lévesque was not examined by her expert until more than a year after the accident, although in the meantime she had consulted several doctors and undergone various examinations. She alone was in a position to provide the Court with this evidence and she did not do so. In my view, the rule must be applied that in such circumstances a court must presume that this evidence would be unfavourable to her. This rule is no less applicable because the witnesses in question all reside in Montreal. The appellant Lola Lévesque should, if necessary, have resorted to the procedure of a commission rogatoire. In these circumstances, it was proper to refuse to accept her testimony and that of her husband as to her good health before the accident as sufficient evidence to exclude other possible causes of deafness.

The power to draw an adverse inference where a party does not call a witness who could have provided important evidence is discretionary, but it may only be exercised if a precondition is met. As explained by the Ontario Court of

Appeal in Lambert v. Quinn et al. (1994), 68 O.A.C. 353, Lévesque v. Comeau supports only the proposition that an adverse inference "cannot be drawn against a party for failing to call a witness capable of providing important evidence unless that party is the only one who could have called that witness."

Our Court discussed the principle underlying the rule concerning adverse inferences in Ritchie v. Thompson (1994), 155 N.B.R. (2d) 35 (C.A.). Justice Ryan explained that, in an unusual case, it may be appropriate to draw an adverse inference from the fact that a party did not call a witness, but that in most cases the availability of discovery removes the need for such an inference. He gave the following explanations at paragraphs 11 to 14: [TRANSLATION]

Lévesque v. Comeau has been cited for more than two decades as authority for the principle that a court "must presume" an adverse inference where one of the parties has failed to call certain witnesses. That is not at all the case.

The circumstances in Lévesque v. Comeau are unusual. The only medical expert presented by Lévesque did not testify that her deafness was caused by the accident. What the expert said was that deafness was not an impossible sequela. Nor, in his opinion, was it impossible that it had been caused by something else. Trauma was only a possible cause. The expert's testimony did not establish causation on a balance of probabilities. The remainder of the excerpt cited at pages 1012 and 1013 reads as follows:

"In these circumstances, it was proper to refuse to accept her testimony and that of her husband as to her good health before the accident as sufficient evidence to exclude other possible causes of deafness."

In such a context, Justice Pigeon's statement that "a court must presume that this evidence would be unfavourable to her" applies neither to the present case nor, all things considered, to most cases.

Excessive reliance on that 25-year-old case is even less justifiable in light of the valid point raised by the trial judge, namely that the appellants still had the

benefit of discovery. At the time of Lévesque v. Comeau, the Rules of Procedure were much more restrictive. Today, disclosure, exchange of documents and pre-trial examination of witnesses are far easier. In fact, it is possible to examine before trial any person other than the parties and to require the parties to disclose the names of the witnesses they intend to call. I refer, for example, to Rules 31 (Disclosure of Documents), 32 (Examinations for Discovery), 52 (Expert Witnesses), and 53 (Obtaining Evidence Before Trial). See also Rules 27.08 (Particulars) and 51 (Admissions).

159. In *Doiron v. Haché*, the defendant had served on the plaintiff a notice relating to an expert witness. A little later, at the request of defence counsel, another expert carried out a medical examination of the plaintiff. Neither of these two expert witnesses was called to testify at trial. The plaintiff therefore asked the trial judge to draw an adverse inference from their absence. The defendant replied that, despite its expert witness notice, that expert had provided no medico-legal opinion. As for the second expert witness, the defendant pointed out that the plaintiff had received a copy of the report and was aware of the expert's conclusions and, moreover, could have called him to testify if she had considered it necessary.

160. The Court of Appeal concluded that this was not an "unusual case" in which it could draw an adverse inference because of the absence of the two expert witnesses. It added that, in such a case, it was incumbent on the plaintiff to prove that the witnesses who were not called were key witnesses and that only the defendant could have caused them to appear.

161. It is obvious that the situation here is quite different from that in *Doiron v. Haché*. The witness with respect to whom the Union asks me to draw an adverse inference is not an expert witness who prepared a report of which the complainant could have obtained a copy. The witness in question here is DM, who at the relevant time was the Employer's Disability Management Advisor. He was the primary person responsible for the complainant's file and the one in contact with the insurer, Blue Cross/Medavie, regarding that file. He was therefore a key witness whose absence was never explained.

162. As to whether the Union could have caused that witness to appear at the hearing, that possibility was never raised by the Employer and nothing allows me to conclude that it existed. The Employer could have indicated that DM was still in its employ or, if not, that he still lived in the region or in the province and was therefore readily accessible to the Union. Instead, the Employer's approach with respect to this witness was complete silence. Apart from the fact that his name recurred regularly in exchanges or during certain testimony, no explanation was offered for his absence. I am unable even to determine whether he is still employed by Vitalité or whether he still lives in the province.

163. I am also mindful of the caution expressed by the New Brunswick Court of Appeal in *Ritchie v. Thompson*, referred to in *Doiron v. Haché*. In that decision, the Court of Appeal stated that reliance on "the adverse inference rule" at trial is less justifiable

today because of rules of procedure that allow parties to examine before trial any person other than the parties and to require the parties to disclose the names of the witnesses they intend to call. The Court also referred to procedural rules allowing disclosure of documents and requests for particulars or admissions. Unfortunately, those procedural rules do not exist in arbitration. For that reason, I believe the Court of Appeal's caution must be taken with some reservation in the arbitration context.

164. For all of these reasons, I am prepared, as requested by the Union, to draw certain adverse inferences from the Employer's decision not to call DM as a witness.

165. One of the first consequences of the absence of this witness is that it deprived the Union of the right to cross-examine him on the communications he had with the insurer, the psychologist, the Union, the complainant and his superiors regarding the file at issue in this grievance.

166. In addition, DM's testimony could have shed light on several issues concerning this file. Among other things, DM could have testified about the exchange he had with the complainant in December 2021 regarding the Public Health position. As we have seen, the complainant testified that during that exchange DM told her that he knew "her restrictions." Since he was not called to explain which restrictions he "knew" or to contradict the complainant's testimony, I must conclude that this exchange did in fact take place and that DM was, at that time, aware of all of the complainant's restrictions known at the time.

167. I also conclude that DM was aware of the January 26, 2021 exchange between the psychologist and TB, his predecessor as Attendance and Disability Management Advisor. He was also aware of the Functional Assessment Form completed by the psychologist on June 11, 2021, as well as the letter the psychologist addressed to TB on the same day, in which she wrote, among other things, "it seems necessary that she benefit from a very gradual return to work, not before six months, in order to foster reassurance and confidence in her work environment and its leaders."

168. Since he was the contact person with the insurer, I conclude that he was also made aware by the insurer of the content of the exchange of letters that its representative RC had with the psychologist on December 20, 2021, in which the psychologist responded to questions concerning the restriction relating to "acute stress at work." In that letter, the psychologist wrote: "[The complainant] cannot work in a setting such as the emergency department or intensive care, nor supervise employees." [Emphasis added.]

169. In her testimony, the uncontradicted evidence of the psychologist was that RC had asked her to send her the recommendations concerning the complainant's restrictions or accommodation needs and that RC would see to it that they were transmitted to the Employer. In addition, SR explained in her testimony that, although the Employer does not receive documents addressed to the insurer, the insurer transmits to the Employer the information contained in them. She added that the Employer enters this information into its PARKLANE system. Given this evidence, I see no reason why the information concerning "supervision of employees" would not have been shared by the insurer with DM. DM's testimony might have led us to a different conclusion, but in his absence I can only draw an adverse inference and conclude that he had received this information.

170. The evidence also established that around March 1, 2022, the psychologist had a discussion with DM to explain the complainant's situation and restrictions to him, and that he, according to the psychologist, "seemed to understand well." The psychologist

was not cross-examined on this exchange or on its contents. Moreover, since DM was not called to testify, there is nothing to contradict her testimony. I therefore infer that all restrictions, including the one concerning supervision of employees, were discussed with DM during that exchange.

171. Regarding the assertion that DM was unaware of the temporary restriction that the complainant could not work at Bathurst Hospital, I note that in an email dated September 6, 2022 to RC, he mentions having received "the limitations and restrictions of January 26, 2021." Since DM was not called to testify, I cannot determine what he was referring to when he spoke of the "limitations and restrictions of January 26, 2021." The only document entered into evidence bearing that date is a letter from PL to TB, which does not mention the complainant's "limitations and restrictions." If correspondence between DM and RC dated January 26, 2021 exists, it was not entered into evidence. The fact that neither DM nor RC was called to testify prevents me from clarifying what DM was referring to in his September 6, 2022 email when he referred to the "limitations and restrictions of January 26, 2021." I would also note that it is somewhat surprising that no correspondence between Medavie and the Employer regarding this file was entered into evidence.

172. In another email dated September 6, 2022, this time addressed to the complainant, DM wrote that he had "absolutely nothing" indicating that the complainant could not "enter a hospital." However, in her letter of November 20, 2021 to PD of Blue Cross/Medavie, the psychologist specifically mentions this restriction. I also note that on September 6, 2022, at 1:05 p.m., RC indicated in an email addressed to the complainant, with a copy to DM, that all medical information relating to recommendations, medical restrictions or limitations had been transmitted to DM.

173. Did Blue Cross/Medavie omit or forget to inform DM of certain restrictions? If so, there is no evidence to confirm it. The fact that neither DM nor anyone from Blue Cross/Medavie was called as a witness prevents me from answering that question and leaves the Employer's evidence in a state of some confusion.

174. For all of these reasons, I accept that I should exercise my discretion and draw an adverse inference from the absence of DM as a witness. I conclude that DM was aware of the complainant's restriction concerning Bathurst Hospital as well as the restriction concerning supervision of staff. These restrictions, contrary to what DM stated in his September 13 letter, were not new restrictions. Perhaps these restrictions were new to JM, AR and other Vitalité managers, but that lack of knowledge is not the fault of the complainant or her psychologist. The only conclusion I can draw is that DM did not share, or forgot to share, this information with his superiors.

(3) Was the duty to accommodate complied with?

175. It is well established that in workplace discrimination matters, the party alleging discrimination must first present a prima facie case of discrimination, after which the burden shifts to the other party to establish a defence provided by law or some other justification: see *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, para. 28.

176. In this case, the Employer does not dispute the existence of a prima facie case of discrimination. The Employer admits that the complainant suffered an injury while

working at Bathurst Hospital, which justifies her being accommodated. The Employer also did not contest the psychologist's diagnosis that the complainant suffered from "post-traumatic stress and major depression." Since that is so, there is no need to dwell further on this question. I therefore conclude that the complainant succeeded in establishing that she was affected by a disability within the meaning of the *Human Rights Act*, RSNB 2011, c. 171, and the collective agreement, as a result of injuries she sustained in the workplace.

177. It now falls to the Employer to establish, on a balance of probabilities, that it sought to find reasonable accommodation for the complainant. In order to satisfy this obligation, the Employer must demonstrate that its search for accommodation "includes all possible accommodation short of undue hardship": *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, para. 32 ("*Meiorin*").

178. In their final submissions, the parties' representatives agreed that the summary of the law on accommodation that I set out in *Syndicat des infirmières et infirmiers du Nouveau-Brunswick et Poirier c Conseil du trésor*, 2024 CanLII 64164 ("*Poirier*"), accurately reflected the current state of the law. I will therefore reproduce that summary:

179. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), the Supreme Court of Canada recognized that the duty to accommodate contains both a procedural and a substantive component, and that "it may often be useful in practice to consider separately first, the procedure, if any, which was adopted to assess the issue of accommodation, and second, the substantive content of a more accommodating standard which was offered, or alternatively, the reasons why such a standard was not offered" (para. 66). [Emphasis added.]

180. With respect to the procedural component of the duty to accommodate, the Ontario Divisional Court in *ADGA Group Consultants Inc. v. Lane* (2008), 295 D.L.R. (4th) 425 ("*Lane*"), summarized it as follows at paragraph 107:

> *The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate: Meiorin, supra, at paras. 64, 65 and 68; Gordy v. Oak Bay Marine Management Ltd., 2004 BCHRT 225, at para. 84; D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1992) 1 Can.*

Lab. L. J. 1 at 11; Moore v. Canada (Attorney General), 2005 FC 13, at paras. 35-36.

With respect to the substantive obligation, the same court explained at paragraph 113:

The substantive duty to accommodate requires the employer to show that it could not have accommodated the employee's disability short of undue hardship. "Accommodation" refers to what is required in the circumstances to avoid discrimination. The factors causing "undue hardship" will depend on the particular circumstances of every case. For example, undue hardship could arise due to excessive cost or safety concerns.

In Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), [2008] 2 S.C.R. 561 ("Hydro-Québec"), the Supreme Court of Canada reminded us at paragraphs 15 and 16 that the duty to accommodate is not "intended to alter the essence of the employment contract, namely the employee's duty to perform work in exchange for remuneration," and that the test is not "the impossibility for an employer to alter working conditions in any way." Nor is the Employer required fundamentally to change the employee's working conditions, as is also stipulated here in article 7.03 of the collective agreement. However, the Supreme Court tells us in Hydro-Québec that the Employer has "the obligation to modify the employee's workplace or duties, short of undue hardship, in order to enable the employee to perform her work."

The Supreme Court continues at paragraphs 17 and 18:

Because the duty to accommodate is individualized and because of the variety of circumstances that may arise, rigid rules are to be avoided. If a business can, without undue hardship, offer flexible working hours, lighten the employee's duties, or even authorize staff transfers, thereby enabling the employee to perform her work, the employer must do so. Thus, in McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés

de l'Hôpital général de Montréal, [2007] 1 S.C.R. 161, 2007 SCC 4, the employer had allowed absences not provided for in the collective agreement. Likewise, in Hydro-Québec, the employer attempted for several years to adapt the complainant's working conditions: physical modifications to the workstation, part-time hours, assignment to a new position, etc. However, in the case of chronic absenteeism, if the employer demonstrates that, despite accommodations, the employee cannot resume work in the reasonably foreseeable future, it will have met its burden of proof and established undue hardship.

Total incapacity of an employee to provide any work in the foreseeable future is therefore not the test for determining undue hardship. Where the characteristics of an illness are such that the proper operation of the enterprise is excessively hindered, or where the employer has attempted to arrange accommodation measures with an employee suffering from such an illness, but the employee nevertheless remains unable to perform his or her work in the reasonably foreseeable future, the employer will have met its obligation. In such circumstances, the impact caused by the standard is legitimate and the dismissal will be considered non-discriminatory. I adopt the statement of Justice Thibault in the decision cited by the Court of Appeal, Québec (Procureur général) c. Syndicat de professionnelles et professionnels du gouvernement du Québec (SPGQ), [2005] R.J.Q. 944, 2005 QCCA 311, that "[in such cases] it is not so much the handicap that underlies the dismissal as the employee's inability to fulfill the fundamental obligations associated with the employment relationship" (para. 76).

In another decision, Stewart v. Elk Valley Coal Corp., [2017] 1 S.C.R. 591 ("Stewart"), the Supreme Court of Canada wrote at paragraphs 126 and 127: To determine what "reasonable or practical" alternatives are available to it, the employer must undertake an individualized analysis of the employee in question (Meiorin, paras. 54-55; Hydro-Québec, para. 17), taking into account

the employee's "individual differences" and "individual capabilities" (Meiorin, paras. 55, 64 and 67). In Meiorin, the Court went so far as to say that "[e]mployers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals" (para. 68). Similarly, in Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504, para. 81, the Court concluded that "no single accommodation measure can meet the needs of all," which reflects the broad spectrum on which disability lies. Consequently, any predetermined or blanket approach to sanctions imposed on employees for conduct linked to a disability will have difficulty satisfying the employer's duty of individualized accommodation.

This individualized analysis involves both procedural and substantive obligations. The procedural obligations relate to "the procedure, if any, which was adopted to assess the issue of accommodation"; the substantive obligations relate to "the substantive content of a more accommodating standard which was offered or, alternatively, the reasons why such a standard was not offered" (Meiorin, para. 66).

179. These are therefore the principles I must apply in this case in order to determine whether the Employer, since it does not dispute that the complainant has a disability within the meaning of the *Human Rights Act*, complied with its duty to accommodate. As the jurisprudence indicates, this duty includes both a procedural and a substantive obligation. The procedural obligation requires the Employer to undertake an individualized analysis in order to identify the employee's particular needs and what kinds of accommodations might be offered. The substantive obligation, for its part, requires the Employer, once the individualized analysis is complete and the information collected, to identify the positions that could accommodate that employee's needs. It is only if it is unable to offer accommodation without suffering undue hardship that the Employer will be relieved of its duty to accommodate the employee.

180. Before proceeding further with the analysis of whether the Employer discharged its duty to accommodate, I consider it important to review what the complainant's limitations or restrictions were that had to be accommodated.

181. The expert witness's evidence indicates that the limitations or restrictions to which I will refer in the following paragraphs were established by the complainant's medical team, which included, in addition to the psychologist, the complainant's family physician and a psychiatrist. However, apart from the complainant's testimony that the

psychiatrist had at one point prescribed her medication and that her family doctor had given her two medical notes that can be described as laconic, there is no other evidence that the family physician or psychiatrist actively participated with the psychologist in establishing these limitations or restrictions. But since the Employer did not cross-examine the psychologist on this point, I must assume that it had no issue with this and accepted that the "treating team" participated in identifying these limitations and restrictions.

182. The complainant's limitations and restrictions are described as follows in the psychologist's various correspondence:

> *"a permanent restriction concerning a return to her pre-disability job; a temporary restriction concerning her workplace (Bathurst Hospital)" — letter of November 20, 2021 to PD – Exhibit C-1, Tab 9.*
>
> *"return to a work environment where the complainant will not be exposed to acute stress; not respond to a code white or during emergency measures; not work in a setting such as the emergency department or intensive care, nor supervise employees" — letter of December 20, 2021 to RC – Exhibit C-1, Tab 10.*
>
> *"permanent restriction from her pre-disability job and from working with a certain psychiatrist and an indefinite temporary restriction from returning to Bathurst Hospital. Recommendation to obtain a position outside Bathurst Hospital" — Functional Assessment Form dated August 24, 2022 – Exhibit C-1, Tab 20.*
>
> *"Permanent restrictions: 1) not be responsible for/head of a team; 2) not participate in Code White and Code Blue calls; 3) not work in acute care, such as Emergency, Intensive Care, or in an acute crisis environment; Indefinite temporary restrictions: 1) not work at or go to Bathurst Hospital." — letter of September 3, 2022 to DM – Exhibit C-1, Tab 22.*

183. Although one may fault the psychologist for not having used uniform wording in each of her letters or assessments to describe the complainant's limitations and restrictions, it is impossible for me to conclude, as the Employer did, that her September 3 letter introduced "new restrictions."

184. As for the "temporary" restriction against working at or going to Bathurst Hospital, that restriction is mentioned in the November 20, 2021 letter and in the Functional Assessment Form of August 24, 2022. Even more significantly, the restriction

"not be responsible for/head of a team," which appears to be the reason that justified the complainant's removal from her Public Health position, is repeated, in different wording I agree, in the December 20, 2021 letter to RC, where it is stated that she must "not work in a setting such as the emergency department or intensive care, nor supervise employees." It is therefore difficult in this context to assert that this restriction was new.

185. In cross-examining the psychologist, the Employer's counsel stressed that several letters the psychologist had sent to Blue Cross/Medavie had not been copied to the Employer. In response, the psychologist explained that RC had told her to send the information to her, and that RC would take care of forwarding it to the Employer. This procedure was also confirmed by SR in her testimony.

186. Should the fact that the psychologist's information was provided to a third party, Blue Cross/Medavie, be considered a failure to communicate it to the Employer? My answer to that question is, for the following reasons, "no." In her testimony, SR explained the close collaboration that exists between Blue Cross/Medavie and Vitalité in accommodation matters. She explained that although some documents sent to Blue Cross/Medavie are not shared with Vitalité, information relating to restrictions is shared. She even added that this information is then entered into the "PARKLANE system," where it can be consulted by the person responsible for the file.

187. It is perfectly normal for an employer to use the services of a third party to manage employees' medical information. Such an approach can be of great value, both in terms of expertise and privacy management. However, the use of such a third party does not alter the Employer's legal duty to accommodate. The third party merely acts as the Employer's agent. (See in particular, *University of New Brunswick Teachers' Association v. University of New Brunswick*, unreported, decision rendered August 5, 2024, and *Mount Allison Faculty Association Union v. Mount Allison University*, 2023 CanLII 115064.)

188. In addition, as the arbitration decision in *St. Joseph's At Fleming v Canadian Union of Public Employees, Local 2280*, 2016 CanLII 7076, paragraph 23, points out, if that third party acts unreasonably or makes an error in its role in the accommodation process, the Employer remains responsible in the same way as if it had made the error itself. Thus, if Blue Cross/Medavie failed to transmit the information provided by the psychologist to the Employer, although that was not established at the hearing, that does not relieve Vitalité of responsibility.

189. I have no reason to doubt that all of the information received by Blue Cross/Medavie regarding this file was transmitted to the Employer. What DM, the person responsible for the file, did with that information remains unanswered because he did not testify. Based on the evidence presented at the hearing and in the absence of any contrary explanation, I conclude that there were no new restrictions in the psychologist's letter dated September 3. It may well be that neither JM nor AR was aware of all of these restrictions, but I have nothing that would allow me to conclude that DM, the person responsible for the file, was not aware of them.

190. Moreover, even if I had concluded that DM had no knowledge of the restriction concerning the "supervision of employees," I believe that, given the procedural duty to accommodate, it would have been appropriate in that case for him to request a meeting with the complainant's treating team in order to better understand the nature of that

restriction if it raised questions for him. In fact, in many of her interactions with him, the psychologist invited him to contact her if he wanted more information. In her testimony, SR explained that she was under the impression that discussions had taken place to see whether this restriction could be accommodated in the Public Health position. She added that this is what she would have done had she been responsible for the file.

191. I agree that the Employer initially got the accommodation process for the complainant off to a good start. It succeeded in finding her a position in Public Health in Tracadie which, according to DM, met the complainant's restrictions. However, the evidence also showed that at some point the relationship between the complainant and her supervisor in Tracadie deteriorated significantly. I do not intend to determine who was right and who was wrong in that interpersonal conflict. What I can conclude, however, is that the timing chosen by the Employer to remove the complainant from the position casts doubt on its motives. In any event, I do not intend to go further on that issue. I prefer to address whether the Employer demonstrated that it could not accommodate the restriction of "not being responsible for/head of a team" without causing itself undue hardship.

192. The burden of proving undue hardship lies on the Employer. In *Meiorin*, the Supreme Court of Canada sets out the factors that should be considered in answering the question of undue hardship. At paragraphs 63 and 64, the Court writes:

> *[…] Among the relevant factors are the cost of possible accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also Renaud, supra, at p. 984, per Sopinka J. These various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In any event, as Cory J. noted in Chambly, supra, at p. 546, "[t]hey should be applied with common sense and flexibility in the context of the facts of each case."*
>
> *[Emphasis added.]*
>
> *Courts and tribunals should consider the various ways in which individual capabilities may be accommodated. In addition to individual assessments to determine whether the person has the skills or qualifications necessary to perform the work, consideration should be given, where appropriate, to the possibility of performing the work in different ways while still accomplishing the employer's legitimate work-related purpose. The skills, abilities and potential contribution of the claimant and others in the same situation must be respected as much as possible. Employers, courts and tribunals should be*

innovative yet practical when considering the best way to do so in the circumstances.

193. In *Seaspan Marine Corporation v. Smolik*, 2023 FC 856, the Federal Court writes at paragraph 88 the following regarding the evidence that must be presented by the Employer to establish undue hardship:

A party must provide clear and convincing evidence in support of its assertion that it is impossible to take reasonable measures without causing undue hardship; hypothetical or uncorroborated concerns that certain negative consequences "might" follow will not suffice (FH v McDougall, 2008 SCC 53 at paras 29, 46; British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868 at para 41). [Emphasis added.]

194. In the present case, I must admit that the Employer presented no evidence in support of its assertion that it was impossible to take reasonable measures to accommodate the restriction of "not being responsible for/head of a team" without causing undue hardship. There was no evidence as to the cost of such an accommodation, nor regarding the relative interchangeability of employees and the workplace, or the prospect of actual interference with the rights of other employees working in Public Health in Tracadie. No evidence was also submitted to demonstrate that the Employer had conducted an objective assessment to determine whether the complainant had the abilities or qualifications required to perform the job without being required to be responsible for or in charge of a team. Nor was there any evidence that the Employer studied the possibility of performing the work in different ways while still achieving the legitimate objective of the position.

195. The only evidence from the Employer concerning undue hardship is that of JM, who testified that DM had been tasked with obtaining more information from Public Health regarding the "new restrictions." But once again, because DM did not testify, it is impossible to know what steps he took and what information he obtained.

196. JM also stated that at that time there were already Public Health employees who were being accommodated for limitations concerning personnel management. In my view, this evidence is not sufficient to establish undue hardship. More details would have been needed to explain how that prevented the Employer from accommodating the complainant's restriction, and that evidence was not presented.

197. I also note a certain inconsistency in DM's September 13 letter. In it, DM refers to "new restrictions" in the plural, thus suggesting that the Employer's decision was based on several restrictions and not only one. However, at the September 13 meeting, he indicated that there was only one so-called "new restriction." So why use the plural in the letter? Was it simply a drafting error, or did the Employer really consider that there were

several "new restrictions" when it made its decision? Unfortunately, in the absence of DM, who is the author of the letter, it is difficult to answer these questions.

198. I agree with the Employer that an employee is not entitled to expect perfect accommodation, and that when the Employer makes a reasonable proposal, the employee is required to facilitate its implementation. However, that issue is not in dispute in the present grievance, at least with respect to the Public Health position. The complainant never refused or sought to hinder the implementation of her accommodation in that position. In raising this point, the Employer is no doubt referring to the accommodation proposed to her after it had already decided to remove her from the position. That argument may perhaps affect the amount of damages for the complainant's financial losses, but it has no impact on whether the Employer would have suffered undue hardship in accommodating the restriction within her Public Health position. As I indicated above, no clear and convincing evidence allows me to reach that conclusion.

199. If the Employer needed clarification concerning the restriction of "not being responsible for/head of a team," it could have requested a meeting with the complainant's treating team or retained an expert to conduct its own analysis of the complainant's condition. The Employer did neither. It simply decided, without further consideration, to remove the complainant from her position. There is no evidence that there was any urgency in the circumstances to act in order to ensure the safety of Public Health clients or the complainant's health. Nothing in the evidence submitted justified the complainant being removed from the position immediately and without delay.

200. The procedural duty to accommodate involves obtaining all relevant information regarding the restrictions and limitations of the employee concerned. This may include information about the employee's health condition, prognosis for recovery, ability to perform duties, and capacity to do alternative work. The concept of "undue hardship" required the Employer in this case to give serious thought to how the complainant's restrictions and limitations could be accommodated, including in particular the restriction of "not being responsible for/head of a team." The failure to undertake that consideration, in itself, constitutes a breach of the procedural duty to accommodate.

201. I conclude that the Employer engaged in no meaningful accommodation dialogue with the complainant or her treating team after receiving the letter of September 3, 2021. Even if I accepted that DM had a discussion with the complainant on September 13, 2021, I would have to conclude that it took place after the decision had already been made to remove her from her Public Health position and therefore cannot be considered an accommodation dialogue. The Employer sought no further relevant information about the needs arising from the complainant's restrictions, in particular the restriction of "not being responsible for/head of a team."

202. For all of these reasons, I conclude that, by deciding to remove the complainant from her accommodated Public Health position, the Employer failed in its duty to accommodate and was unable to demonstrate that this decision was necessary because of undue hardship.

203. I will now address the question of remedy.

(4) What remedy is the complainant entitled to?

204. In its final submissions, the Union representative requested that general damages in the amount of approximately forty thousand dollars ($40,000) be awarded to the complainant, in addition to compensation for past and future wage losses. He also requested that the determination of the amount of past and future wage losses be left to the parties so they could see whether it was possible to reach an agreement on the amount. The Employer, for its part, argued that if it were found at fault, the damages should be lower than those awarded in *Poirier*.

205. The present case is somewhat unusual. The decisions submitted by the parties in support of their arguments on remedy dealt with situations in which the employee had been dismissed. Here, however, the complainant was never dismissed; the Employer simply removed her from her accommodated Public Health position and, for the reasons I explained above, I concluded that in doing so it failed in its duty to accommodate. I could accordingly have ordered the Employer to reinstate the complainant to her position and undertake an assessment to determine whether it could accommodate the restriction of "not being responsible for/head of a team" without causing undue hardship. That is not possible here, however, because, as the evidence demonstrated, the complainant chose in June 2023 to resign from her employment with Vitalité.

206. The Union representative argues that this demonstrates that the employer-employee relationship is no longer viable. I do not agree. It is clear that the complainant had decided that she no longer wished to return to work for Vitalité, but nothing indicates that the Employer no longer wanted to have the complainant as an employee. In fact, the fact that it tasked SR with finding another accommodation for the complainant proves the contrary. Had it not been for the complainant's decision in June 2023, nothing indicates that the Employer would not have agreed to take her back into her Public Health position if I had ordered it to do so. The complainant's decision to resign was her own. That decision may have an impact on the amount of damages for wage loss, but before getting to that, I will address the amount of compensation that should be awarded because the Employer failed to comply with its duty to accommodate.

207. Among the factors I must take into account in determining the amount of general damages are the humiliation caused to the complainant by the Employer's decision, as well as her loss of self-respect, dignity, confidence, and her vulnerability. I must also take into account the seriousness of the offensive treatment and the fact that the moral suffering was reasonably foreseeable.

208. As arbitrator Lynne J. Poirier noted in her recent decision in *Syndicat des infirmières et infirmiers du Nouveau-Brunswick et Conseil de gestion*, unreported, September 14, 2024, at paragraph 59:

> *One of the ways disadvantaged groups experience discrimination is by being ignored or neglected, with the consequence that members of those groups are not seen and become invisible. Ignoring those persons' needs or failing to take them into account is an expression of that form of discrimination. Failing to consider and assess those persons' personal circumstances under the Act*

inherently has a negative impact on their dignity. (Poirier, para. 110, and Lee v. Kawartha Pine Ridge District School Board, 2014 HRTO 1212, para. 96.)

209. In the present case, the evidence established that following the Employer's decision to remove the complainant from her Public Health position, she was placed on sick leave by her family physician "for 2 months for medical reasons." Although no further medical notes were produced afterward, it appears that the complainant remained on medical leave until her decision to resign. The legitimacy of the complainant's sick leave was never challenged by the Employer.

210. The evidence also established that the complainant did not expect that the September 13, 2022 meeting would result in her being removed from her position and placed off work without pay. It is clear that this decision caused her emotional shock, which was confirmed by the other Union witnesses present at that meeting. The decision also had a significant financial impact on the complainant.

211. The uncontested evidence of the complainant's psychologist is that her mental health became more fragile after the Employer's decision. In her report (Exhibit C-5), the psychologist writes that psychologically, the Employer's decision had the effect of increasing the complainant's level of stress and anxiety and had "devastating consequences for her health and well-being" by exacerbating "anxious and depressive symptoms." According to the psychologist, this compromised the complainant's overall "well-being" and "generated periods of distress and instability, testing her resilience and her general well-being."

212. I am also of the view that it should have been reasonably foreseeable to the Employer that its decision to remove the complainant from her Public Health position and send her home without pay for an indefinite period would have major repercussions on her. The Employer should have foreseen that its decision would cause her moral suffering and exacerbate her medical condition.

213. Without questioning the psychologist's findings, I must nevertheless add an important nuance. Throughout her report (Exhibit C-5), the psychologist assumes that on September 13, 2022 the Employer had dismissed the complainant. As we have seen, however, the complainant had not been dismissed but rather removed from her position, with the Employer having undertaken to find her another accommodated position.

214. That said, considering all of the evidence and the direct impact the Employer's decision had on the complainant, I believe that an amount of forty thousand dollars ($40,000) as general damages for the Employer's failure to comply with its duty to accommodate is reasonable. By acting as it did, the Employer failed to take into account the humiliation its decision would cause the complainant and the impact it would have on her already fragile mental health. I do not accept the Employer's argument that the facts here do not justify an amount of damages similar to that awarded in *Poirier* because in the present case the complainant was not dismissed. Whether she was dismissed or not is not the question. What must be considered is the impact the decision had on the complainant. Here, the uncontested evidence shows that the impact on the complainant's mental and psychological health was significant, as it was in *Poirier*.

215. In its final submissions, the Employer's representative also argued that if the complainant suffered harm as a result of its decision, that harm was only "temporary"

because it had quickly found her a new accommodation. I cannot accept that argument. No expert evidence was presented to confirm that the harm to the complainant's mental and psychological health was temporary. On the contrary, the uncontested evidence of the psychologist confirms the opposite.

216. With respect to the complainant's past and future wage losses, I am prepared to grant the Union's request and leave the determination of that amount in the hands of the parties. However, if the parties are unable to reach an agreement on the amount of that compensation, I am prepared to retain jurisdiction to decide that issue, if necessary.

217. I do, however, wish to make a few comments on that question. First, in making that determination, the parties will have to take into account any amounts that may have been paid to the complainant by the insurer or by employment insurance. Second, the parties will have to address what effect the Employer's decision on October 20, 2022 to offer a temporary accommodation, and the complainant's decision to resign in June 2023, may have on the amount to be awarded.

218. Finally, in its opening remarks, the Union mentioned the possibility of claiming aggravated damages. However, in its final submissions, no mention was made of them at all. I therefore conclude that it is not claiming aggravated damages in this case.

H. DECISION

219. For the foregoing reasons, I allow the grievance.

220. Consequently, I order the Employer to pay the complainant the sum of forty thousand dollars ($40,000) as general damages for the violation of Article 7 of the collective agreement and the *Human Rights Act*, RSNB 2011, c. 171.

221. I also order the parties to begin discussions within fourteen (14) days following this decision in order to determine, if applicable, the amount of compensation that should be paid to the complainant as compensation for wage loss.

222. If the parties are unable to agree on the amount of compensation for wage loss, I agree to retain jurisdiction to resolve that issue.

Rendered in Dieppe, New Brunswick
October 23, 2024

Michel Doucet, c.m., o.n.b., c.r., o.f.a.
Arbitrator

APPENDIX

C-1 Binder with thirty-four (34) tabs

Tab 1 Collective agreement between the New Brunswick Nurses Union and the Board of Management.
Tab 2 Grievance Form, October 12, 2022.
Tab 3 Response to grievance, October 24, 2022.
Tab 4 Referral to arbitration, November 3, 2022.
Tab 5 Letter of appointment of the arbitrator, May 31, 2023.

Tab 6 Letter from Paulette Lévesque to Tina Bullen, January 26, 2021.
Tab 7 Functional Assessment Form (FAF) and letter, June 11, 2021.
Tab 8 Email from Pamela Dupuis to Tina Bullen, September 24, 2021.
Tab 9 Letter from Paulette Lévesque to Pamela Dupuis, November 20, 2021.
Tab 10 Letter from Paulette Lévesque to Renée Chiasson, December 20, 2021.
Tab 11 Competition 6-17349 – Registered Nurse Class A (RNCA), Public Health.
Tab 12 Letter from Paulette Lévesque to Renée Chiasson, March 6, 2022.
Tab 13 Letter from Danny Mallet to Mélissa Ferron, March 7, 2022.
Tab 14 Letter from Paulette Lévesque to Renée Chiasson, March 27, 2022.
Tab 15 Letter from Paulette Lévesque to Dany Mallet and Annie Roussel, May 23, 2023.
Tab 16 Competency and performance evaluation grid for the immunization program, May 30, 2022.
Tab 17 Letter from Paulette Lévesque to Jennyfer McBrearty and others, June 20, 2022.
Tab 18 Competency and performance evaluation grid for the immunization program, June 28, 2022.
Tab 19 Letter from Isabelle Moreau to Mélissa Ferron, June 29, 2022.
Tab 20 Functional Assessment Form (FAF), August 24, 2022.
Tab 21 Email from Paulette Lévesque to Dany Mallet, September 2, 2022.
Tab 22 Letter from Paulette Lévesque to Dany Mallet, September 3, 2022.
Tab 23 Email exchange between Mélissa Ferron and Dany Mallet, September 3 to 6, 2022.
Tab 24 Email exchange between Dany Mallet and Shirley Avoine, September 9 to 12, 2022.
Tab 25 Letter from Dany Mallet to Mélissa Ferron, September 13, 2022.
Tab 26 Medical note signed by Dr. Anthony Wade, September 13, 2022.
Tab 27 Email from Shirley Avoine to Dany Mallet, September 16, 2022.
Tab 28 Email from Dany Mallet to Shirley Avoine with attachments, September 16, 2022.
Tab 29 Email exchange between Shirley Avoine and Dany Mallet, September 16, 2022.
Tab 30 Email from Shanie Roy to Shirley Avoine, October 13, 2022.
Tab 31 Letter from Shanie Roy to Mélissa Ferron, October 20, 2022.
Tab 32 Letter from Paulette Lévesque to Shanie Roy, October 20, 2002.
Tab 33 Letter from Shanie Roy to Mélissa Ferron, October 27, 2022.
Tab 34 Functional Assessment Form (FAF), November 4, 2022.

C-2 Note of Shirley Avoine, meeting of June 30, 2022.
C-3 Note of Shirley Avoine, meeting of September 13, 2022.
C-4 Curriculum vitae of Paulette Lévesque.
C-5 Email from Paulette Lévesque to Dany Mallet and others, September 25, 2022.
C-6 Email exchange between March 7 and March 8, 2022.
C-7 Letter from Dany Mallet to Mélissa Ferron, March 7, 2022.
C-8 Email from Dany Mallet to Mélissa Ferron, March 7, 2022.
C-9 Medical note from Dr. D. A. Wade, July 6, 2022.
C-10 Email from Mélissa Ferron to Dr. France Desrosiers and others, July 3, 2023.
C-11 Email from Mélissa Ferron to Shanie Roy, June 29, 2023.
C-12 Email from Mélissa Ferron to Chantal Lafleur, January 12, 2022.
C-13 Public Health, Vitalité Health Network, April 25, 2022.
C-14 Duties of the person in charge of a school clinic, August 12, 2022.
C-15 Job description, Public Health Nurse.

C-16 Public Health, RNCA Position.
C-17 Email from Annie Roussel, September 15, 2022.
C-18 Email exchange, Renée Chisson, Pamela Dupuis and Dany Maillet, January 27, 2022.
C-19 Letter from Paulette Lévesque to Me Joël Michaud, K.C., April 7, 2024.