

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

**THE BOARD OF HEALTH FOR THE PETERBOROUGH
COUNTY-CITY HEALTH UNIT
("the Employer")**

-and-

**CANADIAN UNION OF PUBLIC EMPLOYEES
LOCAL 4170
("the Union")**

**AND IN THE MATTER OF THE SUSPENSION
AND DISCHARGE GRIEVANCES OF C. SCHOFIELD**

Arbitrator: **Randy L. Levinson**

For the Employer: **Paula M. Rusak -Counsel
Jennifer Anderson -HR Advisor**

For the Union: **Stephen Horner -National Representative
Pam Pressick -Local Union President**

Introduction

1. The Board of Health for the Peterborough County-City Health Unit (“the Employer”) employed the grievor between September 2002 and September 30, 2015 (“September 30”). At the time of her one-day suspension and discharge in September 2015, she worked as a Secretary, Infectious Diseases Program. The grievor did not have a disciplinary record. On September 24, 2015 (“September 24”), instead of attending work, the grievor without Employer authorization attended at the Peterborough Regional Health Centre (“the Hospital”) across the street from the Employer, while her husband was having a surgical procedure. On September 25, 2015 (“September 25”), the Employer investigated the matter. By letter dated September 25, the Employer suspended the grievor for one day for insubordination. Briefly, the parties disagree about whether the grievor was suspended for just cause. In that regard, they disagree about whether the grievor engaged in any culpable misconduct. The parties also disagree about whether the discipline contravened sections 49.3 “Family Caregiver Leave”, 53(1) and 74(1) of the *Employment Standards Act, 2000* S.O. 2000, c. 41 (“*ESA, 2000*”).

2. On September 30, the Employer discharged the grievor for breach of trust essentially for exaggerating her medical restrictions, while being accommodated at work between May and September 2015. During that period, the grievor allegedly engaged in activities outside work that were inconsistent with her represented medical workplace restrictions. In its investigation, the Employer met with the grievor on September 28, 2015 (“September 28”) and September 29, 2015 (“September 29”). Briefly, the parties disagree about whether the grievor was discharged for just cause. The disagree about whether the

grievor engaged in any culpable misconduct. They disagree about whether the discharge contravened sections 5, 8 and 17 of the *Human Rights Code*, R.S.O. 1990, c. H.19 (“*Code*”). This includes whether the discharge was discriminatory because of disability, and whether the discharge constituted a reprisal. Alternatively, the parties disagree about whether another penalty should be substituted for the discharge, if the grievor is found to have engaged in culpable misconduct.

3. Having considered the parties’ submissions and the evidence adduced, I conclude the grievor was suspended and discharged for just cause. I also conclude that the disciplines did not contravene the *ESA, 2000* or the *Code*. I further conclude it is not just and reasonable in all the circumstances to substitute a lesser penalty for the suspension or for the discharge.

Employment Standards Act, 2000, S.O. 2000, c. 41

Part XIV
Leaves of Absence

49.3(1) In this section,

“Qualified health practitioner” means

- (a) A person who is qualified to practise as a physician, a registered nurse, or a psychologist under the laws of the jurisdiction in which care or treatment is provided to the individual described in subsection (5).
- (2) An employee is entitled to a leave of absence without pay to provide care or support to an individual described in subsection (5) if qualified health practitioner issues a certificate stating that the individual has a serious medical condition.
- (3) For greater certainty, a serious medical condition referred to in subsection (2) may include a condition that is chronic or episodic.

- (5) Subsection (2) applies in respect of the following individuals:
1. The employee's spouse.
- (6) An employee who wishes to take a leave under this section shall advise his or her employer in writing that he or she will be doing so.
- (7) If an employee must begin the leave before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it.
- (8) If requested by the employer, the employee shall provide the employer with a copy of the certificate referred to in subsection (2) as soon as possible.
- 53(1) Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.
- 53(2) Subsection (1) does not apply if the employment of the employee is ended solely for reasons unrelated to the leave.

Part XVIII Reprisal

- 74 (1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,
- (a) because the employee,
 - (i) asks the employer to comply with this Act and the regulations,
 - (iv) exercises or attempts to exercise a right under this Act,
 - (viii) is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or
- (2) Subject to subsection 122 (4), in any proceeding under this Act, the burden of proof that an employer did not contravene a provision set out in this section lies upon the employer.

Human Rights Code, R.S.O. 1990, C. H.19

- 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.
- 17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
- (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
- (3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.

The evidence

4. On December 14, 2014, the grievor testified she injured her left knee outside work stepping up into her van. On December 15, 2014 (“December 15”), she saw her family physician, Dr. Daryl Sokolon. He did not appear at the hearing. Over the Employer’s objection, I admitted documentary medical evidence advanced on the grievor’s behalf, subject to weight, if any in relation to the issues in dispute. Dr. Sokolon completed a Health Care Provider Certificate (“Employer Certificate”) and filled out a Workplace Safety and Insurance Board (“WSIB”) Health Professional’s Report (Form 8). The Employer Certificate reads, in part, as follows:

1. Date on which employee was last assessed or treated by you: 15 /12 /2014
day month year
2. Next scheduled date that employee will be reassessed: 22 /12 /2014
day month year
3. Is the employee following a plan of treatment? Yes ☒ No ☐
4. Is this employee absent from work due to a medical condition which has prevented him or her from performing all of the material and substantial duties of their job? Yes ☒ No ☐
5. Please use the Functional Abilities Form to indicate what modifications can be made in the workplace to accommodate this employee's early and safe return to work.
6. Will the employee be completely able to perform all the material and substantial duties of their regular occupation? 23 /12 /2014
day month year

5. On the WSIB Form 8, Dr. Sokolon indicated the grievor was advised to be off work until December 23, 2014 ("December 23"). He indicated the grievor could resume her regular duties on December 23 with some limitations. On the WSIB Form 8, Dr. Sokolon checked the following limitations:

- Bending/Twisting
- Climbing
- Kneeling
- Lifting
- Pushing/Pulling
- Standing

6. The Employer accommodated the grievor when she returned to work. The grievor's regular work hours were between 8:30 a.m. and 4:30 p.m., Monday to Friday. On January 8, 2015, the grievor emailed her supervisor, Edwina Dusome, Manager, Infectious Diseases Program with a subject line "Requesting a change of work hours". Her email reads, in part, as follows:

I would like to request that my work hours be altered for this upcoming semester to accommodate childcare arrangement for my grandchildren. My daughter is a single parent and sole support of my grandchildren. She is attending Fleming College and in her second semester of her first year.

I would need to leave at 4:00 p.m. on Monday, Wednesday and Fridays. I would like to take a 1/2 hour lunches on those days to accommodate my leaving early.

This would be in effect from Monday, January 12th until April 30th. It would not include Fleming's reading week (March 9-13).

7. Ms. Dusome approved the grievor's request. The grievor's grandson is 5 years of age. Between 9:00 a.m. and 3:20 p.m., he attends junior kindergarten. The grievor's granddaughter is 2 years of age. She is in day care between around 8:30 a.m. with a 4:00 p.m. pickup.

8. Between mid-January 2015 and the beginning of March 2015, the grievor attended physiotherapy. In March 2015, the grievor was referred for an MRI of her left knee. The MRI scan of April 2, 2015 ("April 2") showed a horizontal tear in the lateral meniscus of her left knee.

9. On Sunday, April 26, 2015, the grievor testified she felt a snap and stinging pain in her left knee while getting off the toilet. On April 27, 2015 ("April 27"), the grievor saw Dr. Sokolon. He completed an Employer Certificate authorizing an absence from work. It reads, in part, as follows:

1. Date on which employee was last assessed or treated by you: 27 /4 /2015
day month year
2. Next scheduled date that employee will be reassessed: 13 /5 /2015
day month year
3. Is the employee following a plan of treatment? Yes ☒ No ☐
4. Is this employee absent from work due to a medical condition which has prevented him or her from performing all of the material and substantial duties of their job? Yes ☒ No ☐

5. Please use the Functional Abilities Form to indicate what modifications can be made in the workplace to accommodate this employee's early and safe return to work.

6. Will the employee be completely able to perform all the material and substantial duties of their regular occupation?

Depends on surgery date
day/ month/ year

10. On May 13, 2015 ("May 13"), Dr. Sokolon completed an Employer Certificate and a Functional Abilities Form ("FAF"). The Employer Certificate reads, in part, as follows:

1. Date on which employee was last assessed or treated by you: 13 /5 /2015
day month year

2. Next scheduled date that employee will be reassessed: / /
day month year

3. Is the employee following a plan of treatment? Yes ☒ No ☐

4. Is this employee absent from work due to a medical condition which has prevented him or her from performing all of the material and substantial duties of their job? Yes ☒ No ☐

5. Please use the Functional Abilities Form to indicate what modifications can be made in the workplace to accommodate this employee's early and safe return to work.

6. Will the employee be completely able to perform all the material and substantial duties of their regular occupation?

In Sept 2015
day/ month/ year

11. On the May 13 FAF, Dr. Sokolon indicated the grievor could return to work on May 14, 2015, assuming the identified "restrictions/limitations" were accommodated. He indicated the expected duration for these limitations to be until September 2015. The FAF indicated, in part, the following limitations:

- Walking short distances only
- Standing less than 15 minutes
- Sitting OK
- No reaching

- No lifting floor to waist
- No lifting waist to shoulder
- No lifting above shoulder
- No pushing or pulling
- Avoid repetitive movement of left leg
- No stair climbing
- The grievor could keyboard for 5 to 7 hours.
- The grievor will be capable of working initially for 20 hours a week.

12. On Tuesday, May 19, 2015 (“May 19”), the grievor met with the Occupational Health and Safety Nurse, Shirley Clark, Pam Pressick, Union President and Ms. Dusome regarding a Return to Work Plan. The accommodations until September 2015 included a reduced workday of four hours between 8:30 a.m. and 12:30 p.m., and the payment of sick leave for the remaining daily hours of work in the afternoon until 4:30. The grievor was not required to attend the front service counter for the public, some 20 feet away from her desk. Her co-workers picked up this responsibility. The grievor estimated she worked at her desk for 95% of her time.

13. At the hearing, Christine Lowe, a co-worker testified under summons. She was first employed in a temporary job with the Employer in October 2014. In April 2015, another contract was renewed ending in the first week of November 2015. After that, she hoped to become a permanent employee, which subsequently occurred. While the grievor was employed, Ms. Lowe saw her socially outside of work and has been to her house.

14. On Victoria Day, namely Monday, May 18, 2015 (“May 18”), the grievor attended Ms. Lowe’s home to take photos of her farm and her family. Ms. Lowe had sold

the farm and wanted photos as mementos. Ms. Lowe testified there is not one square foot of level terrain around the four-acre property. The grievor, her daughter and grandchildren came to Ms. Lowe's house in the afternoon. The grievor and her daughter took photos using two cameras. After the photoshoot, the grievor, her daughter and grandchildren stayed for supper.

15. There are conflicting accounts about what occurred during the photoshoot. According to Ms. Lowe, when they arrived, she witnessed the grievor lifting her granddaughter out of the van. According to Ms. Lowe, the grievor walked around while taking pictures. There was a short drive between locations on the farm, where photos were taken. While Ms. Lowe estimated the grievor walked around her property a minimum 2 1/2 hours to a maximum of 3 1/2 hours, the digital camera data introduced into evidence shows that photos were taken between 16:45 and 18:16.

16. In cross-examination, the grievor testified for the majority of time, she was mostly sitting, and was standing for a bit, maybe 10 to 15 minutes. After the short drive between locations, the grievor testified she spent about 15 to 20 minutes in the van. She testified she took pictures from there and from outside the van, while standing.

17. At the hearing, digital camera data was introduced into evidence. The camera data shows the first photo was taken at 16:45 and the last photo was taken at 18:16. The data shows the grievor took 370 photos and her daughter took 207 photos. More particularly, for the grievor, between 16:30 and 17:17, she was denoted as using a camera with a 70 mm lens. 147 photos were taken. Between 17:33 and 17:46, the grievor was denoted as using a camera with a 50 mm lens. 68 photos were taken. Between 17:47 and 18:16, the grievor was denoted as using a camera with a 70 mm lens. 155 photos were

taken. For the grievor's daughter, between 16:25 and 16:45, she was denoted as using a camera with a 50 mm lens. 109 photos were taken. Between 16:45 and 17:02, she was denoted as using a camera with a 50 mm lens. 44 photos were taken. Between 17:33 and 17:47, she was denoted as using a camera with a 70 mm lens. 54 photos were taken.

18. There are conflicting accounts about whether the grievor kneeled during the photoshoot. According to Ms. Lowe, at one point, the grievor wanted her [Ms. Lowe's] children to pose on the ground. The grievor asked Ms. Lowe's children to go into certain positions on the ground, including the dog. According to Ms. Lowe, the grievor bent down on her knee to get a level angle with her children while on the ground to take the photos. Ms. Lowe testified she questioned the grievor about whether she was okay and whether she should be getting down on her knees. According to Ms. Lowe, the grievor said "shh don't tell anybody". It occurred to Ms. Lowe that the grievor's left knee was not as bad as it was purported to be.

19. According to the grievor, she bent over and took the pictures without kneeling. She explained her camera has a feature on it that enables her to flip an adjustable screen. The grievor's daughter testified she did not see her mother kneel to take these pictures.

20. To demonstrate how the grievor took the photos of Ms. Lowe's children at the farm, while they posed on the ground, the grievor's daughter took photos of the grievor bending over, and then on her knees, while photographing a friend lying on the ground. The grievor's photos were introduced into evidence to show the angle and perspective of her friend in the photos taken from the grievor's positions. In one side-view photo, the grievor is leaning forward and bending over at the waist. Her arms are extended downward

with the camera, at about the same level as her friend's face. The angle and perspective of this photo appears similar to the photos taken of Ms. Lowe's children, while on the ground. The grievor testified this showed the angle she used to photograph Ms. Lowe's children, while on the ground.

21. In another side-view photo, the grievor is kneeling with her arms up. She is holding the camera in her hands around chin level. The camera is above her friend lying on the ground and is pointed downward at her. The angle and perspective of this photo differ from the photos of Ms. Lowe's children on May 18, as the camera is above, rather than being level with the subject. This photo does not replicate the angle and perspective of the photos the grievor took of Ms. Lowe's children while on the ground on May 18. In cross-examination, the grievor acknowledged there was nothing to prevent her from lowering her arms and taking a photo, so that it would end up like the photo taken while bending over. However, the grievor said she could not see any reason why she would be on her knees to use the adjustable flip screen, and at the time, she could not kneel physically anyways.

22. On Canada Day, namely July 1, 2015 ("July 1"), Ms. Lowe saw the grievor at a music concert at Del Crary Park ("the Park") in Peterborough. In the evening, Ms. Lowe testified she saw the grievor walking the last "30ish" feet to the washrooms with her granddaughter in her arms. Ms. Lowe estimated she was about 40 feet away from the grievor. At the time, it was not dark. Ms. Lowe explained that she was going to go to the washroom to speak to the grievor but decided not to do so.

23. On Canada Day, Karen Rogers was also at the Park for the music concert. Ms. Rogers, who testified under summons is an Administrative Assistant. She has worked

for the Employer for 14 years. She is a co-worker of the grievor. She said she had a good working relationship with the grievor. While the grievor was employed, Ms. Lowe saw her socially outside of work. Ms. Rogers described the terrain at the Park as uneven. Ms. Rogers testified she saw the grievor walking among people who were sitting down and carrying her granddaughter across the field towards the washrooms. The grievor did not see her. Ms. Rogers saw the grievor later at the Park and they spoke.

24. The grievor denied carrying her granddaughter. She testified her granddaughter was in a stroller. The grievor estimated her granddaughter's weight to be about 30 pounds. She did not take her granddaughter specifically to a washroom at the Park. She recalled walking behind the stage with her daughter and grandson. Her grandson had to go to the washroom and they were right by the porta-potties. She estimated they were sitting about 100 feet from them.

25. While the grievor was on modified duties, the Employer made inquiries about the date of her upcoming surgery. On August 18, 2015 ("August 18"), Ms. Clark, Occupational Health and Safety Nurse sent a fax to Dr. Sokolon regarding the grievor. There was a cover sheet, a blank Employer Certificate and a blank FAF. The fax cover sheet, included the following in part:

Dear Dr. Sokolon: Thanks for the medical notes you provided for [the grievor] in May 2015. In the letter you referenced that . . . she would require surgery but no date has been provided.

Does the employee still require surgery Yes _ No _

If yes, please provide anticipated surgery date: _____

Please complete and return back to me by no later than **August 25/15**

26. On August 18, Ms. Dusome emailed the grievor and responded to her request for a vacation day on September 24. Ms. Dusome wrote, in part, that: “As you know, we need to have at least two of the three main secretaries [the grievor, Ms. Allen and Ms. Rogers] scheduled to work. You have requested a vacation day when [Ms. Allen] is off. Please try and make other arrangements and rescind.”

27. Around 11:00 a.m. on August 19, 2015 (“August 19”) Larry Stinson, Director of Operations met with the grievor to assist with his planning for secretarial coverage over the next few months. During their discussion, the grievor advised him that she had an MRI booked for September 18, 2015 (“September 18”). She advised him that an MRI was scheduled for next week, but she had to change it, since she will be out of town on vacation. The grievor advised she has a meeting the following week with the specialist (surgeon) to review the MRI and to make plans for the surgery, which she hoped would happen before the end of September. This information was untrue. Mr. Stinson also asked the grievor about whether she believed there will be any changes to her restrictions, as they were initially outlined between then and the surgery. The grievor replied no and that the restrictions would be the same, as there had been no change in her condition.

28. At the hearing, the grievor explained she felt stressed and frustrated because she did not have answers for Mr. Stinson. She said she felt intimidated because he and everyone else was looking for answers and she told him that to give them something. The grievor described it as a spur-of-the-moment decision to give them something and she apologized for that, at the hearing. The grievor said she also spoke to Mr. Stinson about a discretionary leave for September 24, the date of her husband’s surgery. While she could not remember his exact words, she said it was along the lines of it certainly being a

reasonable request that would meet the guidelines of the CUPE contract. Her understanding was that Mr. Stinson would speak to Patti Fitzgerald, Assistant Director and Ms. Dusome's boss. The grievor did not hear back from management.

29. On August 20, 2015 ("August 20"), the grievor emailed Ms. Dusome regarding September 24. The grievor wrote, in part, as follows: "[My husband] is having surgery that day so I will have to pick him up and drive him home when finished. Don't know what time it will be. He has to be in for 8:00 a.m., so I will come in at 8:30 and then wait for his call." On August 21, 2015 ("August 21"), Ms. Dusome responded by email, in part, as follows: "Can you talk about the logistics with me." When they spoke that day, the grievor wanted to book a half-day vacation in the morning, so she could be with her husband. Ms. Dusome initially said no but was willing to let the grievor flex the day.

30. On August 25, 2015 ("August 25"), Ms. Dusome emailed the grievor confirming their conversation. The email, reads, in part, as follows:

- You are on vacation from August 26, 2015 until September 17, 2015 (vacation time is 4 hours per day, 3 hours sick time).
- On September 18, you have a medical appointment in the morning, but will be returning after the appointment to complete your 4 hours of work time.
- On September 24, 2015, you will flex your 4.0 hours to assist your family with a medical appointment.
- Doctor's note for working 4 hours/day ends September 30, 2015.
- Operation is scheduled for October 6, 2015. Return date is possibly one week later. [The grievor] will return to full duties on October 13, 2015. reported.

31. Between August 26, 2015 ("August 26") and September 17, 2015 ("September 17"), the grievor was on vacation. The grievor and her husband drove to

British Columbia. While there, they flew to the Hot Springs Cove, which the grievor described as an island off Vancouver Island near Tofino. She walked down a boardwalk to the Hot Springs. The grievor believed the boardwalk was about a kilometre with stairs periodically around along the way. According to the grievor, she walked at her own pace using her knee brace. She testified she walked for about half an hour. She was on pain medications and anti-inflammatories. The boardwalk finished at a change room, about two or three steps up from the boardwalk. From the changeroom, the grievor indicated there was rough gravel leading to rocks and to the Hot Springs. After sitting down, she kind of scurried down with assistance from her husband and a friend. She grievor then walked back on the boardwalk. On September 8, 2015, the grievor posted photos of herself on Facebook, while at the Hot Springs.

32. On September 22, 2015 (“September 22”) at 10:39 a.m., the grievor emailed Ms. Dusome with a subject line of “1/2 day discretionary”. Article 11.07 “Discretionary Benefits” of the collective agreement reads as follows:

All employees shall be entitled to the equivalent of two (2) discretionary days off per year (January 1 - December 31) without loss of pay to deal with personal or family matters. Such time may be taken in half or full day increments. Employees must request the discretionary leave from their Manager prior to taking the leave. Such request will not be unreasonably denied.

33. The grievor’s email reads, in part, as follows: “As you know, my husband has a medical procedure this Thursday where he will be under anaesthetic. He is not to be left alone for 24 hours afterward. I would like to request a 1/2 day personal day in order to be with him.” At the hearing, the grievor was asked about why she changed her request, after having made arrangements for a flex day on September 24. The grievor explained

she had become aware of new information that her husband had to have someone with him for 24 hours after his procedure.

34. On September 22, Ms. Lowe spoke about a conversation she had with the grievor, after the grievor came out of a meeting with Ms. Dusome. Ms. Lowe said the grievor was extremely upset and angry. According to Ms. Lowe, the grievor told her the following. Ms. Dusome would not let her have the day off and that her family comes first. She had to be with her husband for the rest of the day [September 24], when he comes out of anaesthetic. Ms. Dusome wanted her [the grievor] to come to work after dropping her husband at the Hospital. When her husband came out of surgery, the grievor would pick him up and then come back to work in the afternoon. The grievor told Ms. Lowe that she would not be coming in that day [September 24] anyways.

35. On September 23, 2015 (“September 23”) at 10:42 a.m., Ms. Dusome emailed the grievor. The email reads, in part, as follows:

As discussed, your initial vacation request in August was denied because two of the main secretaries need to be available and [Ms. Allen] is on holidays. Since then, you would have had sufficient time to make arrangements for his care. Taking discretionary time would leave us short staffed and, as you know, this is a very busy time for our program.

You are still on short-term disability for 3.5 hours daily.

Do you have any suggestions on how we can resolve this?

36. On September 23 at 4:19 p.m., the grievor emailed Ms. Dusome. It reads, in part, as follows:

I really feel that a 1/2 day discretionary day should be allowed. As stated, I originally requested a vacation day in order to accompany my husband to the hospital tomorrow for his procedure which you denied. As you know, he has been advised to have someone with him at home for 24 hours after the procedure. He is only comfortable with me.

I know you are concerned with two secretaries being present in our department at all times. We now have 5 secretaries who are able to cover and 3 will be present tomorrow. As for iPHIS, Karen can give the cds (if any come in) to the nurses. She has been doing this for the other times that [Ms. Allen] and myself have been away at the same time. The nurses are able to enter into iPHIS.

As I feel that my request meets guidelines outlined in the CUPE contract and I followed procedure, I will be with my husband tomorrow.

37. On September 24, the grievor without Employer authorization did not attend work. Instead, she parked at the Employer parking lot and attended at the Hospital across the street. At the hearing, according to the grievor, her husband's procedure was at 8:00 a.m. and just before 10:00 a.m., he came out of recovery.

38. At 8:30 a.m. on September 25, the grievor came into work. About 10:00 a.m., the Employer held an investigation meeting regarding the grievor's absence from work the previous day. At the meeting, the grievor estimated she arrived at the Hospital at 8:00 a.m. and was in the waiting room, until her husband was out of the procedure, at probably 11:00 a.m. The grievor advised the Employer she did not know how long the procedure would take and she wanted to be with him, when he came out. When it was put to the grievor that she could have been working between 8:00 a.m. and 11:00 a.m., and that is what she agreed to do, the grievor replied that she wanted to be there [the Hospital], that she had the right to be there, as she had a half-day discretionary day.

39. During the meeting, the grievor advised, in part, that she had received additional information on a form from the Hospital. More particularly, the grievor advised the Employer the instructions on the Hospital form said that her husband had to have someone with him and could not be left alone for 24 hours after the procedure. At the hearing, a document from the Hospital titled "Surgery & Outpatient Procedures" was

admitted into evidence regarding the September 24 surgery. The document listed a two-letter acronym under "Procedure". Under the heading of "Before Your Surgery or Procedure", a bullet point reads "Arrange suitable transportation. You must not drive for 24 hours after your surgery". Another bullet point reads: "A responsible adult must stay with you overnight, at home, on the day of your surgery." In cross-examination, the grievor acknowledged the Hospital's "Surgery & Outpatient Procedures" document did not state that her husband could not be left alone for 24 hours after the surgery, but said it was open to interpretation.

40. On September 28, the Employer held an investigation meeting in the morning regarding the grievor allegedly engaging in activities exceeding her restrictions. The meeting followed employees bringing forward concerns about the grievor's activities outside work to the Employer's attention. One concern was that the grievor may not be as injured, as she represented. This would include seeing the grievor's Facebook postings of activities, while not at work. The employees were upset by performing duties the grievor would otherwise perform at work in the afternoon, which was viewed as causing extra stress and pressure. As an example, Ms. Lowe testified she felt the grievor as a friend was deceiving and hurting us [co-workers]. Ms. Lowe truly thought they were friends, and in her books, friends do not do this to other friends. Ms. Lowe testified it was never her intention to have the grievor fired. While she was aware the Employer would take some action, she did not believe it would be discharge.

41. During the meeting, the grievor confirmed her current restrictions were the same and they needed to be followed before surgery. When asked about her relationship with Ms. Rogers and Ms. Lowe, the grievor replied that she had no problem with them,

everything was fine and she socialized with them outside of work.

42. The grievor denied getting on her knees to take photos of Ms. Lowe's children and denied telling her not to tell anyone on May 18. In cross-examination, the grievor acknowledged her involvement in taking pictures was a lot greater than what she reported at the investigation meeting. At the investigation meeting, the grievor indicated, in part, that she took some pictures, that she stood briefly on her feet, but that her daughter took the majority of them. The grievor estimated she was standing 10 to 15 minutes on and off. The grievor denied carrying her granddaughter at the Park on July 1. The grievor said she was at the Park with the stroller for her granddaughter and that she could not physically carry her. When asked whether she went sightseeing during her vacation, the grievor indicated, in part, that they did not do a lot of walking or maybe for an hour a day in total. When asked how much walking she did on her vacation, the grievor advised they maybe did 10 to 15 minutes sporadically, and they would then sit down.

43. After the investigation meeting, the grievor saw Dr. Sokolon in the afternoon. The grievor testified she made this appointment on September 18. This was the first time she had seen Dr. Sokolon since May 13. He filled out an Employer Certificate and an FAF, which the grievor provided to the Employer the next day. The Employer Certificate reads, in part, as follows:

1. Date on which employee was last assessed or treated by you: 28 /09 /2015
day month year
2. Next scheduled date that employee will be reassessed: 20 /10 /2015
day month year
3. Is the employee following a plan of treatment? Yes ☒ No ☐
4. Is this employee absent from work due to a medical condition which has prevented him or her from performing all of the material and substantial duties of their job? Yes ☒ No ☐

5. Please use the Functional Abilities Form to indicate what modifications can be made in the workplace to accommodate this employee's early and safe return to work.

6. Will the employee be completely able to perform all the material and substantial duties of their regular occupation?

21 / 10 / 2015
day month year

44. In the FAF, Dr. Sokolon indicated, in part, that the grievor could return to work on October 21, 2015, assuming the identified restrictions/limitations were accommodated. He indicated the number of hours/days per week the grievor would be capable of working initially as "full-time as tolerated". The expected duration for these limitations was "2 – 4 wks". Some limitations in the September 13 FAF were the same as the May 13 FAF. This included walking short distances only and standing less than 15 minutes. Other limitations changed. For example, no reaching changed to "n/a". The limitations for lifting floor to waist, lifting waist to shoulder, lifting above shoulder and pushing and changed to "to less than 25 pounds" from not doing these activities. The September 28 FAF added avoid repetitive movement to both legs, whereas the limitation previously applied to the left leg.

45. On September 29, the Employer met again with the grievor. She did not acknowledge any wrongdoing. She also told the Employer she could do whatever she wants after work and that her own time is her business. The following day, the Employer discharged the grievor.

46. On October 6, 2015, medical documentation introduced into evidence showed the grievor had surgery to repair her meniscus tear.

47. On February 10, 2016, the grievor signed and filed an application ("Application") alleging discrimination with the Human Rights Tribunal of Ontario. The Application included a Medical Certificate from Dr. Sokolon dated January 25, 2016

(“January 25”). It reads, in part, as follows:

Ontario’s Employment Standards Act, 2000
Medical Certificate to Support Entitlement to Family Caregiver Leave,
Family Medical Leave, and/or Critically Ill Childcare Leave.

Patient’s name [*husband’s name: handwritten*]

I examined the patient on (YYY/MM/DD) [*2016-01-25 handwritten*] and certify that the following conditions existed (check all that apply)

A. Family Caregiver Leave

A1. Does the patient have a serious medical condition? (This may include a condition that is chronic or episodic) Yes *x* No ☐

A2 In some situations, the employee will have taken leave before the certificate is issued. Did the patient have a serious medical condition before today? Yes *x* No ☐

If yes, please provide the earlier date (YYY/MM/DD) [*2015-09-24 handwritten*]

A3 The patient is expected to have the serious medical condition until (YYY/MM/DD) [*N/A handwritten*]

The decision

48. The first question concerns the one-day suspension imposed on the grievor for insubordination when she did not attend work on September 24, the day of her husband’s surgery. The parties disagree about whether the grievor engaged in any culpable misconduct. They disagree about whether the discipline contravened sections 49.3, 53(1) and 74(1) of the ***ESA, 2000***. From May 19 onward, the grievor’s accommodations included a reduced workday of four hours between 8:30 a.m. and 12:30 p.m. and the payment of sick leave for the remaining daily hours of work in the afternoon until 4:30.

49. On August 18, Ms. Dusome denied the grievor's request for a vacation day on September 24 for operational reasons.

50. On August 19, the grievor said she spoke to Mr. Stinson about a discretionary leave for September 24. While the grievor said Mr. Stinson told her words along the lines of it certainly being a reasonable request that would meet the CUPE contract guidelines, she did not hear back from management that day.

51. On August 20, the grievor emailed Ms. Dusome regarding September 24 advising that her husband was having surgery, that she will have to pick him up and drive him home when finished, that he has to be in the Hospital for 8:00 a.m. and that she will come in at 8:30 and then wait for his call.

52. On August 21, Ms. Dusome denied the grievor's request to book a half-day vacation in the morning, so she could be with her husband, but was willing to let the grievor flex the day.

53. On August 25, Ms. Dusome emailed the grievor confirming their conversation. The email reads, in part, as follows: "On September 24, 2015, you will flex your 4.0 hours to assist your family with a medical appointment."

54. On September 22, the grievor emailed Ms. Dusome requesting a "1/2 day discretionary". The email reads, in part, as follows: "As you know, my husband has a medical procedure this Thursday where he will be under anaesthetic. He is not to be left alone for 24 hours afterward. I would like to request a 1/2 day personal day in order to be with him." The grievor explained she changed her request, after having made arrangements for a flex day, as she had become aware of new information that her husband had to have someone with him for 24 hours after the procedure. On September 22, Ms.

Lowe spoke with the grievor, after she came out of a meeting with Ms. Dusome. Among other things, the grievor told Ms. Lowe she had to be with her husband for the rest of the day [September 24], when he comes out of anaesthetic and that she would not be coming in that day [September 24] anyways.

55. On September 23 at 10:42 a.m., Ms. Dusome emailed the grievor and denied her request for a 1/2 day personal day for operational reasons. At 4:19 p.m., the grievor emailed Ms. Dusome telling her why she would not be coming into work and would be with her husband. This included the grievor's representation that she was advised to have someone with her husband at home for 24 hours after the procedure, that he was only comfortable with her, that she felt her request met the collective agreement guidelines, that she followed procedure and that she really felt a half-day discretionary day should be allowed. At the September 25 investigation meeting, when it was put to the grievor that she could have been working between 8:00 a.m. and 11:00 a.m., and that is what she agreed to do, the grievor replied, in part, that she had the right to be there [the Hospital], as she had a half-day discretionary day.

56. It is evident from what occurred at the time that the grievor was solely seeking to exercise a right under article 11.07 of the collective agreement to be absent from work with pay on September 24. Article 11.07, "Discretionary Benefits" provides, in part, that all employees shall be entitled to the equivalent of two discretionary days off per year without loss of pay to deal with family matters, that such time may be taken in a half day increment, and that a request for discretionary leave will not be unreasonably denied. To objectively assess whether the leave was not unreasonably denied, one must consider the evidence and context. In the circumstances, I find the leave was not

unreasonably denied. There were operational reasons for the denial, namely being short staffed at a very busy time.

57. Also, there was an agreement in place for September 24. In that regard, I am satisfied that Ms. Dusome's August 25 email reflects that agreement, namely that the grievor would flex four hours on September 24 to assist her family with a medical appointment. By her actions, the grievor purported to unilaterally resile from this agreement based on new information necessitating her absence from work on September 24. The new information the grievor represented to the Employer was to the effect that her husband had to have someone with him for 24 hours after his procedure.

58. However, that was simply not the case, as the new information was not as represented and does not constitute a material change in circumstances. In my view, the Hospital's "Surgery & Outpatient Procedures" document is clear and is not open to interpretation, contrary to what the grievor testified. In that regard, the document provided, in part, that the grievor's husband not drive for 24 hours after surgery and that a responsible adult must stay overnight, at home, on the day of your surgery. Given the clarity of these instructions, the grievor could be under no genuine misapprehension about their meaning. Moreover, I note even the grievor's conduct the following day, September 25 was inconsistent with her alleged understanding, as she came into work at 8:30 a.m., which is before the Hospital "mandated" 24-hour window she asserted would end.

59. Given the foregoing, I must conclude the grievor was attempting to use the Hospital's "Surgery & Outpatient Procedures" document as a pretext. In that regard, it is clear from the grievor's conversation with Ms. Lowe on September 22, that she had no intention of coming into work on September 24. In any event, I note the agreement as of

August 25 to flex four hours on September 24 is consistent with and would enable the grievor to comply with the actual instructions in the Hospital's "Surgery & Outpatient Procedures" document.

60. As an alternative argument, the Union argues the Employer violated article 11.02 of the collective agreement, which deals with a leave of absence without pay. It reads as follows: "The Employer may grant leave of absence without pay if an employee requests it in writing from the Employer and if the leave is for good reason and does not unreasonably interfere with the efficient operation of the Health Unit, provided that if such leave is for a period in excess of three (3) months, the employee will only be returned to employment when the position for which she is qualified becomes open." In my view, article 11.02 does not apply here, as such leave was not sought as of September 23. On the contrary, the grievor was seeking paid leave under article 11.07 at all material times.

61. As a further alternative argument, the Union argues the discipline imposed contravened sections 49.3, 53(1) and 74(1) of the *ESA, 2000*. There are no magic words that an employee must use to engage the right to unpaid Family Caregiver Leave under the *ESA, 2000*. However, whether this right has been engaged requires a contextualized assessment of the facts. In these particular circumstances, I am compelled to find the parties at all material times were operating solely and exclusively under the terms of the collective agreement, that sections 49.3, 53(1) and 74(1) of the *ESA, 2000* were not engaged.

62. It is evident from what occurred that the grievor at all material times was seeking to exercise only collective agreement rights to be off work with pay on September 24. As of September 23, the grievor made it clear in her email that she was solely seeking

to exercise a right for paid leave under article 11.07 to be absent from work on September 24. In that regard, her email read, in part, as follows: “I really feel that a 1/2 day discretionary day should be allowed. . . . As I feel that my request meets guidelines outlined in the CUPE contract and I followed procedure, I will be with my husband tomorrow.” Further, at the September 25 investigation meeting, the grievor advised, in part, that she had the right to be there [the Hospital], as she had a half-day discretionary day. Given the foregoing, Dr. Sokolon’s Medical Certificate of January 25 in an effort to now support a claim for unpaid Family Caregiver Leave under the **ESA, 2000**, some four months after-the-fact does not materially change the reality or objective characterization about what actually occurred.

63. In these unique circumstances, I must therefore conclude the one-day suspension imposed for culpable misconduct did not contravene sections 49.3, 53(1) or section 74(1) of the **ESA, 2000**. The Employer has proven the grievor engaged in culpable misconduct under the collective agreement and was insubordinate, by not attending work, as scheduled on September 24. On objective review, there is no principled basis to conclude the discipline fell outside the range of reasonable disciplinary responses.

64. I do not consider the result here to be inconsistent with ***Re Kruger Inc. (Packaging Division) and Communications Energy and Paperworkers Union, Local 1646***, 2012 CarswellOnt 201, [2012] L.V.I. 3987-2, [2012] O.L.A.A. No. 3, 109 C.L.A.S. 33, 214 L.A.C. (4th) 357 (Herlich), as the facts there materially differ. In that case, the employer denied the grievor’s request for unpaid leave to attend a specialist’s appointment. After attending the appointment, the employer discharged the grievor for not reporting for work. The parties disagreed about whether the grievor was entitled to a leave

of absence without pay (Personal Emergency Leave) under section 50 of the *ESA, 2000* and whether the discharge was a reprisal prohibited by section 74 of the *ESA, 2000*. The employer argued the grievor was ineligible for personal emergency leave because he failed to advise it that he was doing so and that a specialist's appointment was not a personal illness or injury within the meaning of section 50 of the *ESA, 2000*.

65. In allowing the grievance, the arbitrator concluded the grievor was entitled to Personal Emergency Leave and that the discharge was a prohibited reprisal. The arbitrator found the grievor gave sufficient notice to the employer of his need to attend a medical appointment with a specialist. The arbitrator was satisfied that the grievor's evidence of a physical concern coupled with the specialist's involvement in the process established that the leave was taken because of personal illness or injury, within the meaning of section 50 of the *ESA, 2000*. In contrast, the grievor here at all material times was seeking to exercise only collective agreement rights and was seeking paid leave for September 24. As of September 23, it is clear from the grievor's email that she was solely seeking to exercise a right for paid leave under article 11.07 "Discretionary Benefits" of the collective agreement to be absent from work with pay on September 24. Further, at the September 25 investigation meeting, the grievor advised, in part, that she had the right to be there [the Hospital], as she had a half-day discretionary day.

66. I now turn to the discharge, which concerned various allegations. Given my findings and conclusions about what occurred on May 18, July 1, and the grievor's activities at the Hot Springs, I consider it unnecessary to address the other allegations. As part of the medical context, the MRI scan of April 2 showed a horizontal tear in the lateral meniscus of the grievor's left knee. The operative limitations in place over the relevant

period are set out in Dr. Sokolon's May 13 FAF and are found at paragraph 11 of this award. In his May 13 Employer Certificate, Dr. Sokolon indicated the expected duration of the limitations to be until September 2015. As Dr. Sokolon did not testify at the hearing, it was unclear about the extent that his assessment and opinion were based on objective findings from examination and the grievor's reporting of subjective symptoms.

67. The agreed-upon accommodations that arose out of the May 19 meeting regarding a Return to Work Plan were two-fold. There was a reduced work day of four hours, with the payment of sick leave for the remaining daily hours of work. There were also limitations in place for what the grievor could do while at work. One of the stated limitations was "Walking short distances only". At the May 19 meeting, it was agreed the grievor would not be required to attend the front service desk for the public, some 20 feet away from her desk. Following the May 13 FAF, the grievor maintained her current restrictions were the same and needed to be followed before surgery. This included the September 28 investigation meeting. Following that meeting, Dr. Sokolon filled out an Employer Certificate and an FAF, which the grievor provided to the Employer the next day, September 29. Some limitations in this FAF were the same as the May 13 FAF, including walking short distances only. Notably, while some limitations changed, the September 28 FAF is prospective in nature. Given that, it does not purport to be retrospective or to materially qualify the operative limitations in place before the grievor's surgery on October 5.

68. There were conflicting accounts about what occurred on May 18 at Ms. Lowe's farm and July 1 at the Park. I have considered the parties' submissions about what findings I should make on the evidence adduced, which I have not reproduced. On the

material factual disputes, I find Ms. Lowe and Ms. Rogers to be credible witnesses and their evidence to be reliable. In that regard, I have considered the demeanour of the witnesses, the character of their evidence, whether they appeared to be forthright, open, or evasive, their capacity and opportunity to perceive, recollect and communicate, the consistency of their evidence, the inherent probability of their evidence, and the presence or absence of bias, interest or other motives.

69. At this point, I would like to address the considerations of the presence or absence of bias, interest or other motives regarding the evidence of Ms. Lowe and Ms. Rogers, who socialized with the grievor. Employees brought forward concerns about the grievor's activities outside work to the Employer's attention. One concern was that the grievor may not be as injured, as she represented. It seems apparent that employees were upset. On objective review of the evidence as a whole in context, I find the employees being upset led them to report their concerns, as distinct from Ms. Lowe or Ms. Rogers intentionally misrepresenting what they reported to the Employer. Moreover, in Ms. Lowe's case, I do not find the evidence to be sufficiently probative to objectively establish that she concocted her evidence in an effort to secure full-time employment. While Ms. Lowe was upset enough to report her concerns to the Employer, I find her to be credible and her evidence to be reliable in relation to her testimony that it was never her intention to have the grievor fired and to the effect she did not believe the Employer would take the action of discharge.

70. There are stark differences in the accounts about what occurred on May 18 at Ms. Lowe's farm. In objectively reviewing the foregoing conflicting accounts, I find reliable Ms. Lowe's straightforward and consistent testimony about what occurred, as it

relates to the grievor's actions in photographing Ms. Lowe's children, while they posed on the ground. Ms. Lowe was in proximity to what she observed and heard. There is no material similarity between the grievor bending over, as opposed to kneeling to take photos of Ms. Lowe's children. Given that, I do not consider this to be a case where Ms. Lowe was mistaken in what she saw and what she heard. While Ms. Lowe's estimate of the length of time of the photoshoot was inaccurate, as the digital camera data objectively demonstrates, I do not find this to undermine the reliability of what she saw and what she heard. In that regard, estimating time in the present context materially differs from witnessing conduct and speech.

71. I note the evidence of the grievor's daughter that she did not see her mother kneel to take these pictures. I do not find this evidence to be particularly probative, as she did not indicate where she was looking at the times the photos were taken. Moreover, she did not corroborate her mother's testimony that she bent over without kneeling when she took the photos of Ms. Lowe's children, while they posed on the ground. I also do not find probative the photos the grievor proffered to demonstrate how she took the photos of Ms. Lowe's children at the farm, while they posed on the ground. While the angle and perspective of the "bending over" photos appear similar to the photos the grievor took of Ms. Lowe's children while posing on the ground, the "kneeling" photos do not. Unlike the "bending over" photos, the grievor while kneeling did not similarly place her arms down to reach the same level as the "bending over" photos, which she could have done.

72. I find reliable Ms. Lowe's straightforward and consistent testimony that the grievor while kneeling responded to her [Ms. Lowe's] question about whether she was okay and whether she should be getting down on her knees by saying "shh don't tell

anybody”. Ms. Lowe was in proximity to what she heard. I also find reliable Ms. Lowe’s straightforward and consistent testimony that the grievor lifted her granddaughter out of the van. On the evidence, there is no principled basis to conclude she was mistaken about what she observed.

73. I further find the grievor walked and stood for a majority of the approximately 90-minute photoshoot. I note Ms. Lowe was not asked about how much time the grievor sat during the photoshoot. Notwithstanding that, I am satisfied while the grievor sat during the photoshoot, that she did not do so for the majority of time and that she did not stand for only 10 to 15 minutes, as she testified. Objectively, if the grievor’s account was reliable, one would not expect the stark differences in the accounts about what occurred. However, that was not the case here. While Ms. Lowe’s estimate of the length of time of the photoshoot was inaccurate, I do not find this to undermine the reliability of what she saw and what she heard, as estimating time in the present context materially differs from witnessing conduct and speech.

74. There were conflicting accounts about what occurred at the Park on July 1. In objectively reviewing the conflicting accounts, I find reliable Ms. Lowe’s and Ms. Rogers’ straightforward and consistent testimony about what occurred, as it relates to the grievor carrying her granddaughter to the washrooms. Ms. Lowe had the opportunity to observe the grievor walking the last “30ish” feet to the washrooms with her granddaughter in her arms, as she was about 40 feet away from the grievor. Ms. Rogers saw the grievor carrying her granddaughter across the field towards the washrooms, and they later spoke at the Park. On the evidence, there is no principled objective basis to conclude there was a case of mistaken identity. Moreover, there is no material similarity between the grievor

carrying her granddaughter, as Ms. Lowe and Ms. Rogers observed and the grievor's granddaughter being pushed in a stroller, as the grievor maintained. Given that, I do not consider this to be a case where Ms. Lowe and Ms. Rogers were mistaken in what they observed.

75. While on vacation at the Hot Springs Cove, the grievor at the hearing acknowledged walking two kilometres along a boardwalk to and from the Hot Springs. Given that, I find on the grievor's own evidence that she walked two kilometres along a boardwalk to and from the Hot Springs.

76. The evidence has proven that the grievor engaged in activities outside work on May 18, July 1 and while on vacation at the Hot Springs Cove that were inconsistent with the stated restrictions in the May 13 FAF, under which the parties were operating at the workplace at all material times. This includes the September 28 investigation meeting, where the grievor confirmed her current restrictions were the same and they needed to be followed before surgery.

77. What, if any culpability flows from the findings of fact, in the present circumstances? The parties disagree about whether I can make any finding of culpability, in the absence of medical evidence regarding the grievor's activities outside work. In support of its argument that I cannot make any finding of culpability, the Union relies on *Re Greater Toronto Airports Authority and P.S.A.C., Local 0004*, 2010 CarswellNat 1694, [2010] L.V.I. 3896-2, [2010] C.L.A.D. No. 127, 100 C.L.A.S. 371, 191 L.A.C. (4th) 277, 88 C.C.E.L. (3d) 32 (Shime). In that case, the employer terminated the grievor for being dishonest in reporting her absences and for continuing her dishonesty by not being truthful when she was questioned about her absences, resulting in the loss of trust. In

allowing the grievance, the arbitrator found, in part, that the video surveillance did not establish on a balance of probabilities that the grievor was medically fit to return to work to perform modified duties.

78. I will set out some background context. The grievor, a long-term employee injured her knee at work. Her job involved a considerable amount of walking. On February 19, 2004, the grievor had surgery on her knee. On February 24, 2004, the surgeon provided a medical note indicating she would be off work for four weeks as a result of the surgery. After that, the grievor attended a physiotherapy clinic for five days a week. The grievor was put under video surveillance. On March 9, 2004, the grievor was seen attending physiotherapy and driving to a store. There, she was observed for about 15 minutes browsing for merchandise and reaching out to remove merchandise from the shelving. She was also observed standing on her toes and according to the investigator, demonstrated “no discomfort with either leg”. After that, the grievor drove to a drugstore, a gas station, a community mailbox and to the airport. On March 10, 2004, the grievor was observed attending physiotherapy and entering and exiting a grocery store with three full grocery bags. The investigator indicated the grievor appeared to walk with an even gait with no indication of discomfort and either leg.

79. As a result of video surveillance, the grievor was contacted with a request for information from her physician about why she required four weeks of recuperation and whether she could return earlier with or without restrictions. The grievor obtained a note from her surgeon and returned to work on March 17, 2004, a week before the original return date of March 22, 2004. The restrictions for 2 weeks included no lifting, no driving, and no walking greater than 10 minutes. On leaving the workplace that day, the grievor

was observed through surveillance to be limping slightly on her right leg and then continuing to walk with “quite a severe limp on her right leg”. The investigators concluded that “she [the grievor] displayed a pronounced irregular gait”.

80. Management reviewed the surveillance video. Relying on their own observations, management concluded the grievor was defrauding it. Management considered the doctor’s note to have more restrictions than the grievor appeared to have in the video, namely when she was walking for more than 10 minutes and driving. Based on what the employer observed on the video and what they were told during the investigative meeting, it was concluded the grievor was defrauding the employer.

81. At the hearing, the grievor’s physiotherapist and surgeon testified. The arbitrator concluded the totality of the union’s medical evidence supported the grievor. On balance, he preferred the evidence of the surgeon and physiotherapist that the videotapes when properly and medically assessed did not establish that the grievor was fit to return to work to perform modified duties as the employer inferred. He found the videos to be clearly consistent with the grievor’s explanation that she felt better after physiotherapy and was on painkillers.

82. The arbitrator did not adopt any conclusions from the opinions derived from the videotapes by the investigators or the employer regarding the grievor’s return to modified duties. He considered it outside the expertise of an ordinary layperson to assess the extent to which a person may modify their gait or shift their posture to compensate for an injury, as such shifts may also be subtle and not apparent to the untrained eye. On the facts there, the arbitrator concluded the employer ought to have consulted a person with the relevant expertise such as a medical doctor to assess the videotapes. In relation to

management's erroneous lay assessment of the grievor's medical condition and videotape evidence, the arbitrator noted, in part, that management did not distinguish between a work environment where an employee is subject to the demands of the employer and the job, and rehabilitation in a home environment, where an employee is free to take painkillers, to rest and to exercise as may be necessary.

83. In the present matter, the parties disagree about whether I can make any finding of culpability, in the absence of medical evidence regarding the grievor's activities. While a factor, I do not consider the absence of medical evidence regarding the grievor's activities on May 18, July 1 and at the Hot Springs in principle to necessarily preclude a finding of culpability, in the present circumstances. In my view, one must review the evidence adduced in its full context to determine whether the Employer has met the onus upon it, including having regard to the documentary medical evidence adduced. Here, there are patent incongruities between certain proven activities of the grievor outside work and her workplace limitations from May 13 onward. Those incongruities call out for a medical explanation, which was not forthcoming. In the circumstances, the patent incongruities were not medically explained or reconciled.

84. The grievor's principal defence to the allegations regarding May 18 at Ms. Lowe's farm is that they did not occur. I have found that not to be the case. On May 18, it was not medically explained and reconciled how the grievor could lift her granddaughter out of the van, when the operative workplace limitations include no reaching, no lifting floor to waist, and no lifting waist to shoulder. It was not medically explained and reconciled how the grievor could walk and stand for a majority of the approximately 90-minute photoshoot, and yet based on the represented limitation of "Walking short

distances only”, it was agreed the grievor would not be required to attend the front service desk for the public, some 20 feet away from her desk. While denied by the grievor, her kneeling was medically unexplained. I note that kneeling was not expressly mentioned as a limitation in the May 13 FAF. However, the action of kneeling and the informative statement the grievor made to Ms. Lowe, namely “shh don’t tell anybody” along with lifting her granddaughter out of the van and walking and standing for a majority of the approximately 90-minute photoshoot objectively support a conclusion the grievor manipulated her stated “limitations” at work for her own benefit.

85. The grievor’s principal defence to the allegations regarding July 1 is that they did not occur. I have found that not to be the case. On Canada Day, I find the grievor was carrying her granddaughter to the washrooms at the Park. It was not medically explained and reconciled how the grievor could carry her granddaughter on July 1, when the operative workplace limitations include no reaching, no lifting floor to waist, no lifting waist to shoulder, and given the represented limitation of “Walking short distances only”, where it was agreed the grievor would not be required to attend the front service desk for the public, some 20 feet away from her desk.

86. While on vacation at the Hot Springs Cove, the grievor at the hearing acknowledged walking two kilometres along a boardwalk to and from the Hot Springs. It was not medically explained and reconciled how the grievor could do so, while at work, with the represented limitation of “Walking short distances only”, it was agreed the grievor would not be required to attend the front service desk for the public, some 20 feet away from her desk.

87. On the whole, the patent incongruities between the grievor's activities on May 18, July 1 and at the Hot Springs in the context of her workplace limitations from May 13 onward cannot be explained by the May 13 FAF and cannot be reconciled with it. Further, the September 28 FAF does not explain or reconcile the patent incongruities between the grievor's activities on May 18, July 1 and at the Hot Springs in the context of her workplace limitations from May 13 onward, as it is prospective in nature. The September 28 FAF does not purport to be retrospective or to materially qualify the operative workplace limitations in place before the grievor's surgery on October 5.

88. In the circumstances, and having regard to the grievor's activities on May 18, July 1 and at the Hot Springs, I must conclude the grievor manipulated her stated limitations at work for her own benefit and misled the Employer from the outset. The duty to accommodate has been described as multi-party, namely involving the employer, the union and the affected employee. At a minimum, the accommodation process contemplates an employee seeking accommodation to act honestly and in good faith, which includes providing accurate medical information to facilitate an appropriate accommodation. In the circumstances here, I must conclude the grievor did not meet this standard. By her actions, the grievor has undermined the propriety and efficacy of the accommodation process and her obligation within that process. The Employer has proven the grievor has engaged in serious culpable misconduct undermining trust in her employment relationship.

89. It is alleged the discharge contravened sections 5 and 17 of the *Code* and constituted a reprisal under section 8 of the *Code*. In *Noble v. York University* 2010 CarswellOnt 18678, 2010 HRTO 878, [2010] O.H.R.T.D. No. 841, the Ontario Human

Rights Tribunal (“Tribunal”) articulated what elements must be proven to establish a reprisal under the **Code**. The Tribunal wrote, in part, as follows:

31. In order to prove reprisal, a complainant (now an applicant) must establish that the respondent engaged in an action, or threat, which was intended as a retaliation for the claiming or enforcement of a right under the **Code**. Unlike an allegation of discrimination, where intention is not a necessary element to prove a violation, where reprisal is alleged, the complainant must establish that the action was taken with an intent to punish or retaliate. See: *Jones, supra*; *Jones v. Amway of Canada Ltd.* [2001 CarswellOnt 5753 (Ont. Bd. of Inquiry)], 2001 CanLII 26217; *Ketola v. Value Propane Inc.* [2002 CarswellOnt 5507 (Ont. Bd. of Inquiry)], 2002 CanLII 46510; *Moffatt v. Kinark Child & Family Services* (1998), 35 C.H.R.R. D/205 (Ont. Bd. of Inquiry).

33. Thus, in a complaint or application alleging reprisal, the following elements must be established:

- a. An action taken against, or threat made to, the complainant;
- b. The alleged action or threat is related to the complainant having claimed, or attempted to enforce a right under the **Code**; and
- c. An intention on the part of the respondent to retaliate for the claim or attempt to enforce the right.

90. On objective review, I find the evidence did not establish that the discharge contravened sections 5 and 17 of the **Code** or constituted a reprisal under section 8 of the **Code**. The Employer discharged the grievor for breach of trust essentially for exaggerating her medical restrictions, while being accommodated at work between May and September 2015. The evidence has proven the grievor has engaged in serious culpable misconduct undermining trust in her employment relationship. Conversely, the evidence did not establish the Employer discharged the grievor with any intention to retaliate for the claiming or enforcement of a right under the **Code**.

91. As the evidence has proven the grievor has engaged in serious culpable misconduct undermining trust in her employment relationship, the next question is

whether a lesser penalty should be substituted for the discharge. I am compelled to conclude it would not be just and reasonable in all the circumstances to substitute another penalty for the discharge. In support of reinstatement, the grievor relies on her years of service with the Employer and a clear record. In my view, the following factors outweigh any positive inferences that one might otherwise draw about the grievor's rehabilitative potential from her years of service and tip the scales against her reinstatement.

92. The grievor engaged in serious misconduct which calls into question her trustworthiness, which is a cornerstone for a viable continuing employment relationship. On the whole, I have not found the grievor to be a credible witness or her evidence to be reliable on the major factual disputes. This heightens concern about her trustworthiness and casts further serious doubt regarding her rehabilitative potential. Overall, the grievor did not fully acknowledge or take any real and meaningful responsibility for her actions throughout the investigation process and at the hearing. She only apologized for lying to Mr. Stinson on August 19 regarding an MRI. I do not consider this to be particularly meaningful in the overall context, as there was no other real alternative for the grievor. Further, I do not consider the grievor's evidence about the one kilometre walk each way to and from the Hot Springs to be a particularly meaningful acknowledgement in support of reinstatement, as there was no other real alternative available to her. Additionally, as the nature of the grievor's serious misconduct is something that is difficult to detect, there is a legitimate need here for deterrence.

93. I do not consider the result here to be inconsistent with *Re Greater Toronto Airports Authority and P.S.A.C., Local 0004* (supra), as the facts there materially differ. For example, there was no dispute about what occurred in that case. Rather, the parties

there disagreed about what conclusions, if any could be properly drawn from the observed activities in issue. Here, there were factual disputes about whether certain activities occurred. Also, the present matter does not involve limitations in the context of an individual recuperating from surgery, who is in rehabilitation and is progressing. Further, we are not dealing with nuance and subtlety, as was the case there. Rather, there are patent incongruities between the grievor's activities outside the workplace on May 18, July 1 and at the Hot Springs and her workplace limitations from May 13 onward.

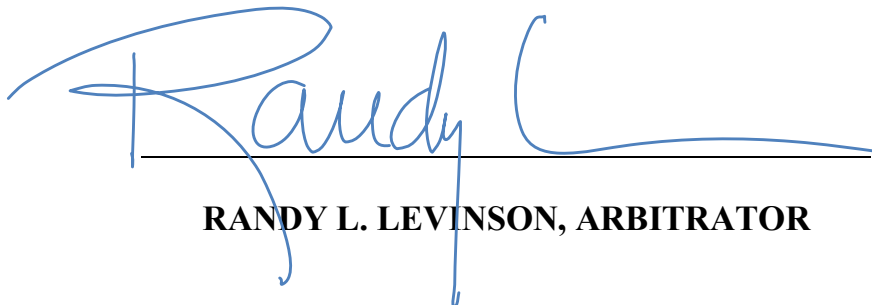
94. Before concluding, I would like to briefly address allegations in the grievor's Application filed with the Human Rights Tribunal of Ontario. The application alleges the Employer acted in bad faith in suspending and discharging the grievor. In my view, the evidence did not establish bad faith in either context. The grievor was suspended for proven insubordination. The grievor was discharged for a breach of trust and the evidence has proven she has engaged in serious culpable misconduct undermining trust in her employment relationship.

95. In the context of the suspension, the evidence did not establish the Employer contravened sections 5, 8 and 17 of the *Code*. At all material times, the parties were operating solely and exclusively under the terms of the collective agreement. The grievor was disciplined for insubordination. She was not disciplined because of family status or because of disability. Accordingly, I must conclude the suspension did not contravene sections 5 or 17 of the *Code*. Further, the evidence did not establish the Employer suspended the grievor with any intention to retaliate for the claiming or enforcement of a right under the *Code*.

96. Given my findings and conclusions that the disciplines did not contravene the *ESA, 2000* or the *Code*, there is no principled basis to support the remedies claimed in the Application. This includes the evidence not proving the following, namely that the suspension was discriminatory because of family status or because of disability, that the discharge was discriminatory because of disability, that the Employer failed to make reasonable accommodation of the grievor's needs, that the disciplines contravened sections 5 and 17 of the *Code*, that the suspension constituted a reprisal under section 74(1) of the *ESA, 2000*, or that the disciplines constituted reprisals under section 8 of the *Code*.

97. To summarize, having considered the parties' submissions and the evidence adduced, I conclude the grievor was suspended and discharged for just cause. I also conclude that the disciplines did not contravene the *ESA, 2000* or the *Code*. I further conclude it is not just and reasonable in all the circumstances to substitute a lesser penalty for the suspension or for the discharge. Finally, I would like to thank Mr. Horner and Ms. Rusak for their thoughtful submissions.

DATED at Ancaster, this 5th day of June, 2018.



RANDY L. LEVINSON, ARBITRATOR