

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

The Employer

-and-

THE UNION OF NORTHERN WORKERS, a Component of the
Public Service Alliance of Canada

The Union

GRIEVANCE RE: L. R.
(Grievance Number: 20-E-02653)

AWARD

Before: Thomas Jolliffe, Q.C.

Representing the Employer: Jeremy Walsh, Counsel

Representing the Union: Janice Maslanko, Counsel

Hearing Dates (via Zoom): May 25, 26 and 27, 2022
June 1, 2022

Date Award Issued:
July 20, 2022

1. This matter concerns the grievance filed on July 13, 2020 on behalf of an aggrieved bargaining unit employee, thereby crystallizing the issue of accommodating a diagnosed medical condition at that point and going forward, which the Union alleges has been mismanaged by the Employer so as to generate a continuing cause of action requiring suitable redress, both declaratory and compensatory. The Employer responds that it has continued fulfilling its obligation to the grievor through the various legitimate efforts made towards finding a suitable placement after having reasonably determined that returning him to his home position or Department at Stanton Regional Hospital in Yellowknife, in the known circumstances, was not an appropriate solution. It relies on the grievor's past employment history raising ongoing serious safety issues given his highly responsible home position. At the same time it does not doubt the legal significance of the long-established duty resting with it to accommodate employees seeking to return following a period of incapacitating unfitness, needing to be pursued short of undue hardship.

2. I will say at the outset that I agree with the comments of Arbitrator Stout in *Canadian Pacific Railway Company v. Teamsters Canada Rail Conference*, 2016 CanLII 25247 that while no doubt it is normal practice in labour arbitration matters for arbitrators to identify the parties, arbitrators can exercise their discretion to provide for anonymity in situations where there is "personal, private and extremely confidential information such as medical records" entered in evidence. This award contains personal and private references involving medical information and assessments, and therefore it is appropriate to provide anonymity for the grievor who will be referenced throughout by his initials "LR". In all, there were some 107 documentary materials presented at hearing, in addition to receiving the testimony of the grievor and Union representative Shane Pike, and from management witnesses Kevin Yates and Cynthia Sutherland.

Factual background leading to eventual accommodation requirement:

3. The grievor was hired in November 1999 into medical radiation technology work at the Stanton Territorial Hospital, taking the Senior Technologist Computerized Tomography (CT) position in the Radiology Unit (Diagnostic Imaging Department) for which there can be no doubt about his having been considered qualified by reason of his technical education, training and experience. Due to patient safety concerns which materialized over time, including departmental protocol violations in his day-to-day work which were investigated as an unsatisfactory performance issue, the grievor in 2016 was assigned to administrative duties in his department with which his immediate supervisor in the Radiology Unit, Ms.

Sutherland, considered was not a long-term viable option. She did not doubt that he had been compliant with a Performance Improvement Plan (PIP), which nevertheless was not viewed by supervisory staff to have been successful, nor were the other study platforms and hands-on refresher training received by him as developmental supports during a several months' period. Despite working to improve and update his skills and knowledge, including with the assistance of CT equipment specialists, the grievor's care and protection of patient safety was assessed as not having improved to the point where he was performing at a satisfactory level.

4. Unquestionably, by the time of the grievor's being assigned to administrative duties in 2016, management had assessed there to be a developed and persistent continuing pattern of failure to follow known and well-accepted protocols. This included episodic unsafe handling of patients. It was taken to be a competency issue which required their investigating any precipitating medical reasons, possibly requiring accommodation at that point. There were requests delivered for medical examination, diagnosis and prognosis in that the previous counselling efforts and stated expectations from his immediate supervisor were not considered to have been sufficiently followed.

5. More particularly, the grievor's immediate supervisor, Ms. Sutherland, currently the Manager, Diagnostic Imaging at Stanton, had become increasingly concerned over time with his performance level. In her correspondence to him dated November 30, 2016, following her updated review of some recurring difficulties, which is to say his having committed certain inexplicable "errors", she asked whether there was a medical condition possibly impacting his ability to perform the job at that point. Patient safety ramifications were always taken to be the paramount consideration in diagnostic imaging work, as had been explained to the grievor during past counselling and investigation sessions. In her correspondence to the grievor Ms. Sutherland pointed out that their obtaining a medical diagnosis/prognosis was an essential component of the accommodation process, needing to know how his medical condition was affecting his ability to perform instructed job duties, if at all. She stated therein that based on the information received "we will be in a better position to accommodate you in the workplace by promoting as productive a work life as possible". By that time, Ms. Sutherland admittedly was losing confidence that the grievor was suitable for continuing in his Senior Technologist position. Accordingly, she proposed that his personal physician advise whether there was a medical condition that impacted his performance ability, and if so list the limitations and/or restrictions, including whether there were any medical limitations affecting his ability to

work safely, and whether there was anything else the Employer should be made aware of. Ms. Sutherland also reminded the grievor that there was an Employee and Family Assistance Program available which included a confidential, voluntary, counselling and referral service available to all GNWT employees.

6. In Ms. Sutherland's correspondence to the grievor dated November 30, 2016, there was enclosed a detailed form for his personal physician in Yellowknife, Dr. Mansouri. The form was completed and returned by her, dated December 2, 2016, which is to say two days after it was provided to the grievor with instructions to see his family physician to obtain a report on the medical situation. In responding, Dr. Mansouri circled one item in the several boxes, namely "no" in answering the question of whether the grievor had any limitations impacting his ability to carry out his job duties. The grievor attended a follow-up meeting with management on December 7, having Union representation, where he explained having been fully open and honest with his family physician who had submitted her opinion that there was no underlying medical condition to explain the on-the-job difficulties he was experiencing. No further medical evaluation was scheduled at that point. His explanation, supported by his personal physician, was accepted at face value.

7. Another investigative meeting convened by Ms. Sutherland was held on January 16, 2017, attended by the grievor with Union representation, there having been another observed breach of protocol occurring the previous week. It was at that point that Ms. Sutherland made her recommendation to the Chief Executive Officer of the Northwest Territories Health and Social Services Authority (NTHSSA), Sue Cullen, that the grievor should not be allowed to continue his employment in the Senior Computed Tomography (CT) Technologist position, representing "too great a safety issue". There was only one such position wherein the incumbent was required to perform the full scope of the position duties. She was recommending a permanent non disciplinary demotion into a Medical Radiation Technologist (MRT) position which would presumably allow more flexibility in how he was being used day to day, and to be supervised on that basis.

8. Ms. Cullen agreed with Ms. Sutherland's recommendation and on February 10, 2017 she corresponded with the grievor confirming the demotion decision, after "having considered the options before me for addressing your performance leading to these incidents". She further advised that management did not attribute these occurrences to wilful or culpable negligence on his part, stating therein: "but rather to your failure to achieve and maintain the level of competency required to safely perform the duties and

responsibilities” of the position, despite what the Employer viewed as its best efforts to train and develop his skills and abilities, and his efforts to learn and follow directions. His observed difficulties would continue despite the clean bill of health from his family physician. After detailing a number of incidents about which she had been made aware by subordinates, Ms. Cullen presented her conclusion to the grievor that allowing him to remain in his longtime position was no longer a viable option due to patient safety and liability concerns for the facility. She thanked him for his patience in continuing to perform the temporarily assigned alternate duties while awaiting her determination of the next step going forward. No grievance resulted.

9. Suffice to say, the grievor’s performance while performing MRT related duties after February 2017 ultimately did not go smoothly. By December 2017 he was again being interviewed for work-related mishaps, encountering various protocol issues on more than one occasion. On January 16, 2018, he attended another meeting, together with his newly appointed Union representative Shane Pike, to discuss an alleged protocol failure arising a few days earlier, in that he had performed an exam on a patient independently, without supervision, when he had received instructions to only shadow and observe at that point. It was at this meeting that the grievor for the first time shared some doubt he was having about his personal well-being, in stating: “I have wondered privately” whether there might be a mental health issue, possibly a depression situation, having conveyed that he was losing weight and was thinking that there may be some effect on his cognitive ability at work.

10. While no further medical investigation immediately followed, the briefing notes for the next meeting with the grievor held on January 23, 2018 outlined the previous two years of performance difficulties, acknowledging his commitment to the developed Learning Plan/Performance Improvement Plan (PIP) although his having failed to successfully complete a refresher radiological imaging procedures’ course the previous fall. His working alternate duties in his demotion scenario was noted, and being placed into mentorship under the watchful attention of one of the hospital’s medical radiation technologists to reintroduce him to the role. He had also been agreeable to taking another Northern Alberta Institute of Technology (NAIT) delivered course, Radiological Imaging Procedures, to support his becoming competent, which course he had been unsuccessful in passing on his first attempt.

11. Having also set out various coursework and mentoring efforts under the previous PIP which was not considered to have been successful, the meeting notes record that management had significant concerns at

that point about his ability to perform the work of the position from a technical perspective. Another PIP plan was being established meant to target development of his technical skill set. The grievor indicated during the meeting that he was in agreement with participating further. The briefing notes also refer to the grievor's family physician having cleared him to return to work, with his medical prognosis indicating there were no limitations impacting him at that point. He was asked to be aware that were there any emerging health issues affecting his performance or his ability to do the job, the Employer was expecting to be advised immediately, to which expectation the grievor responded in the affirmative.

12. Thereafter on March 14, 2018, Dr. Mansouri completed and signed another medical form provided by the Employer whereon, for the first time, she circled "yes" in the box set aside for whether he had any limitations impacting his ability to carry out his job duties, and also circled "yes" in the box set aside for whether he could perform any duties in the attached list. She also indicated thereon that she would expect he would have to be accommodated for the next six months. That same day she also compiled an attached report which the grievor provided to Ms. Sutherland, where she stated:

I have seen and assessed (LR).

At this time he has a medical condition that does affect his ability to focus and concentrate. I would recommend that her (sic) remain on administrative duties only until Mid September but this will be re-evaluated on a regular basis over the next six months.

13. There was a follow-up investigative meeting held on March 29, 2018, attended by Duty to Accommodate (DTA) Advisor Rebekka Lutes, Technical Supervisor Miranda Thomson, and also Manager Kevin Whitehead. The grievor was again accompanied by Mr. Pike. There was concern expressed at the meeting that the grievor's family physician, although providing a medical note, did not indicate how his medical condition impacted his ability to perform the duties of his position about which management needed some elaboration from the grievor for the accommodation process. He explained that his current difficulties lay in his problems with focussing and concentrating, which affected his successively performing his duties, although he was not suffering from any physical illness by his own awareness. The management approach following the meeting was to request in correspondence directed to the grievor dated April 3, 2018 that he have his doctor answer various additional questions. Their position was that his physician was recommending administrative duties but it was unclear whether there were any diagnosed medical limitations impacting his ability to perform his duties as a Medical Radiation Technologist (MRT), but if

so what were his limitations and restrictions. Further did he have any medical condition that could cause him not to follow protocol, also seeking clarification on how his medical condition could affect his behaviour and decision-making ability, and whether any such medical condition was diagnosed as a result of diagnostic testing or was it self-reported. In addition, was there any treatment plan, and given his reported symptoms of lacking concentration and having drowsiness was he medically fit to work at all at the current time. Dr. Mansouri responded with the following report dated April 17, 2018:

At this time (LR) has the limitation of having difficulty with focus and concentration. At this time I recommend that he remain on administrative duties until we see further improvement.

He has been diagnosed with depression. Depression when untreated can cause a lack of focus and concentration. In his case it may have caused decreased in his ability to concentrate.

He has been diagnosed based on both subjective and objective assessment.

He is at this time following the treatment plan and has noted improvement. Over time the employer will observe an improvement in his symptoms.

He had been on a medication that caused drowsiness but has now stopped that and has changed to one that does not cause drowsiness and he is noting an improvement in sleep pattern.

At this time he has not been referred to a specialist.

At the time of the last appointment, it was noted that his medication at that time was not effective and causing side effects. He is now noting improvement on his new medication and not experiencing the side effects.

I would recommend that he remain on administrative duties until he has been on this medication for a few more weeks to allow for re-evaluation of his focus and concentration.

Follow up will be on May 7th to re-evaluate when he can return to his regular duties. We will likely be looking at a graduated return to full duties.

14. Technical Supervisor Thomson's reaction was to provide another standard form medical prognosis accompanying her correspondence to the grievor dated May 4, 2018. She was requesting further clarification from Dr. Mansouri, wanting his limitations and restrictions to be specifically addressed, including timelines

and whether he had any medical conditions that would cause him to not follow protocols, whether he could participate in training and whether he should be working at all at that point, whether it had been a matter of assessing the grievor's self reporting or had there been any diagnostic tests, and was there any recommendation that the Employer should seek medical information from a specialist(s). Dr. Mansouri responded three days later, showing no reluctance in answering to the degree she was able at that point, reporting that there had been "significant improvement", that he was not compromised in performing his tasks, that his condition did not impact his ability to participate in and successfully complete training or attendant work to perform instructed duties. She could not provide a timeline, while advising that there had been no adjustment to his recommended treatment, that the triggers impacting his medical condition were unknown at that time, and that the current plan was to have him return to his duties on a graduated basis. She also provided a brief report likewise dated May 7, 2018 outlining the timelines for the recommended graduated return, starting immediately with three half days per week until full time return to full duties by June 25, 2018. She did not say anything about involving any specialist at that point. It would seem evident that Dr. Mansouri assessed the grievor as being on the road to full recovery.

15. The grievor continued working in whatever MRT duties to which he was being assigned at that point, supervised and mentored. Another meeting was scheduled by supervisor Thomson, initially set for June 29, 2018 and then rescheduled to July 4 which the grievor attended in the company of Mr. Pike. He was advised during the meeting of having failed to successfully complete the NAIT technical upgrading/bridging course. It meant that he would have to be placed in alternate duties as there had been a loss of trust in his professional ability to perform the patient related duties of the MRT role without successfully completing this coursework. He was advised of another upcoming opportunity to be successful in the September-December timeline covering the next available course. In the meantime he would have two hours study time per week to prepare for the course and would be working assigned duties. The grievor disclosed at the meeting that the first time he had taken the course he had "issues in my life" concerning which he had received treatment and currently felt better. He indicated having no reason to think he would not be successful at that point.

16. Thereafter the grievor received a formal letter of expectations from Ms. Thomson dated July 27, 2018 outlining numerous performance difficulties the grievor had encountered over the last few years, his work revisions and learning plans, performance improvement plans and work-through efforts, including coaching

and peer mentoring. It had mentioned his having been unsuccessful in the NAIT radiological imaging procedures' course the first time which he was retaking in the fall. The letter included the following paragraphs:

(LR), from the professional development and training initiatives listed above in this letter, it should be clear to you the extent of the support the Employer has provided you with. It is becoming imperative that you understand that you must also make considerable efforts in order to be successful in this position. The first step in your success is this NAIT Radiological Imaging Procedures course. It is my expectation that you will do your utmost to successfully complete and pass this course for this job requirement.

(LR), your employment with NTHSSA - Stanton Hospital, Diagnostic Imaging Department is at a critical juncture. Despite extensive efforts by your Employer to improve your performance, you continue to be unable to perform in your position. If this continues, your Employer will have no choice but to consider how this impacts the employment relationship.

17. As expected, the grievor completed his bridging/updating course work at NAIT over the fall months of 2018, done remotely while receiving on-site support and training at the Stanton Hospital. The documentary materials on file indicated that the coursework was split into two areas: technical skills competencies and general competencies. Both supervisors Cynthia Sutherland and Miranda Thomson, and the Client Service Manager Pam Reid, were made aware that the grievor recorded a mark of 57% percent on his final exam and a total 62% on his coursework, which they viewed as a minimal passing grade, being not what was expected from a technologist with his experience. Their concern was partly generated by the expectation that MRTs must remain current and proficient on the changing technology, upgrades, etc., of the equipment. In her follow-up January 14, 2019 email to her supervisor colleagues, Ms. Sutherland expressed her view: "We have significant concerns on his ability to perform the work from a technical perspective. I believe we need to address this gap prior/simultaneously as the general competencies gaps". By then Dr. Mansouri had provided an updated medical report dated January 4, 2019 relating her opinion that the grievor did not currently have any limitations in performing his duties as an MRT, but that given the length of time he had been away from these duties she was recommending a graduated return, meaning his starting with full duties for three half days a week before reaching full time after six weeks. The final sentence of her brief report reads as follows:

He no longer has any limitation on his ability to focus or concentrate and his condition has shown improvement. He has fully complied with all treatments and there are no new changes to plan there are no workplace triggers.

18. Having observed that the grievor was currently on a graduated return to duties over the upcoming six weeks, Ms. Sutherland reported that he would be packaging films for the Stanton Renewal Project, as well as shadowing and commencing his current Performance Improvement Plan (PIP), which was expected to start on the upcoming Monday. The grievor was subsequently advised by Ms. Thomson that his upcoming work schedule for the first two weeks would be starting with Tuesdays and Thursdays full days, also Monday, Wednesday and Friday afternoons. He attended a meeting in the Stanton boardroom on January 23, 2019 to discuss the PIP. He signed an acknowledgement stating that he was agreeing to its terms, including completing assigned tasks and participating in his specifically tailored performance improvement and learning plan. There is no doubt the grievor and supervisory staffs were anticipating that to be successful there would be a period of reintegration into the unit leading to performing full MRT duties. They were hopeful that Dr. Mansouri's prognosis would prove accurate. Following that meeting Ms. Thomson emailed their Diagnostic Imaging coworkers, stating:

I want to welcome (LR) back to the floor! (LR) has been out of radiology practice for a while, and will need some time and assistance to reintegrate to his MRT role. I would like to congratulate (LR) on passing his bridging course, and welcome him back to X-ray!

(LR) will be working part time with you MRTs on the floor for a while, and back to full-time duties by end of February. He will be working toward competencies based on the NAIT student logbook, which will be posted on the student whiteboard we used for (named coworker).

Thank you all for being patient and helping to mentor (LR) into his role. This will provide even more experience to help with our newest NAIT MRT student who will be with us in mid May.

19. There was no consideration given at that time towards obtaining any further medical evaluations, having accepted that Dr. Mansouri's opinion could be relied upon, the grievor not having indicated there was any medical condition limiting his return to work on the basis discussed. Thereafter, on February 18, 2019 he received a hand-delivered letter from Ms. Thomson addressing the January 23, 2019 meeting, and setting out a detailed background description of events covering approximately the previous three years. The grievor's work history was recounted by her as revealing multiple, ongoing challenges and incidents

occurring related to his work performance. In all, she described them as having negatively impacted his ability to perform his position, having noted that there had been some discipline and performance development initiatives undertaken by the Employer. It was pointed out that since passing his Radiological Imaging Procedures course in December 2018 the grievor had remained in alternate duties pending completion of the PIP, and had received a variety of what was called “targeted training” such as with the new CT equipment. She went on to state in her letter:

(LR), as is laid out in the PIP, your employer expects you to meet performance expectations as an independent, competent MRT, able to work weekends and cover calls, by May 24, 2019.

As you are aware, we are in the midst of transitioning into the new hospital. This requires a lot of planning and administrative work, and also includes moving the films from the film library. You could be assigned to any of these duties until successful completion of the PIP. It is my expectation that you will do your utmost to successfully develop the competencies outlined in the PIP.

(LR), it should be clear how much support the employer has provided to date. It is imperative that you understand that you must also make considerable efforts in order to be successful in this position. The first step in your success was passing the NAIT Radiological Imaging Procedures course, which you achieved. It is my expectation that you will do your utmost to successfully complete and pass this next step in your development, being the PIP.

From the professional development and training initiatives listed above in this letter, it should be clear to you the extent of the support the Employer has provided you with. It is imperative that you understand that you must also make considerable efforts in order to be successful in this position.

(LR), your employment with the NTHSSA – Stanton Hospital, Diagnostic Imaging Unit is at a critical juncture. If you are unable to achieve the success expected in your PIP and fulfil performance expectations, the employer will have no choice but to consider how this impacts the employment relationship.

20. At the same time the grievor’s immediate unit supervisor in diagnostic imaging work, Ms. Sutherland, was not enthused about his working towards returning to the full scope of MRT duties, with the requirement of his continuing PIP program at that point. Nevertheless, he was being assigned to work under the direct and continuous supervision of a fully qualified technologist. However, on April 11, 2019, which would be shortly following his transition from administrative to clinical duties, a mishap occurred in an x-ray room where during the procedure he was performing the grievor irradiated an infant patient with a much

higher dose in the soft tissue neck area than was appropriate, said to be 20x higher than required for the procedure. It had apparently occurred as a result of his mistakenly mis-dialling the required dosage. It occurred when he was not at that moment working under anyone's direct supervision contrary to the specific instructions he had received. In the follow-up investigation occurring five days later, the grievor accompanied by his Union representative Mr. Pike, acknowledged choosing the wrong setting for delivery of the x-ray dosage, done without another technologist being with him. While spending time explaining how the incident had occurred, indicating that he had been left alone by the other technologist to work it out himself, he also stated: "I made a severe error of judgement and accept that I did".

21. Following consideration by supervisory staff in the Diagnostic Imaging Department, their reporting to the labour relations and client service managerial level, the decision was to suspend the grievor with pay for the time being, meaning until the investigation was completed and a decision made respecting his employment future. The grievor's immediate supervisor, Ms. Sutherland, was of the view that he should be held culpable for his behaviour in that he knew the limits of what he could do without supervision, not having yet earned competency in performing any pediatric examinations. The grievor was still being held off work when Ms. Thomson recommended to the CEO, Sue Cullen, that due to the most recent failure to follow protocol, and having continued placing patient safety at risk, despite past warnings, restrictions and retraining efforts, he should be dismissed from his employment.

22. Ms. Cullen quickly advised the grievor that he was being provided the opportunity to respond to the recommendation for termination, which resulted in his email to her sent on May 30, 2019. He answered with his belief that his behaviour had not been culpable. In support he described some of the symptoms associated with what he said had been a diagnosis of depression, meaning his raising an ongoing medical issue at that point, which condition he described as impacting his ability to follow protocol and fulfil his job duties. In finding it difficult to cope, he stated that he was and had been seeking medical help for this condition and was currently following the prescribed treatment plan which he believed was impacting his ability to do his job. He described suffering from memory lapses and forgetfulness, losing track of time and having difficulty with language expression. He also advised that his family doctor was aware of this condition and he was having regular appointments with her every six to eight weeks to monitor and discuss his medical situation. Dr. Mansouri had made no mention of any current debilitating medical condition in her most recent report dated January 4, 2019 when she had recommended a gradual return to full duties over the next six weeks,

opining that the grievor no longer had any limitation on his ability to focus or concentrate.

23. On June 6, 2019, Ms. Cullen responded in correspondence to the grievor wherein she recounted his having previously been accommodated in his home department, and referenced the most recent January medical prognosis from Dr. Mansouri indicating no current limitations. She noted that he had not advised of any changes to his medical condition. There was no record of his declaring or otherwise divulging any symptoms after the January 4, 2019, medical prognosis. He had been returned to work as recommended. While not seeing any nexus between his misconduct and a protected ground requiring accommodation, Ms. Cullen nevertheless, in her correspondence, stated as follows:

However, the Government of the Northwest Territories is committed to assisting and supporting employees requiring workplace accommodations. The objective is to provide safe, timely and reasonable accommodation measures in a manner that treats each employee with dignity. In reaching this objective the Employer, employee, medical practitioner and union each have an active role in the accommodation process.

**A medical prognosis is an essential component of the potential accommodation process that could help explain how your medical condition affects your ability to perform job duties. Based upon the information received we will be in a better position to accommodate you in the workplace by promoting as productive a work life as possible. Specifically we would like your medical practitioner to answer the following questions
...**

24. There followed in the same correspondence a number of questions for Dr. Mansouri concerning whether the grievor currently had a medical condition impacting his ability to perform his duties as an MRT, pointing out that nothing along that vein was indicated in her last report. Ms. Cullen wanted to know what caused the change, if anything, whether the grievor's medical condition could affect his behaviour and decision-making ability, and did it prevent him from understanding and following directions. She asked whether there had been any changes to the treatment plan, and whether it impacted his ability to perform his duties. She asked whether he had been compliant, how long his condition was continuing to be monitored, if it was, and requested that Dr. Mansouri outline his appointments, whether he had been referred to a specialist in order to treat a mental health condition, and whether there was anything else the Employer should be aware of.

25. Some six days later, on June 12, 2019, Dr. Mansouri replied to Ms. Cullen's questions. While opining that some aspects of the situation were currently unknown, she stated that "at this time it seems that

he does have a condition that affects his abilities to perform his functions as a Technologist”, indicating there were limitations in his ability to focus and concentrate, not present at the time of the January 4, 2019 assessment. She stated, in sidestepping this most recent report: “There appears to have been a recurrence/worsening of his condition in the last 2-3 months resulting in recurrent concern around focus and concentration”, while indicating that she could not answer the question of what caused this change which was unknown at the current time. She was recommending that the grievor be off work “temporarily in order to implement his treatment plan... At this time he will be recommended to be off work until mid August to be reassessed prior to that date”.

26. On July 3, 2019, Ms. Cullen corresponded with the grievor to advise that she was in receipt of Dr. Mansouri’s June 12, 2019 report. She was concerned over the spate of unknowns respecting prognosis, and pointed out that the Employer’s decision on any recommendation for dismissal must consider medical information to determine the initial culpability which would have to be delayed at that point. Accordingly, Ms. Cullen was placing the recommendation for dismissal in abeyance pending further medical information from his family physician and specialist. She advised that there would be subsequent requests for updating his medical prognosis. He remained off work as per his family physician’s advice. Indeed as matters were developing, the grievor’s last day of work at Stanton was April 18, 2019, initially placed on leave with pay pending completion of the investigation, then turning to his sick leave bank which he eventually exhausted without ever applying for long-term disability benefits.

27. Ms. Cullen further corresponded with the grievor on July 22, 2019, requesting answers to further questions for Dr. Mansouri said to reflect the Employer’s commitment to assisting and supporting employees requiring workplace accommodations, in its providing safe, timely, and reasonable accommodation measures. She advised that “based upon the information received we will be in a better position to accommodate you in the workplace by promoting as productive a work life as possible...”. Specifically Ms. Cullen was looking to have Dr. Mansouri advise whether there was any change in medical condition and limitations since the previously received prognosis completed on June 12, 2019, and if so what were they. Further she wanted the physician’s opinion on such issues as whether he had any medical condition that could have caused him not to follow protocols in April, whether he had a medical condition which affected his behaviour and decision-making ability, and whether his condition prevented him from following directions and required having another technologist with him while he worked. Ms. Cullen also wanted to

know whether it had been recommended that the grievor see an attending specialist, or was expected to meet with one. Were there any anticipated changes to his treatment plan which impacted his ability to attend work, and was he compliant.

28. Dr. Mansouri responded on August 27, 2019 that there was currently no change, and investigation was ongoing. Her report replying to the specific questions asked included the following synopsis:

(LR's) medical condition has impacted his ability to follow and comply with necessary protocols. We are currently investigating the nature of the medical condition, however at this time it does affect his ability to perform his duties. His limitations at this time are in his ability to focus, concentrate and with memory. We are awaiting more detailed assessments.

29. The physician also reported that the grievor had seen one specialist who had recommended a referral to another specialist in a different field where there was a wait list. She had advised him not to attend work until there was a more definitive diagnosis. By her description, he was compliant with the treatment and investigation recommendations. As reported, she had concluded that the specific nature of his medical condition which affected his ability to perform his duties was not yet completely defined and they were awaiting further evaluation. Thereafter, she provided a work absence certificate indicating that the grievor had been assessed in her office “and is unable to work due to illness until reassessment in November – will be off at least until November 30 and reassessed prior to that time”.

Emergence of accommodation issue:

30. A critical juncture in the Employer's assessing and dealing with the grievor's performance mishaps, and future prospects for continued employment, occurred on September 20, 2019 when Ms. Cullen again corresponded with him. She thanked him for having provided the August 27, 2019 report from Dr. Mansouri and conveyed the Employer's position that after having considered this latest medical prognosis it had been decided not to proceed with dismissal for the incident that occurred on April 11, 2019. She further stated that “the employer's *Duty to Accommodate Injury and Disability Policy* will be applied to your future employment with the Government of the Northwest Territories”. The Employer had determined it should not pursue a discipline track at that point but would consider it to be a disability issue requiring further assessment and working toward accommodation short of undue hardship. The grievor continued to be off work in line with his physician's advice.

31. In the confirmation letter to the grievor concerning the next meeting Ms. Sutherland advised that he would be remaining on sick leave until receipt of medical information clearing him for return to work in some capacity, their needing additional details outlining his functional limitations. The grievor met with Ms. Cullen on October 1, 2019 to review the medical prognosis. As described in her confirming letter of November 14, it had been convened to “discuss next steps”. At this meeting Ms. Cullen had addressed Dr. Mansouri’s recommending the grievor remain off work until a more definitive diagnosis was known, confirming the grievor’s advice that he was on a waiting list for a specialist’s assessment. The expectation at that point was that he would remain on sick leave until receipt of further medical information that could clear him to return to work, and provide any additional details outlining his functional limitations, as she put it: “so we may better determine how we may accommodate you”. It was left to the grievor, presumably with the assistance of his Union representative if need be, to deal with his sick leave entitlement. Ms. Cullen anticipated the accommodation situation playing out following the grievor’s being medically cleared to return to work in some capacity.

32. In this follow-up confirming letter Ms. Cullen provided the grievor with more questions for his physician to address, to which Dr. Mansouri responded on November 19, 2019 in recommending that the grievor continue remaining off work until a more definitive diagnosis was known. There had been no change to that opinion, and apparently no further information yet developed, although by Dr. Mansouri’s understanding, as therein communicated, he was currently scheduled to see a psychiatrist and was awaiting neurological investigation prior to returning to work. In the meantime, she reported, the grievor was compliant with the recommended treatment plan. Ms. Cullen recognized, no doubt, that it was too premature at that point to propose any accommodation plan given Dr. Mansouri’s latest report. There is no indication of any Union involvement about that time.

33. As matters were progressing during the fall of 2019, in his dealing with Dr. Mansouri’s having reported the possibility of a specialist’s assessment, the grievor testified that with his off work status set to continue until at least November 2019 he was “looking for” an appointment for a specialist assessment in Edmonton, having had to rebook it after missing one appointment. By his description he attended at Misericordia Hospital in Edmonton for an electro-encephalogram at some point that fall, but if that occurred as recollected the testing did not generate any report placed in evidence, nor was any specialist’s report

specifically referenced by Dr. Mansouri in any subsequent reporting. Presumably, nothing significant developed in that aspect of the medical investigation so as to find its way into the grievor's recovery prognosis going forward.

34. Following months of the grievor's being absent from the workplace by reason of his family physician's updated medical opinion, on February 13, 2020, Dr. Mansouri further reported. By her recommendation, the grievor was ready to perform administrative duties at three half-days a week beginning February 17, 2020, then increasing to five half-days after two weeks. She also advised that there would be a reassessment in one month's time, and that "the goal will be to get to full-time administrative work and then to start back at his regular duties as CT technologist". There followed a letter to the grievor from Ms. Sutherland dated March 9, 2020 confirming their receipt of the medical note from Dr. Mansouri, therein acknowledging what the physician advised was her opinion at that point. Ms. Sutherland in this letter detailed the background information on which the Employer was relying, from her perspective, which is to say the history of performance related concerns dating back several years respecting his failing to follow required protocols and procedures taken to impact patient safety. Ms. Sutherland noted therein that the grievor had participated in a meeting held on October 1, 2019 where she had stated her view that given the safety sensitive nature of his position, it would be considered undue hardship to support any return to MRT work. She was well aware that there were ongoing equipment and other technical changes to the diagnostic imaging work which required a continual process of familiarizing oneself with the evolving technology. She requested that the grievor take the letter to her medical practitioner.

35. In this March 9, 2020, correspondence responding to Dr. Mansouri's most recent February 13 report there were again numbers of questions set out for the physician, such as what were the grievor's current limitations and restrictions, what work supports would be required upon his return and what type of administrative work could be accurately and safely performed, to what extent was his focus, concentration and memory still affected, what had caused it to have been compromised, and was there a possibility of recurrence/relapse in the future.

36. Dr. Mansouri responded the following day in her March 10, 2020 report indicating that currently there were no limitations but that due to the length of time the grievor had been off work she was recommending a gradual increase in hours and such duties as would be "work hardening". In her opinion,

the grievor would need refresher training in order to return to full duties. Nevertheless, he had been “thoroughly evaluated and has a diagnosis... all testing has been completed”. He had attended all his appointments. There was no mention of any specialist’s involvement. In dealing with whether there could be a relapse, she reported “I cannot predict 100% accurately but at this time I do not anticipate a relapse”, nor was Dr. Mansouri anticipating there would be any workplace triggers. Ms. Sutherland was not convinced. Her previous medical reports outlining a positive prognosis for expected full recovery in returning to work were not proven accurate. The grievor remained off work at that point, having exhausted his sick leave bank but, by his description given in testimony, not having applied for any long-term disability. This was on the basis that his physician had reported his being not incapacitated but was able to return to work firstly on a short-lived graduated basis and then eventually into full-time duties in MRT work.

Accommodation efforts:

37. As the situation unfolded following the March 10, 2020 report from Dr. Mansouri, there was no doubt about Ms. Sutherland’s view. She had been increasingly concerned since at least 2016 over the grievor’s recurring performance difficulties and safety missteps, initially resulting in assigning administrative duties for a time, and then demoting him from his Senior CT position in 2017. There were upgrading efforts both in coursework and on-the-job instruction and mentoring, followed by his unsuccessful graduated return to MRT duties. It was all unfolding within the backdrop of his being medically assessed by his family physician, repeatedly. The observed performance failings had culminated in the unfortunate April 11, 2019 x-ray procedure mishap involving an infant patient. Ms. Sutherland testified that it had become her firm view by then: “we could not have him back, (he) couldn’t be trusted with patients”. She had concluded that whatever the grievor’s improving mental situation by March 2020, were that the real situation, his return to diagnostic imaging duties, or even working at Stanton in any capacity involving patients, in light of his established problems with concentration and following directions, and mishandling safety sensitive situations, was unsafe and unrealistic. Further, on her assessment, there were no administrative vacancies available in the Department which could be considered suitable for his skills, their being filled by clerks earning significantly less wages than an MRT with a much different skill set. She has never changed that view, having made it plain enough in her discussions with other managerial persons, as she did during her testimony. Whatever the workplace decision to be worked out by the Duty to Accommodate (DTA) team through the internal accommodation process, she did not want the grievor returning to Diagnostic Imaging, nor even to Stanton, in any capacity. In her considered view: “his

competencies did not measure up”, presenting a patient safety issue were he to be working in the hospital.

38. Ms. Sutherland, together with the DTA Advisor, Rebekka Lutes, attended the June 25, 2020 accommodation meeting with the grievor who was accompanied by his Union representative Shane Pike. By the grievor’s description given in testimony, it had been the first real meeting with him to discuss his situation and explore possibilities for returning to work. He was aware that his family physician by then had “cleared me”, as he put it, and at that point he was not admitting to any limitation preventing his return to the Department. He was expecting a return-to-work program, but their approach straight away was to tell him that they were trying to find a position elsewhere. Ms. Sutherland in her testimony did not recall the grievor saying anything at the meeting which would dispute the position she was taking whatever he may have been thinking.

39. Mr. Pike testified that up to that point, which is to say over the previous 14 months since the grievor had left work following the April 2019 mishap involving the infant patient, no placement offer had been brought to the Union for its review, although the grievor for most of that time had been taken out of the workplace by his physician. He was aware that the most recent report was from March 10, 2020 providing Dr. Mansouri’s update about bringing the grievor back to work. Nevertheless, his Union representative had not been brought into the discussion prior to this June 25, 2020 meeting. By Mr. Pike’s description, there had been no discussion about the grievor’s situation in any of the periodic meetings he had attended dealing with the needs of numerous GNWT employees seeking an accommodated return to work. At that point, the Union was relying on the latest medical report clearing the grievor to return to his Department, initially on a graduated basis, needing to work his way into full-time MRT duties. Mr. Pike also testified that as the grievor’s representative reviewing the file, he recognized that the grievor could not perform at that point in his home position duties, having been off work altogether for the previous 14 months, but management needed to look beyond this immediate placement problem in light of Dr. Mansouri’s latest report submitted in February.

40. It was in this context that Mr. Pike was made aware at the June 25, 2020 meeting that the Employer was intending on transitioning the grievor into a cross-departmental job search as opposed to returning him to his unit in some capacity. It meant to him that they were “expanding the search” about which he had his doubts given the inherent difficulties in the DTA team having to deal with other possibly unreceptive hiring

managers. He also expected that were the Employer in its accommodation search to find a “potential fit”, they would advise, but he did not conclude that the Union was being invited into the job search, although he asked whether they had yet uncovered any potential placements, none located. He knew that one of the problems to overcome was that the grievor’s wage rate could well be higher than any jobs they would be able to locate away from his home department, but he had never been brought into any discussions about the grievor’s pay level placement once coming within the accommodation process.

41. The grievor testified that by the June 25, 2020 meeting he was ready and willing to return to work on an accommodated basis whenever that could be arranged, and he was “hopeful”. He said that his physician’s ongoing treatment, which had included what he took to be a successful medication regimen, had improved his outlook physically and mentally. Following discussions with Dr. Mansouri, he did not foresee any insurmountable difficulties in returning to work in the Diagnostic Imaging Department. By that time he thought he had been medically cleared there on a graduated basis, admittedly needing some retraining and work hardening, and was prepared to comply with whatever conditions were considered appropriate, were that offer to be made. The Employer was not asking for an updated prognosis. He went on to say he was expecting that his return would be within a reasonable period of time, thinking that at least by September 2020 arrangements could be made to start the graduated return-to-work process towards eventually reintegrating into full-time MRT duties. By his recollection he was not about to apply for long-term disability payments in that his family physician had indicated to him it should not be an option because he was able to return to work, advising him not to apply. However, keeping in mind that DTA Advisor Lutes had indicated at the meeting there were still available sick leave credits at that point, the grievor testified that he “must have had” some sick leave left and agreed that he had been receiving it over the previous months, following the initial leave with pay pending investigation situation.

42. It can be observed that the Employers’s typewritten notes from the June 25, 2020 meeting describe their acknowledging the latest medical prognosis dated March 10, 2020 which recommended a graduated return to administrative duties at that point, with refresher training to follow. However, these notes also record that the grievor was advised of the Employer’s position that given the risk of relapse with respect to focus and concentration, his returning to work within the full scope of Medical Radiation Technologist duties would place patients at increased risk due to the safety sensitive nature of the role. The notes show that Ms. Lutes had stated: “As a result, it would be an undue hardship to return you to this position”, which

would be the Employer's position going forward in dealing with the accommodation issue, to whatever extent it did over the following several months. The meeting notes indicate that Ms. Lutes tabled various points for consideration, namely:

- **As discussed in the fall, the employer is committed to finding you alternate employment at or close to your home position rate of pay.**
- **Thank you for providing your resume as we will look at your experience and transferable skills to assess vacancies as they become available.**
- **You do not necessarily need to meet the screening criteria or qualifications for any reasonable positions we review. However, the employer needs to be confident that you could learn the knowledge, skills, and abilities and meet the competencies of the position within 1 year on-the-job training.**
- **In recent weeks, identifying both temporary and permanent duties has been more challenging, due to the COVID-19 situation; as all employees are working remotely, and recruitment has slowed down. With that said, noticed this changing in recent weeks as more postings become available within NTHSSA.**
- **Process requires us to initially search within the NTHSSA as a whole to determine if there are reasonable temporary or permanent alternate duties you can perform that are within your limitations.**
- **If nothing becomes available in the foreseeable future we can proceed to request you be placed on the cross departmental list which allows for priority consideration across all vacancies within the GNWT.**
- **It's possible that it may take longer than we hope to find a reasonable alternate position for you.**
- **A review of your sick leave shows you have approximately 292 hours or 7.5 weeks remaining.**
- **In the event we are unable to identify any work in this period of time, I would suggest you discuss with your doctor the possibility of applying for Disability Insurance in the event your Sick Leave credits are used prior to a position being found. If eligible this allows an employee to receive 70% of their earnings if due to a medical condition they are unable to perform their duties. These are payable after 13 continuous weeks of total disability or when paid sick leave is exhausted. If needed, the employer could provide a clarifying letter for your practitioner to support the claim.**

43. These meeting notes also indicate that the grievor was asked whether he had any questions regarding finding alternative employment after what was said about the GNWT “cross-departmental process”, to which he is noted as having responded that it “made perfect sense”. There was no indication of the Union being invited into the job placement process or anything said about it being tripartite. Mr. Pike in his testimony indicated from the Union’s perspective that they understood COVID 19 to present “a challenge” while pointing out in the meeting that the legal duty to accommodate was a high one. There is no suggestion from these notes that he indicated the Union had undertaken its own research on a possible position placement.

44. Be that as it may, the Employer’s approach at that point was confirmed in follow-up correspondence to the grievor from the Chief Operating Officer for NTHSSA, Georgina Veldhorst, delivered prior to the end of June 2020 in order to update him on the current situation from the Employer’s perspective. It included her mentioning that the most recent medical prognosis from March had indicated that it was not anticipated he would relapse, which nevertheless could not be predicted with 100% accuracy. She confirmed that at the June 25 meeting they had discussed the next steps in the accommodation process, pointing to the Employer’s position that inasmuch as there was at least some risk of relapse he could not be returned to the full scope of MRT duties. Given the safety sensitive nature of the job, Ms. Veldhorst stated, any such return would present undue hardship. Nevertheless, as she put it: while they “remain committed” to finding the grievor alternate employment at or close to his home position rate of pay, due to the patient health and safety risk were he to remain at Stanton, and the possibility of relapse given his limitations with respect to focus and concentration, she was requesting he be put on what was formally captioned as the Cross Departmental Accommodation List covering GNWT positions in Yellowknife. Accordingly she was seeking approval from the Deputy Minister of Finance to allow their searching outside the NTHSSA for a suitable accommodation position which was a required step in the process they were invoking.

45. There is no doubt that Ms. Sutherland continued to have input, by then being the Manager, Diagnostic Imaging. By her description, while she was available to assist in looking for placement into a suitable vacancy elsewhere, she made her view clear to the DTA Advisor that she did not want the grievor “anywhere in the Hospital... probably not in the Health Authority” whatever the healthcare recruitment situation at that point which she said was “active” in responding to the COVID pandemic. Nevertheless, by her description she also did not want to leave the impression that she was otherwise biased in her dealings with the grievor, and over time by her account she may have reviewed as many as 15 - 20 vacant positions

which came to her attention, but not assessing any of them to be suitable, none of them at Stanton, and not indicating in her testimony that she recommended him for any outside position to anyone who sought her advice on the placement issue.

46. It was plainly put to Ms. Sutherland in cross-examination that the grievor was found to have been non culpable due to his medical situation, had cooperated with the assessment and treatment process, and eventually had been cleared for return to work by his physician without any medical report to the contrary. She responded that knowing his track record and performance issues she could never trust him again to suitably perform, a matter of ensuring the safety of patients. By her description she would never allow him to work with patients in her Department, and would be against his being placed anywhere within a hospital setting. She also testified that she cannot say where or how the process thereafter failed to find the grievor a suitable position as a matter of accommodating him, but her principal input was to clearly communicate to the management level team that he should not be coming back to deal with any patients in any capacity, which is what she had indicated to him during their June 25, 2020 meeting.

47. On July 17, 2020, the grievance was filed on (LR's) behalf. By then Mr. Pike had reasoned there had been enough delay, there having been sufficient time since the February 2020 report to arrange suitable accommodation whether short-term at that point or something more permanent. He knew that the Employer was taking the approach for the first time that the grievor would never be allowed back in his home department to start a graduated return. By Mr. Pike's description, the Union was aware that the grievor could not perform MRT duties at that point, but the Employer should have been looking beyond that situation inasmuch as he was able to do productive work. The Union, he said, had decided that it was time to place the Employer on notice that its "dragging your feet" approach was not acceptable, and he was not yet hearing anything from the Employer as to why something suitable could not be have been arranged. He knew that the Employer was still committed to routine staffing and had created positions to deal with the various aspects of needing to combat COVID 19. As it was, by Mr. Pike's understanding, nothing was materializing following their June 25 meeting, and the grievor remained off work.

48. The grievance claimed as follows:

As you are aware, (LR) was cleared to work by his medical physician in the fall of 2019. The employer deemed it an undue hardship to keep him in his home position as a Laboratory Technician but committed to finding alternate duties/role for him. As well, (LR) was advised that the employer would apply its Duty to Accommodate and Disability Policy and that he would have priority hiring status in his search for alternative work. Shortly after this (LR) provided the employer's representatives with an updated resume to aid them in a search for a reasonable position for him. Since that time, the employer has not supplied the grievor with an accommodation measure and has not demonstrated that they have taken reasonable steps to do so. This unreasonable delay is offensive to the grievor's Human Rights and his medical condition.

49. In the grievance the Union sought a declaration that the Employer has misinterpreted, misapplied and/or violated the Collective Agreement, and that the grievor should be made whole, including interest on any monies owing to be made part of the redress in addition to being awarded monetary damages.

50. On July 21, 2020, DTA Lutes emailed both Ms. Veldhorst and Ms. Sutherland suggesting they have a meeting to discuss the grievor's requiring a permanent accommodation at that point and presenting a brief history of his situation. Again, there was no Union invitation to join the discussion. It included referencing the grievor's latest medical prognosis from March 10, 2020 whereby his attending practitioner had recommended a graduated return to administrative duties at that point, and was suggesting that following a "work hardening approach" he could return to full CT duties. Ms. Sutherland was clear enough in her view, relying on her knowledge of his poor performance history, safety protocol breaches, and the risk of relapse. By her assessment, it presented an untenable loss of trust. At the same time, the grievor's medically supported non culpability status was not being denied.

51. On August 4, 2020, Ms. Sutherland responded to Ms. Lutes July 21, 2020 email inquiry concerning whether an appropriate placement could be identified within the NTHSSA and seeking input at that point to deal with the request for accommodation. She therein stated:

I reviewed the vacancy reports Rebekka provided, keeping in mind (LR's) previous experience, skills and limitations/accommodation needs. I also reviewed some of the position's job descriptions to ensure I had a good understanding of the positions and requirements associated with the position.

At this time, there are no vacant position meeting (LR's) requirements.

52. On August 11, 2020, Ms. Sutherland, in her managerial capacity, acknowledged receipt of the grievance, denying it, and stating within the Employer's written response:

The Employer denies these allegations as we have been working with (LR) consistently since his medical condition was brought to light. As you are aware, (LR) was unable to return to his position, as his limitations surrounding focus and concentration raised concerns regarding patient safety. As such, we met with him in June 2020 to discuss the next steps in the duty to accommodate process. This included discussions regarding providing him a new position within Stanton, if one is available, if no opportunities arise in the near future, placement on the cross departmental accommodations list would occur.

It should be noted in the previous months there have been challenges in identifying both temporary and permanent placements, due to COVID19. All recruitment was delayed in order to prepare for the potential pandemic, with the exception of key positions (mainly Registered Nurses) and redeployment of current staff. It is imperative the hospital takes the appropriate steps to minimize the impact of COVID prior to other day to day activities, which ultimately has caused an unfortunate delay in (LR's) accommodation. However, during this time we did consider (LR) as part of the review of redeployment needs within the organization.

Currently, a review of Northwest Territories Health and Social Services Authority vacancies is underway. Once reviewed, if we are unable to identify reasonable placement within his home department, we will be seeking a placement on the cross departmental priority hiring list.

53. It is a noteworthy response to the grievance in that Ms. Sutherland had unquestionably already formed the opinion that the grievor would never be allowed to return to the Diagnostic Imaging Department, preferably not anywhere in NTHSSA. She was firmly against his working in any hospital setting. She had already replied to Ms. Lutes a week earlier that on her review there are no NTHSSA vacant positions meeting his requirements. Indeed the decision had already been made to seek the Deputy Minister's authority for placement into the cross-departmental list. At the same time, there is no doubt that COVID presented organizational difficulties in 2020 but also created opportunities for hiring and redeployment of staff in dealing with this pandemic.

54. In his written response to the grievance denial, and reference to Step 2, Mr. Pike stated that the Union was maintaining its position that the Employer was not providing timely accommodation, his not having received any information concerning what measures may have been taken "to get (LR) back to work". Further: "To be clear, the Union fully understands the situation with (LR) and that he cannot work in his

home position due to patient safety,” while disputing that any delays we experienced in placement could be blamed on COVID. He additionally mentioned that the accommodation process was not part of, or should not be part of, the regular staffing and recruitment process. It was a priority situation. It was a matter as he put it, of accommodating the grievor “in a safe, reasonable and timely manner”. He knew that one difficulty would be in looking to find the grievor an accommodated position with comparable pay. Mr. Pike requested the list of positions and/or activities which had come under consideration for his accommodation – not to be provided.

55. Thereafter, CEO Cullen, relying on the information she had been provided, followed up with her own letter to Mr. Pike dated September 8, 2020. In confirming the grievance denial, stating:

The Employer denies these allegations as we have been working with (LR) consistently since his medical condition was brought to light. Unfortunately, these processes are time consuming, however we have done the following to accommodate (LR):

- **Reviewed redeployment options,**
- **Reviewed vacancy lists within Stanton Territorial Hospital,**
- **Reviewed possible temporary accommodations, and**
- **Reviewed anticipatory vacancies.**

The vacancy lists are an internal recruitment process and we do not share this information with outside parties.

The Employer agrees DTA trumps normal staffing, however staffing during COVID was not normal. This was due to the urgency of the pandemic, everything else was put on hold to ensure the health and safety of all employees, and public alike during this unprecedented time. This is the main priority of the Northwest Territories Health and Social Service Authority. With that being said, during this time we did review the vacancy list within NTHSSA, and reviewed of (sic) redeployment needs within the organization, however there were no appropriate placement or redeployment options for him.

We have finalized the review of Northwest Territories Health and Social Services Authority vacancies and we were unable to identify a reasonable placement. NTHSSA will request to be placed on the cross departmental priority hiring list.

56. The Union was aware that while there were various working restrictions imposed, the Government’s response to COVID created employment opportunities through its setting up a temporary department dedicated to combatting the pandemic. One CBC generated report indicated that by September 25, 2020

there had been as many as 86 new staff hired on one-year contracts for its new COVID Secretariat, in addition to transfers from other Government departments as needed. These figures were not confirmed through any Government circulated materials entered in evidence, but presumably there would have been at least some new staff hired and vacancies to be filled, including in the departments from which some existing staff were moved to take up COVID related duties.

57. DTA Advisor Georgina Carr signed off on the Cross Departmental Accommodation Form on September 29, 2020, containing the information on which the Employer was relying to address the accommodation process going forward. Its contents described the understood factual background of there having been “*multiple* instances of risk to patient health and safety”, with the grievor having been medically cleared to return to full duties on more than one occasion and afterwards demonstrated an inability to follow protocol. The Form contained dates and descriptions of various prognosis responses and other comments, and additionally stated:

Reason for Cross-Departmental Request: Employee requires a position that is not safety sensitive due to risk of relapse of limitations with regards to focus and concentration. Stanton has reviewed positions within Stanton Hospital at, or near, (LR’s) Home position rate of pay that may be a match to his knowledge, skills and abilities; however they are all safety-sensitive in nature.

Nature of Medical Condition: Depression which affects his ability to focus and concentrate. (LR’s) practitioner has determined he can return to full duties on multiple occasions, and there are multiple relapses indicated on the file.

Impact on Home Position: Given risk of relapse of employee’s limitations with regards to focus and concentration, the employer determined that returning employee to the full scope of Medical Radiation Technologist would place patients at increased risk due to the safety sensitive nature of the role. As a result it would be an undue hardship to return him to this position. (LR) has been informed of this decision and understands the employer is committed to finding him alternate work.

Positions Considered Within Home Department: Due to nature of work completed at Stanton in relation to (LR’s) knowledge, skills, and abilities, no positions were considered, as they were all safety sensitive in nature.

58. Basically, the Form was an acknowledgement that there had been no real progress in the placement of the grievor into suitable accommodated duties. At some point the Union came into possession of the Employer’s list of Monthly Active Positions current as of June 30, 2020, placed in evidence, which

contained some 430 vacancies at NTHSSA across its Northwest Territories operations, including professional, technical, and administrative positions at varying levels. While not interviewing the grievor during its search efforts, the Employer had long since been put in receipt of the grievor's resume, not updated, which included his 1989 BSc (Physics) from Trinity College in Dublin, and his 1992 BSc (Radiological Sciences) from the University of Hertfordshire, and his 1995 Diploma in Computed Tomography from the University College in London. His work history prior to employment with NTHSSA at Stanton had always been as a radiographer or senior radiographer positioned in hospital radiology units in the United Kingdom and elsewhere.

59. In correspondence dated October 15, 2020 the Deputy Minister, Finance, Sandy Kalgutkar, advised the COO, Ms. Veldhorst, that he was approving the recommended cross-departmental approach for placement within the GNWT's Yellowknife operations. He was doing so, as stated therein, on the basis of being "satisfied with the clear rationale as to why (LR) is unable to be accommodated in the Medical Radiation Technologist role, and why a Cross-Departmental Accommodation is necessary at this time". Keeping in mind that the lack of an accommodation solution has generated the grievance filed three months earlier in mid-July, by Mr. Pike's description, nothing further was heard from the Employer subsequent to the Deputy Minister's approval of a cross-departmental search until "quite a while later". Apparently, there was no standardized/formalized Union involvement following the Employer's advising in particular situations that it was expanding its placement search, no developed consultative approach. Mr. Pike said that he did not expect to hear about every search or receive updated reports, but if there was a "potential fit" he would have thought it should be presented for discussion. There was no request received for further medical assessment.

60. Wanting to stay positive, by his analysis at the time, in dealing with accommodation matters, he reasoned that the extra public-sector services needed to confront the many COVID 19 ramifications would have created more employment opportunities for available staff in screening and other duties, and he knew that the grievor, in an accommodation situation, would have priority over normal staffing procedures. From Mr. Pike's point of view: "COVID was perfect timing" for the accommodation process, even if it meant the grievor being "red circled" in whatever duties to which he was being assigned as suitable to his current needs, or even accepting a lower pay rate. As he put it: the accommodation was supposed to be done "in a safe, reasonable and timely manner", whether or not any close match in pay scale was absolutely achievable,

and he knew there likely would be a pay range issue keeping in mind the grievor's salary level at the Diagnostic Imaging Department. He thought it was something that could be worked around, and the first step would be letting the grievor know what his options were as placement possibilities appeared, about which he could receive the Union's input and advice. Mr. Pike went on to clarify his noninvolvement in the accommodation process by stating that subsequent to filing the grievance he had no meaningful interaction with any Employer representative concerning accommodation efforts over the next 20 months ("no engagement"). As it was he moved the grievance along to arbitration referral, and scheduled the hearing.

61. At the same time, it was Mr. Pike's understanding that once an employee was placed on the cross-departmental duty-to-accommodate list the required search efforts would be sufficiently broadened and a potential solution presented for consideration before any potential job went out for competition in the usual way. However, by his description, following the grievance process being invoked, he had no information that the grievor's situation was being addressed during the Employer's periodic internal accommodation meetings dealing with numerous employees, at least he received no information about what was occurring.

62. Kevin Yates commenced employment on October 5, 2020 as GNWT Labour Relations Investigation Specialist, overseeing duty-to-accommodate obligations and providing advice to management. Prior to embarking on his labour relations career, following his Union side involvement with the Saskatchewan Government Employees Union, including as its president at one point, Mr. Yates for many years, until 2011, was an MLA in the Legislative Assembly of Saskatchewan, and for some period of time held a seat in Cabinet. He testified that on taking up his duties at GNWT he embarked on the process of reviewing the open accommodation files and sorting through the approximate 1,000 jobs coming available for consideration across its operations. By then, DTA Advisor Lutes had left her employment. Ms. Carr remained in her DTA Advisor position. She eventually was assisted by Human Resource Intern Jennifer Huynh in addressing the grievor's situation.

63. In the course of his file reviews, Mr. Yates observed there were some 556 employees needing placement in other suitable work or return to their own areas, under an accommodation plan, whether temporary or permanent. It included the small percentage of situations requiring cross-departmental placement which he took to be an "extreme" process in that it required the Deputy Minister, Finance, to be satisfied that the placement could not reasonably come about within one's own departmental organization.

Once included on this list, as was the grievor, no further consideration was being given to returning the employee to their own department. Presumably that avenue had been exhaustively searched. He was able to observe near outset of his employment that the Employer in handling the accommodation requirements of employees, did so through its DTA advisors and responsible department managers as an internal process without necessarily consulting with the Union as the various files came under consideration and placements materialized.

64. By Mr. Yates' description, the COVID outbreak presented a difficult situation in dealing with the resultant mental health issues which had materialized for many employees, and requiring increasing numbers to be accommodated while at the same time recognizing there was a contraction in jobs across GNWT operations. Fortunately, most affected employees were able to successfully modify their own job duties at a departmental level. He said the reality he faced was that during the height of the COVID created difficulties, placing anyone outside their own unit was especially difficult. Following his arrival on scene in October 2020, by Mr. Yates' description, he held internal DTA meetings with his team twice per week lasting approximately an hour, with that time spent discussing some or other of the 556 active files in their "various stages", as he described it. He knew that some of the employees requiring permanent accommodation had been waiting for as long as two or three years for suitable placement, while others were able to be worked into a new position quickly, given their skill set, ability to work away from Yellowknife, and having a broad-based education as opposed to highly technical training in one area. Having to utilize the cross-departmental approach, he said, occurred only infrequently. By his calculation there currently were no more than seven or eight employees on this list, with inclusion approval currently being sought for six or seven more.

65. As matters developed, following her updated review of placement possibilities, Ms. Carr in January 2021, without Mr. Pike being involved, or the grievor, put his name forward in requesting consideration by Aurora College for a manager/instructor's position in its Health Research Program with a pay range similar to the grievor's. By reference to the job description, it entailed developing and managing health research projects at the College including dealing with participating agencies for long-term funding of scientific research in the region, carrying out scientific research in the areas of their specialty or participating in joint research projects. It included those sponsored by national or international groups. The successful candidate would also be instructing students. The job description provided for the successful candidate typically having

a Master's Degree in Nursing with five years experience in health research project management as well as teaching experience. The grievor was one of seven unsuccessful employees mentioned in the reply notification to the DTA Advisor, Ms. Carr, on the basis that he did not meet the requirements which were not obtainable within one year of training. There is no evidence that the grievor had been consulted at any point respecting this researched possibility.

66. That same month, January 2021, Ms. Carr proposed the grievor for the position of Financial Planning & Budget Officer for North Slave Region, again having a suitably attractive pay range. The described responsibilities taken from the job description included preparing, analysing and consolidating all the Region's budgetary developmental exercises, providing ongoing financial management analysis and advice/information to the Regional Superintendent and program managers, providing regional financial and accounting advice, direction and leadership, including conducting audits of suppliers, contractors and contribution payments under the *Financial Administration Act*. The qualifications for the job, again said to be "typical", were a Bachelors Degree in Business or Commerce, or a related discipline, and/or the equivalent level of the professional accounting designation in addition to varying accounting and management experience. Again, the simply-put rationale for declination sent to Ms. Carr from the responsible hiring manager as to why it was unreasonable to hire the grievor was that he did not meet the requirements which were not obtainable within one year of training. Again there is no indication of any involvement on the grievor's part.

67. According to both the grievor and Mr. Pike, no one from the Employer's DTA team was arranging any meetings with them. Mr. Yates testified that the grievor's name came up at their internal DTA meetings in terms of discussing the options available for employees needing cross-departmental placement, there being several other employees seeking such accommodation. Subsequent to his arrival in October 2020 he had been looking for the Employer's internal DTA process to provide an answer in numerous situations under review. He recalled that Ms. Sutherland attended some accommodation meetings dealing with Stanton positioned employees, she being the responsible manager of the grievor's home department. It was her role to assist the DTA Advisor in the job-search process. By his recollection, he never heard Ms. Sutherland express the view to him that she never wanted the grievor back at Stanton or working in any NTHSSA healthcare position. He said that he recognized that some managers felt that way about certain employees requiring accommodation which could lead to intransigence. However, in his view, it did not take away

from the Employer's legal responsibility.

68. Meanwhile, the grievor had continued remaining off work. He had heard nothing from the DTA team, describing what was occurring from his perspective as a lengthy period of "radio silence". Ms. Carr was aware in the Fall of 2021 that he had been on a cross-departmental priority hiring list for over a year "without finding a reasonable match". In October 2021 Ms. Carr reported what she apparently took to be a possible placement to consider, although it was at a lower pay level. By then she had enlisted the assistance of Human Resource Intern, Jennifer Huynh, who requested the responsible departmental hiring manager to consider the possibility of placing the grievor into a vacant Registration Clerk position at Stanton in another department. She explained in her letter to the hiring manager of that department that a candidate needing to be placed under duty-to-accommodate guidelines was given time to learn the necessary knowledge, skills and abilities, to be accomplished within one year, and that any costs associated with training would be the responsibility of his/her home department. She also pointed out that the grievor's medical condition prevented him from being employed in safety sensitive positions, not thought to be relevant for the position under review. The written response she received, as passed on verbatim in an email to Ms. Carr, copy to Mr. Yates, stated as follows:

After careful consideration and consultations with (LR's) past Stanton Hospital Manager, (two named responding managers) have concluded that (LR) would not be suited, or have the ability to perform the duties of the Registration Clerk position. His past Stanton Manager brought to our attention that (LR) lacks the aptitude for attention to detail, which is a critical requirement for registering patients for services at Stanton. It was also noted that (LR) has made some significant errors performing his duties, that he did not acknowledge, or take ownership of these errors. These errors impacted patient's care. Taking (LR's) past Manager's experiences dealing with him into consideration, (LR) does not meet the Registration Clerk position competencies to be considered for this position.

69. There was no other evidence produced about Ms. Sutherland seeking to advance and assist the grievor's chances in finding a suitable position in exercising her managerial responsibility.

70. Mr. Yates testified that by February 2022, having become familiar with the cross-departmental accommodation parameters applying to the grievor's situation, he was also aware of the most recent medical report on file from Dr. Mansouri. There were no other physicians reporting. In his reviewing the file, he could see the concern expressed in June 2020 by his manager that he might be susceptible to relapse – no

100% guarantee provided, having made significant performance errors in the past, thereby raising an unresolved patient safety issue. The cross-departmental placement approach had been decided on the basis that while appropriate work could be found within the GNWT operation, he should not be returning to his home position at any point for the reasons reviewed. Further, it appeared to him that the Union had at least accepted in June 2020 that he was “not yet ready” to return to any diagnostic imaging duties which for him stood out as an acknowledgement of the Employer’s responsibility not to take any patient safety risks. Apparently it had presented an issue which could not be resolved in the grievor’s favour going forward, in that returning to MRT duties was not considered to be a long-term safe alternative. Resorting to the cross-departmental list meant a broadening of the search. At the same time, there was no indication from his initial file review that anyone in authority was saying that there was undue hardship connected to grievor’s return to Stanton in some capacity, or working elsewhere within the NTHSSA network. He could see that there was a resume on file but it did not contain any further details outside of the grievor’s technologist’s education, training and history. On Mr. Yates’ review of the situation, having noted his narrowly defined technical skills and wage level, he could see they would encounter difficulty in finding him a placement at comparable wages. Further, the grievor’s recorded preference was to remain in Yellowknife which would make search more difficult. At the same time, he said, the responsibility remained with the home department to review possible positions coming available for their displaced workers, including cross-departmental placement for those on the list. It meant Ms. Sutherland’s continued involvement in the internal discussions and search for an accommodated position.

71. Mr. Yates was also made aware from his February 2022 file review that following the June 2020 meeting the Union was not at the table for any follow-up discussions and he could not see any indication that any representative had ever pressed them on what was the progress being made towards finding the grievor a suitable placement. He resolved to talk to the grievor himself, which he was doing with some others facing difficult placement situations. He wanted further information in the nature of the grievor’s needing to enlarge his resume reflective of his interests, skills and pursuits, which would be helpful in considering placement possibilities.

72. With the accommodation process having produced no results over the first 18 months, by Mr. Yates’ description, he first reached out to the grievor by telephone on February 5, 2022. He recalled the grievor’s attitude as one of being helpful and cooperative. Nevertheless, by his assessment, on his file review, he could

see that he had a “gap” in applicable skills relative to other positions, and accordingly there might be some difficulty in finding him a placement. He needed more background information from the grievor. At the same time, he was aware that someone being accommodated could use up to a year for retraining purposes if able to be accomplished in that time frame. He was not yet aware in February 2022 that the Union had long-since filed a grievance, which had by then been referred to arbitration about to be scheduled for hearing commencing May 25. By his recollection he had been told by staff that the issue of providing further information was already raised with the grievor by an HR Advisor who reviewed his accommodation file in September 2020.

73. The grievor in his testimony acknowledged that the brief employment history set out in his initial resume, long-since placed on his personnel file, might be seen to provide too little information in looking at job search parameters outside of MRT work, having focussed on his training and work experience associated therewith. Its purpose had been to cover his technical education and briefly describe his working background at the time he was applying for the Senior Technologist job. However having heard the testimony from Mr. Yates about being concerned over the lack of additional information to assist in the accommodation process, no updated resume, the grievor searched his files at home and located the email chain between him and the responding HR Advisor starting on September 20, 2020 whereby he provided an updated informational memorandum expanding his resume description of his personal background, educational and working history, prior to and during his employment with the GNWT. It included describing the various radiographic positions he held while working in other countries starting in 1995, such as working in Hong Kong, Australia and New Zealand after finishing his post graduate studies at University College London in the diagnostic imaging discipline, where he applied his learned CT skills and gained experience. As he put it, while working abroad he had to “learn how to adapt to new cultures and ways of living and thinking about the world. How to make new friends and grow as a person”. Following his returning to London in 1997 he described working in a full-time Senior Radiographer position at University College London Hospital which he explained in the memorandum was the country’s largest teaching and research hospital. He therein related his responsibilities which he described as including the day-to-day running of three CT units and two MRI units, supervising and organizing staff, dealing with equipment maintenance issues, designing new protocols, and having teaching duties for new and existing staff after having completed the in-house courses on supervisory skills and entry-level management.

74. The grievor's memorandum described his having taken computer and spreadsheet analysis courses, and courses to assist basic financial skills with respect to departmental budgeting and spending priorities, including giving tutorials. He described himself as being one of the two lead organizers of an accredited study for urological radiology, being a subspecialty at the hospital. It described his being the department lead on three mass casualty events in London concerning which he was internally commended for his contribution to the response. On emigrating to Canada with his Canadian wife, he was hired in November 1999 into the Senior CT Technologist position which working experience he described in the memorandum as follows:

I established, organised and refined the department's policies and procedures with respect to CT. I maintained a positive and professional relationships with various vendors and their field engineering teams. I also strived to and believe I did maintain this same relationship with the public and the staff at the hospital and throughout the NWT. I established and maintained an early database used to track individuals CT exams (prior to electronic records system), and was also used to shadow bill Nunavut for CT procedures. I produced monthly use and billing costs for these which I submitted to my supervisor and also to my manager. I have taught a large number of individuals the various skills required to safely and successfully obtain diagnostic quality images in many sometimes stressful situations and quite a few to my knowledge have turn this into a career through Canada. From 2016 to 2019 I returned to the floor as A technologist, successfully completed my CAMRT registration through distance learning from NAIT. I also developed computer skills and knowledge of various applications, to produce various reports and information packages for the departmental management team.

75. The emailed response from the HR Advisor received a few days after providing her with his memorandum was not to dispute anything he had written, but to thank him for the information and indicate she could give him "some pointers and tips" about incorporating it into his cover letter and resume. There is no indication that there was any further contact. At this point, it might be said that the grievor's memorandum could admittedly stand some updating. By his description, were he now to include further outside interests and accomplishments more recently achieved, he has continued to pursue a postgraduate study program started some seven years ago, having received a Master's Degree in Physics (first undergraduate degree from Trinity College, Dublin) from the University of Waterloo, through its distant learning program. He indicated his continuing towards a higher degree.

76. Mr. Yates testified that on his review of the DTA file, including HR Advisor involvement in assisting the accommodation assessment, no information contained on file developed after July 2020 not associated with the decision to seek cross-departmental placement and the periodic team reviews. Following this file review and from his initial discussion with the grievor, Mr. Yates determined he should keep a closer eye on what was occurring. As indicated earlier in this award, he was aware that the accommodation process was operated essentially as an internal management program where he would say that whatever the frequency of their meetings and discussions concerning the grievor's placement, his Union representative had not been invited to attend the discussions over uncovering specific possibilities. Nor had the Union provided any placement alternatives from its own research, prior to March 2022, which presumably it could have always done had it been so inclined. Nevertheless, Mr. Yates could see that no successful placement had been arranged through the Employer's management of its DTA responsibilities, even on a temporary basis. He described being concerned over the passage of time since the grievor was cleared by his personal physician for return to work in some capacity. Ms. Sutherland had ceased to be involved in any discussions, having turned her accommodation responsibility over to Ms. Veldhorst, except for recommending that before any placement was made there should be another medical prognosis assessment. As the grievor's former supervisor she was available on a consultative basis if approached. As matters were unfolding, Mr. Yates met with the grievor in April and again viewed him as not being resistant or obstructive of the process. He described the grievor as continuing to be cooperative. By that time Mr. Pike was becoming involved, having been approached by the grievor about his first interaction with Mr. Yates.

77. Inasmuch as additional placement activities were being reviewed, by early March 2022, presumably following additional internal discussions, Ms. Carr had uncovered another placement possibility, namely a job opening at Stanton in the Operations and Allied Health unit, again not being the grievor's home department. The possible placement was a Diagnostic Services Clerk/Booking Clerk position at an appreciably lower pay range than the grievor had received as an MRT. Ms. Huynh, in continuing to assist Ms. Carr, had contacted the hiring manager indicating in her email that she had reviewed the cross-departmental list and identified the grievor as a reasonable match under the screening criteria based on his experience and knowledge of medical vocabulary and clinical skills. The job description she had reviewed indicated that the incumbent would be providing cross departmental administrative and clerical support to the Diagnostic Imaging, Laboratory Services and Respiratory Therapy units, such as managing report distribution and other related duties, including receiving requisitions from other hospitals, ensuring that the

required information had been provided and entering requests into the hospital information system. The education and experience for the position required a Grade 12 diploma coupled with completion of a recognized Medical Terminology course, together with two years of related experience in a healthcare setting, or having related experience in customer service/administrative work. There were no unusual sensory demands and no unusual mental demands. It was advanced by Ms. Huynh for consideration given the grievor's technical background in diagnostic imaging work. The grievor was not chosen by the hiring manager, there being no indication that he was even contacted for an interview. There was no direct explanation for the declination given in evidence.

78. On March 29, 2022, Mr. Pike emailed Mr. Yates indicating that he had been speaking with the grievor. Therein he described his discussion with LR who, he said, indicated that the Employer was anxious to get him back to work and moving toward finding a solution. Mr. Pike accepted it to be "great news", given the lengthy delay in his email he provided. Therein he provided his own recently researched information that there were two positions coming available which the grievor thought might be possible, being a database/records administration job, and a homeless shelter worker's position, both at a lower pay rate. Mr. Pike also asked what they had been doing over the previous two years to accommodate the grievor, there not having been any request for updated medical information during all that time, no approach to involve the Union. He was aware that as the months had passed, the DTA team had never suggested their meeting together with the grievor to review the situation, and consider options. He also stated that there had been no mention to that point of providing another request to his family physician for an updated medical prognosis, or wanting to know more about the current state of his treatment and recovery situation which he thought could be an important step in finding an appropriate placement.

79. Mr. Pike recollected that in his follow-up meeting with Mr. Yates he initiated a discussion over whether the Employer might at least look at "red circling" were the homeless shelter position to be considered an appropriate placement, and that the responsible manager would likely need a current medical prognosis. He recalled having meetings with Mr. Yates on April 9 and April 12, 2022, during which discussions he received no indication of any consideration being given to returning the grievor to his "old job" or to his home department in any capacity, "not discussed at all". By that time he thought it was reasonable to at least investigate returning him to Diagnostic Imaging, whether or not he currently required some accommodation to be eventually reintegrated into the MRT duties or would show himself to be unable

to do so. Mr. Pike did not suggest to Mr. Yates or convey in his testimony that it was unreasonable at that juncture for the grievor to be medically assessed before an acceptable offer could be finalized. Mr. Pike was well aware that Dr. Mansouri had reported two years earlier that the grievor was medically fit enough to return, with some retraining and work hardening before moving from administrative into MRT duties. Neither Mr. Pike, nor the grievor, was expecting any different current assessment. Hers had been the last medical advice received by the Employer. Prior to April 2022 the file materials do not disclose any additional requests for medical assessment.

80. On April 14 the grievor was contacted respecting the possible Shelter Services' position uncovered by Mr. Pike, and provided with the job description. As might well be expected, the manager of Shelter Services requested that he provide an updated medical prognosis. This meant his family physician needing to complete the medical information form containing numerous questions, similar to those that Dr. Mansouri had answered in the past. It included detailing any medical limitations and what the impact of those limitations would be in performing the duties of a Shelter Services worker with its emotional and psychological demands which the responsible manager advised could be extremely high at times. The grievor responded on April 29, 2022 through his email to Mr. Yates thanking him for the opportunity to be considered for the position, indicating that he had not yet been able to obtain an appointment with his family physician or any other doctor to yet complete the medical prognosis form. He reported that he had been requesting an appointment every other day, and asked to be placed on the cancellation list, but as yet had not been successful. He remained hopeful. In response, Mr. Yates on May 9 asked for an update respecting the request, which by the time the arbitration hearing was completed on June 1, 2022, had not resulted in an updated medical report yet being provided. The grievor testified that he is still working at arranging an updated medical examination and prognosis to follow.

81. Mr. Yates testified that his priority remains getting the grievor back to work in some capacity, understanding that it is harder to reintegrate a worker the longer it takes to provide appropriate accommodation. By his description, he recognizes that it has rested with the Employer to examine the parameters of what was potentially available, but that overall it was tied to its own staffing processes which meant that over a significant period of time there was no suitable accommodation identified. At the same time, it rests with the hiring manager of the department to make the final decision as to whether the employee can be accommodated in the available duties knowing their individual workplaces as they do, and

one can observe that the grievor was rejected by hiring managers on every occasion, there having been a known, assessed, performance, ability and safety concern existing in dealing with any possible return to working status at Stanton. He had been assessed, as communicated by Ms. Sutherland, to be an unacceptable placement risk, whatever the latest report from the grievor's personal physician. Subsequent to his having been placed on the cross-departmental list, Mr. Yates accepted, it was no longer about locating work in his home department. From his file review, he recognized that the grievor was "never going back to his home position", probably not back to Stanton in any capacity. At the same time, there was never any re-examination or additional review of the risk potential, no further medical assessments on file, no neuropsychological or any other specialist reports sought or delivered.

82. Nevertheless, Mr. Yates recognizes that the latest physician's report from March 10, 2020 had indicated there was no medical limitation on the grievor returning to the Diagnostic Imaging Department, whatever the workplace "dynamics" which militated against that occurring. This is where the accommodation efforts stood at the time of the arbitration hearing concluded on June 1, 2022. Mr. Yates went on to remark that the DTA assessment and placement system "needs to be improved", and currently he has undertaken a "complete review" of the program, looking for positive change. He would say, at this point that he "firmly believes" that regular joint meetings, possibly even a joint governance committee, would make a difference in securing suitable placements. He acknowledged that the Union can be a valuable partner in researching solutions in putting people back to work. But at the same time he pointed out that there is currently approximately 10% of the Government's unionized workforce holding an accommodation status which makes it difficult for an overworked DTA staff to sort through all the placement possibilities. In his estimation, it would always be difficult to place a highly skilled technician, narrowly trained well paid, in another position, often much lower paying. It is the problem presented in many accommodation files.

Submissions in argument:

Union:

83. In argument on behalf of the Union Ms. Maslanko submitted that the legal principle long ingrained into Canadian labour relations requires that all reasonable efforts must be made to accommodate an employee's nonculpable medical condition, and the work-related ramifications associated therewith, short of undue hardship. It certainly must be viewed as applicable in a situation, as here, where an employee has suffered a medically diagnosed depression related mental disability requiring successful treatment efforts,

periodic assessment, and time to recover. On the totality of evidence presented I am urged to find that the Union has shown that a *prima facie* case has been made out of discriminatory treatment and resultant adverse impact for the grievor due to his disability, taken out of his job, with the Employer intending on denying him any chance of return to his unit at any point, including going forward. The Union contends that the Employer has fundamentally failed to meet its continuing accommodation obligations. I should conclude that there has been no successful answer from the Employer to the Union's case brought forward to arbitration. Admittedly, counsel submitted, there are numerous pieces to the puzzle of why the grievor has been set to one side as discussed in evidence, notably including that his immediate supervisor in his home department, Ms. Sutherland, currently his manager, was not about to consider any return there despite the non culpability finding and the attending physician's positive reports on prognosis for full recovery, without any contrary medical information developed.

84. I am asked to consider that by Ms. Sutherland's assessment, there would be no graduated reintegration into MRT work, nor moving into any other duties associated with the Diagnostic Imaging unit on a graduated return to work basis, despite Dr. Mansouri's updated March 10, 2020 report that the grievor was no longer medically limited from taking on a graduated return to duties. The evidence, in all, was plain enough that she did not want him returning to the hospital in any capacity, nor even to work again in any other NTHSSA operations. As counsel put it: "there was never any consideration given to putting him back". This would be despite Dr. Mansouri's reporting, uncontradicted as it was by any other medical practitioner, that the once debilitating medical issues are no longer incapacitating to any degree, although she could not give an absolute guarantee as would presumably be the case with anyone suffering from a depression related illness. Apparently the critical phrase was: "I cannot predict 100% accurately but at this time I do not anticipate a relapse". Thus one phrase, in light of the grievor's performance issues, in the Union's view, was apparently enough to end his career at NTHSSA. But at the same time Dr. Mansouri advised that the grievor had attended all his appointments, was thoroughly evaluated, and all the testing had been completed.

85. In argument, counsel stressed that against Dr. Mansouri's opinion there was no evidence provided from any other source indicating that as at March 2020 or thereafter the grievor was suffering from any continuing disability, however uncomfortable his past performance issues had made Ms. Sutherland. No second medical opinion, or specialist involvement was sought at that point when the decision was made never to allow the grievor back into his home department where he was hired as the Senior CT Technologist

in 1999, eventually affected years later by a treatable illness causing his disability. She referred to Ms. Sutherland's efforts as meant to sabotage his chances of ever working again within NTHSSA, essentially a replacement for outright dismissal. It ignored one's accommodation rights requiring reintegration back into the unit, where possible, which is the only medical evidence. It is not appropriate to require 100% certainty of result, but rather to consider what is reasonable on the basis of the medical information provided to the Parties and able to be relied upon without any additional assessments to the contrary.

86. The Union contends that the evidence reveals the Employer not to have fulfilled its accommodation responsibilities, as there was never any sufficient effort shown at any point to properly fulfil the obligations associated with the grievor's assessed illness and the prolonged but successful recovery therefrom. Even were it to be appropriate to permanently remove the grievor from his home department and Stanton, which the Union disputes, then notably any efforts at researching jobs to reflect his abilities, training and experience, was sporadic and incomplete at best, being poorly researched, and only occurring many months following the need for accommodation first arising. The Union takes the evidence to be illuminating on that issue.

87. On the Union's review of the evidence, it cannot be overlooked, discounted or discredited that in September 2019, CEO Cullen advised the grievor that she was taking the non culpable approach due to his assessed medical condition and would be looking to accommodate him. Currently, more than two years subsequent to his latest diagnosis clearing him for a return to work he is still without any placement, whether it be in his home department, or elsewhere. The only medical information on which the Employer was able to rely indicates he was ready to return on a graduated basis by March 2020.

88. Counsel submitted that significantly the grievor has never shown himself to be anything but cooperative throughout, having attended to his treatment, receiving updated medical assessments when requested, and unfailingly made himself available for any meetings to which he was called to attend. Investigation Specialist Yates specifically assessed the grievor as being cooperative from the point of his first contact with him. The previous spate of researched placement possibilities prior to Mr. Yates becoming personally involved, if that is what they were, obviously way outside the grievor's useful and suitable qualifications, or his ability to learn within one year, or he had been found unsuitable for whatever reason to the point of not being interviewed. This included a letter of unsuitability from his former supervisor

respecting a clerk's position coming available at Stanton. He was not even contacted for any input. I am urged to find that there is no conclusion to be reached that Ms. Sutherland, despite her indicating in testimony that she was not biased, played any positive role in the accommodation process. Ms. Sutherland's focus was plainly on having him removed altogether from NTHSSA operations, permanently. No one was talking to the grievor about what could be done, his having described it in his testimony as a lengthy period of "radio silence".

89. Certainly the grievor was not invited into the process, never contacted by the DTA team for many months, hearing nothing until Mr. Yates called him and opened discussions in February and March 2022, by then some two years following Dr. Mansouri's latest un-rebutted reporting. At the same time, despite Ms. Sutherland's misgivings, the fact remains that he had been cleared by his physician. The latest medical prognosis indicated that he was capable of returning on a graduated basis, an employee with over 20 years seniority working at Stanton in medical radiology technology duties, until his 2016 demotion from his Senior Technologist position into MRT duties. The placement onto the cross-departmental list was described by Ms. Maslanko as not so much an accommodation as his superiors in Stanton "washing their hands", essentially permanently intending on removing him from radiology work, and from the hospital setting altogether, no doubt eventually resulting in exhausting his sick leave.

90. In arguing that the grievor's accommodation rights were violated and seeking a declaration to that effect, he should be made whole. The Union seeks damages for any provable lost wages, that his sick leave be replenished, and general damages for pain and suffering, as well as my directing that there should be no further delay in reaching an appropriate placement. This should include the possibility of returning him to his home position as the only medical information which has been developed indicates he has been ready to return for the last two years.

Employer:

91. Mr. Walsh on behalf of the Employer submitted that on my considering all the evidence in this matter, the grievance should be dismissed. The Employer relies on the extensive summary description contained in Brown and Beatty, *Canadian Labour Arbitration, (5th Edition)* at topic 7:83 covering accommodation rights and responsibilities, and initiatives to be taken in respect thereof. No doubt, as the learned authors recognize, the need to realistically search for an accommodation solution to meet the

difficulty of the situation presented is well accepted, with which guidance the Employer views itself as having complied, however not to the extent of posing an unacceptable risk to its healthcare operation, including patient safety. The Employer was essentially attempting, without success, to accommodate the grievor in his home unit between 2016 and April 2019 as described in evidence, eventually leading to an unacceptable residual patient issue safety situation arising. Reference can be made to the following Brown and Beatty description:

To satisfy the duty to accommodate, employers are not expected to have to bear excessive financial costs or expose other workers or members of the public, or even the disabled employee, to unacceptable levels of risk to their health, safety and general well-being.

92. The learned authors go on to point out that whether there has been undue hardship “invariably depends on the facts of each case”, which is what arbitrators examine and assess through the totality of circumstances placed in evidence. In support of the soundness of that approach counsel referenced the Supreme Court of Canada’s judgement in *Syndicat des Employes de L’Hopital General de Montreal v. Centre Universitaire de Sante McGill* (2007), 159 L.A.C. (4th) 1 (S.C.C.) recognizing accommodation rights as a duty, the scope of which “varies according to the characteristics of each enterprise, the specific needs of each employee, and the specific circumstances in which the decision is to be made”, hence the significance of the totality of evidence presented in this matter which the Employer recognizes needs to be carefully outlined and reviewed in order to achieve an overall understanding of the placement problem. Nevertheless the Employer has not argued that it has exhausted its ability to accommodate in a suitable fashion, and the need to make reasonable attempts towards achieving that end.

93. In reviewing the circumstances at hand, Mr. Walsh submitted that the Employer, after careful assessment, recognized in September 2019 that the grievor’s known medical diagnosed disability constituted an actual indefinite functional limitation on his ability to do the job, thereby presenting a continuing duty to accommodate short of undue hardship. It did not take a culpability approach which may well have resulted in termination given his past performance issues and most recent conduct in seriously over-radiating an infant patient. Its primary position would be one of contending that the grievor could not be accommodated in his home position because he had rendered himself unable to competently perform the essential functions of that position. It presumably means that the required qualities for MRT work of concentration, attention to protocol, and memory would have to be considered *bona fide* occupational requirements of the position,

given the crucial patient safety aspects of the job. The Employer relies on Ms. Sutherland's testimony that the grievor over time had proven himself to fall short on these aspects and there was no guarantee going forward that there would not be a relapse to a situation of deficient performance. He had received medical clearance in the past which proved to be unreliable. He had also received support in attempts at upgrading/refreshing his skills, to no avail. In light of the time and effort Ms. Sutherland, and others, had expended correcting what she had assessed over considerable time to be the grievor's careless or unfocused approach toward his highly responsible duties she was no longer hopeful of any change, whatever his diagnosed medical condition. I am urged not to lose sight of the fact that an MRT technologist holds a safety sensitive position, given the continuous patient interactions.

94. Counsel submitted that the grievor essentially disqualified himself on a non culpable medical basis from again taking up the duties for which he had been suitably trained, or indeed working in any patient interaction duties at Stanton. His assessed deficient performance was an issue which had been building, playing out over time. It had included his 2016 assignment into administrative duties, his 2017 demotion, and following a return to MRT duties with upgrading efforts, his April 2019 mishap when he very seriously over-radiated an infant patient. Counsel submitted that the Employer's decision after determining that it was taking the non culpable route, should not be discarded. An employee's possible continuing unsuitability for the position in which they had been unable to successfully perform stands as a mainstay consideration in any accommodation effort, nor should the Employer be expected to bear excessive costs or patient safety exposure associated with any further attempts to turn the grievor's inadequate performance around.

95. Mr. Walsh, on his review of the evidence, outlined the Employer's position that its DTA team and responsible managers reasonably sought to fulfil their accommodation responsibilities, setting out what he called the "numerous efforts" to find the grievor another job. In support of its contention that there were appropriate accommodation efforts which continues to the present time, counsel cited awards where arbitrators have considered accommodated placement issues presented in light of the difficulties needing to be sorted out, including related expenses and possible undue hardship arising given the nature of the aggrieved employee's work. For example, in *Edmonton Regional Airports Authority v. P.S.A.C.*, 2001 CarswellAlta 1850 (Smith) the decision not to renew a seasonal equipment operator was upheld in a situation where the employee had been suffering from debilitating chronic pain and headaches, entirely non culpable, but the employer was shown to have no ability to ensure that he was fit enough to work in any

related duties while preserving public safety. There was no issue of trying to fit him into other seasonal employment. In *Hamilton Health Sciences and ONA (Pringle)* 2013 CarswellOnt 8640 (McNamee) a registered nurse working as a team leader in geriatrics care had suffered a debilitating back injury. She eventually was fit enough to return to work on an accommodated basis, but thereafter was unable to perform the bedside nursing components of her job, including not being able to work full-time which meant losing income, leading to a claim for damages. The arbitrator was satisfied there was a demonstrated need to accommodate the employee but there was no convincing evidence that it was feasible on a safety sensitive basis to place her back in her team leader position, with the possibility existing of having to do bedside care for which she was no longer suitable, and noting the conclusion reached that she would not be able to perform certain essential duties of the job. It was said that had the employer placed the employee in her team leader position it would have had to provide someone else specifically for the purpose of assisting her in performing the essential duties of her job, which was not required in an accommodation situation. Further, counsel submitted that in such a situation of finding appropriate accommodation one's pay grade could realistically be affected due to eventual position placement not being a return to their old job on some reduced or assisted basis. In *Toronto Community Housing Corporation and Toronto City Employees' Union, Local 416, CUPE (Knight)*, 2013 CanLII 57240 (Parmar), a maintenance mechanic performing cleaning/caretaker functions in a housing complex eventually was medically fit enough only to perform light duties. The employer attempted to search out another role, but had found the employee to be unsuitable by reason of her limited skill set. The arbitrator determined that the employer's obligations to accommodate her disability only went so far as jobs for which the person actually had the skills to perform, but was unable to find any such position. Presumably anything further would have amounted to an undue hardship. The Employer draws a comparison with the grievor's situation in that there has been a significant roadblock in finding any position which fits with his specific and narrow technical skill set, or one presenting the potential of similar earnings. At the same time it is still awaiting further information on prognosis, keeping in mind that the grievor has been requested to re-attend on his physician, which at the time of hearing had not occurred.

96. The Employer relies on the Union's having conceded in Mr. Pike's Step 2 grievance submission to CEO Cullen of August 11, 2020 that it was accepting the grievor could not work in his home position due to patient safety concerns and his proven track record of performance issues. This was essentially the Union's contribution to that point following submission of the grievance a month earlier. The Union, he

submitted, should be viewed thereafter as having chosen to have no real involvement in assessing the grievor's accommodation needs, or researching possible positions, not becoming involved any further over the next 1½ years, although eventually referring the grievance to arbitration. The Union's involvement was described as remaining stagnant until Mr. Pike contacted Mr. Yates in March 2022 on learning that he had discussed the situation with the grievor, his having researched and proposed a possible placement situation. Nor does the evidence show much contact during all these months between any Union representative and the grievor, outside of filing the grievance. Certainly Mr. Pike had not approached the DTA team although he had apparently discussed other accommodation situations from time to time with the DTA Advisor, Ms. Carr. Presumably he may have been waiting for the accommodation issue to sort itself out through an arbitration hearing which had been scheduled to commence May 27, 2022, or he was content to leave the research and placement issue up to the Employer, being its process.

97. Mr. Walsh submitted that the Union for too long a period of time basically behaved "like a bystander" and that other than filing a grievance in July 2020 did too little to assist the accommodation process on the grievor's behalf. Indeed, it contends that there was too little effort or involvement by either the grievor or the Union in attempting to search out a suitable solution keeping in mind the difficulties presented by the grievor's situation. These include his physician keeping him out of the workplace for a considerable period of time, the pay differential issue in finding comparable employment, the safety factors which continued to be in place, and the grievor's own narrow technological training which would be a difficult match in finding replacement employment. At the same time the DTA team was facing accommodation considerations concerning over 500 bargaining unit employees across the GNWT operations.

98. Mr. Walsh submitted that it is well accepted that the disability accommodation process requires a tripartite effort involving employer, union and aggrieved employee in reaching an appropriate accommodation solution. It relies on the Supreme Court of Canada's dictum in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, a case involving religious discrimination, where the Court dealt with the significance of having a multi-party approach. Justice Sopinka undertook a far ranging examination of the associated duties, stating at one point at p. 994:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At page 555 McIntyre J. stated:

Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case a part-time work, must either sacrifice his religious principles or his employment.

To facilitate the search for accommodation, the complaint must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

99. Accordingly, the Employer takes the position that the grievance should be dismissed in its entirety in that, all things considered, reasonable efforts were made by the Employer towards accommodating the grievor's very difficult situation given his unsuitability for continuing to work as an MRT, his very narrow technical training, and the highly responsible nature of his work in patient care through very technical and highly demanding procedures. The search is ongoing, but there are literally hundreds of employees seeking accommodation. He no doubt would have presented one of the more difficult situations for the DTA team.

Union Reply:

100. In her reply argument, Ms. Maslanko reviewed the facts a little further from the Union's perspective keeping in mind what it takes to be an attempt by the Employer to somehow shift the blame for the failure to accommodate. The supposed accommodation process was run solely by the DTA team without its seeking the grievor's involvement, or consulting the Union. He should have expected ongoing assistance from his home department supervisor, although there is little doubt about Ms. Sutherland's firm view of the grievor's unsuitability to work at Stanton or anywhere within the NTHSSA operations as stated during her testimony. She can only be described as unhelpful whatever her comment about being "unbiased". Obviously, there was no consideration given to actioning his placement on any priority basis. The grievor should not be found to have been unhelpful. He was not asked to take part, nor was the Union, on any ongoing basis but notably when he was contacted in September 2020 to provide some additional personal information that might be helpful in finding a suitable placement, he did so. He heard nothing further. The Union views the decision

to cross-departmentalize his accommodation, taking him away from his home department, as the Employer's way to have simply sidelined him. Thereafter he heard nothing further from any Employer representative until Mr. Yates became involved in February 2022, despite there being literally hundreds of vacancies coming available across the GNWT, including in NTHSSA operations. On being contacted by Mr. Yates, he cooperated and was willing to provide anything further that was required of him. The grievor had always attended for his scheduled medical appointments which had resulted in updated medical reports from Dr. Mansouri whenever requested. He did not reject the first and only job offer ever presented as a possibility, being a position in Shelter Services concerning which he was attempting to obtain another updated medical report from his physician at the time of the arbitration hearing. In the meantime no one over the previous 1½ years following his being told that he was being placed on the cross-departmental search list had sought any medical assessments from other than Dr. Mansouri, no demand made for any specific specialist assessment during that period of time.

101. I am urged not to lose sight of the fact that his March 10, 2020 medical report was the only prognosis on file while the grievor continued to wait for accommodation, and Dr. Mansouri's assessment continued to be ignored that he was capable of returning to his position on a graduated basis towards working again as a full-time MRT. It is something which should be given appropriate consideration even if now, after all this time has passed, one should consider a specialist's involvement. On a fundamental employee assessment basis, it cannot be said that there is any current evidence raising a safety issue were the grievor to work toward returning to full MRT duties and it may well be that no lasting medical accommodation is any longer required, nothing any different than the usual graduated return to work, needing a period of work hardening and refresher training as would be the situation with any employee coming back to work after a lengthy time away. One should keep in mind that the accepted course of action in bringing employees back to work is that they have as long as a full year to develop the necessary skill set in whatever technical area is involved upon returning to work. At this point, Ms. Maslanko submitted, the grievor needs to be returned to his home department and fairly compensated, including for the pain and suffering in light of the evidence showing the Employer's failure to properly deal with his accommodation requirements over a lengthy period of time, notably coming up with only a few job searches which anyone could see was far outside his skill set.

Analysis and conclusion:

102. Unquestionably, the Parties' respective counsel from their distinct and quite separate perspectives carefully traced the coiled and prolonged course of events elicited through testimony and the numerous documentary materials provided for my consideration. At the same time, in reviewing the evidence there can be no dispute over the grievor's having a disability and the right to be reasonably accommodated on that basis. CEO Cullen acknowledged as much in her September 30, 2019 notification to the grievor. No doubt the Union would have been able to make out a *prima facie* case of discrimination in any event by establishing that there were numerous protocol requirements related to the grievor's performing as an MRT technologist which had an adverse effect upon him because of his diagnosed depression/confusion related disability affecting his memory and concentration. Under the *Human Rights Act* SNWT 2002 c.18, where the enumerated prohibited grounds of discrimination include physical or mental impairment, there is no requirement for an intention to discriminate. The Collective Agreement under Article 3.02 requires that "there shall be no discrimination, interference, restriction, harassment or coercion exercised or practiced with respect to an employee by reason of....disability". But, the Employer's acceptance of the need for accommodation takes us to the point of examining how they met that admitted obligation. Indeed the grievor had already been accommodated to a degree, as explained by Ms. Sutherland in her testimony, while still working in technologist duties, having been provided upgrading/refreshers training, a PIP plan, and additional supervision to assist in suitably improving his performance level, done outside the disciplinary process.

103. The discrete issue at hand is whether the Employer at the point of the Union filing its grievance on LR's behalf, and thereafter, has failed to reasonably exercise its role in the accepted tripartite approach towards resolving the grievor's accommodation needs, and were that shown to be the case what should be the actionable consequences of such a failure, all things considered. It cannot be missed that to the current time, two years past the critical June 25, 2020 meeting, and the grievance which shortly followed, there has been no accommodated placement, and as yet no firm offer, although a Shelter Services' manager's position currently presents an opportunity, pending medical clearance given the nature of the job. All the while subsequent to the need for accommodation being recognized there has been no permanent placement, or otherwise, anywhere at Stanton Territorial Hospital in any capacity, or elsewhere within NTHSSA operations within which structure the grievor had worked for some 20 years.

104. Certainly, the responsible manager in the grievor's home department, Ms. Sutherland, plainly expressed her view concerning altogether excluding the grievor from any healthcare role in going forward with any accommodation plan. It was made clear on the basis of having extended enough time and effort towards rehabilitating the grievor's performance, unsuccessfully, to favour sidelining him permanently from any future Stanton placement, even anywhere with NTHSSA. The prospects for placement somewhere within the GNWT operations have remained difficult although the possibility remains, pending medical clearance, of a Shelter Services job, a possibility recently uncovered by Union representative Pike.

105. In my considering the grievor's role, the evidence does not disclose that at any point he showed himself to provide a negative response to anything that was being suggested by the DTA team or that he was anything but cooperative were any input to be sought. Obviously, he had no interest in presenting any roadblock, wanting to get back to work. Union representative Pike had been involved in analyzing the return-to-work conundrum following the management decision in September 2019 to apply the non culpable approach, thereby recognizing the grievor's needing to be accommodated. During these early months, in my view, there was no meaningful effort to invite the Union into the process on a consultative basis, outside of recognizing its having filed and moved its grievance along through the grievance steps after July 2020, eventually referring it to arbitration. It would seem that the DTA team, as assembled, considered the accommodation process to be its unhindered responsibility, no doubt recognized by Mr. Yates in February 2022 to be out of step with the modern approach explained in *Renaud*, on his becoming personally involved with the grievor's file. He was focussing on his responsibly and that of the DTA team needing to work towards fashioning an appropriate accommodation. One might well ask whether any mutually adaptable offer would have emerged had he not taken a personal interest in the file and started interacting with Mr. Pike and the grievor.

106. The accommodation process might best be described as stagnant over many months, whether the grievor's medical issues were fully resolving or otherwise. Mr. Pike had attended the June 25, 2020 meeting with management, convened essentially to advise the grievor that he was not going to be accommodated in his position, no graduated return to MRT work or anything else at Stanton connected to his computed tomography education, training and experience. He would be one of only a handful of employees out of more than 500 across the GNWT operations requiring some level of workplace accommodation who would face

the cross-departmental challenge. The approach, as we now know, was intended to end the grievor's career at the Hospital, and in all likelihood would result in placing him outside the operational framework of the NTHSSA, if anywhere. It was as if they were telling him after reviewing his performance record, whatever the causative medical situation which might well be resolving, or possibly not completely, he had shown himself unable to successfully work in healthcare in light of the continuing patient safety issue. This would be despite his lengthy career at Stanton, and whatever his ability to successfully carry on with employment somewhere else within the NTHSSA operations or the GNWT which, one would think, at least presented a possibility. Certainly, Mr. Pike at that point understood that the grievor was needing to be accommodated away from his home position. The month following Ms. Sutherland's June 25, 2020 declaration, on filing the grievance, the Union was stating its reliance on the grievor's having been cleared to work by his physician, but the Employer had deemed placing him back in his home position to be an undue hardship. It recognized that the Employer had committed itself to finding alternate duties/role for the grievor but nothing was materializing. By then he had already been off work since April 2019 and had been cleared to work for the previous four months. It would seem that in filing a grievance and thereafter moving the matter through the hearing steps, the Union was prepared to be involved in finding a solution.

107. I agree with the Union's viewpoint, that it is not as if Mr. Pike over the time prior to his dealing with Mr. Yates was ever considered part of the accommodation puzzle, whether or not he acknowledged as a second-level grievance response that the grievor, at that point, needed to be accommodated elsewhere. It does not appear that he was ever requested to provide input or attend any DTA team meetings covering the grievor's placement possibilities, after filing the grievance. There is no suggestion there was ever any consultation over the "possibilities" located by Ms. Carr. As managed, it was solely the Employer's process. At the same time there is no evidence indicating Mr. Pike was ever intending on being obstructionist or uncooperative. Upon entering the picture following Mr. Yates reviewing the grievor's file, contacting him and taking personal control, Mr. Pike presented a job possibility researched by the Union in Shelter Services. It can be compared with the unrealistic "possibilities" researched by the DTA team until Ms. Huynh became involved in finding vacant opportunities at Stanton, starting in October 2021. She no doubt thought that the most logical fit would be somewhere within the NTHSSA operations.

108. Ms. Huynh presumably must not have been aware of the management position against his being placed in any position at Stanton, even outside his home department, even into something administrative. Note the response from a hiring manager who made short shrift of any such placement possibility after having discussed the grievor's shortcomings with his home department manager, in dealing with an administrative position. Be that as it may, no doubt Ms. Huynh was trying to fulfil what she understood to be her responsibility to locate a suitable placement, and presumably thought that with the grievor having a medical services/technical background, healthcare would be the obvious place to look. In early March 2022 she presented another healthcare opportunity, which did not generate an interview nor any explanation. Notably, with Mr. Pike having moved the grievance along to the point of scheduling it for hearing, Mr. Yates was only wanting to find a reasonable solution to the accommodation conundrum after observing the lengthening delay without any suitable placement having been proposed. He was not yet made aware that a grievance had been filed. Nor had he been made aware that the grievor had provided revamped resume information to the HR representative in September 2020, as requested by her, and entered in evidence, which had not ended up on his accommodation file, at least not brought to Mr. Yates' attention. At the same time, one should recognize as he pointed out, and the Union would be quite aware, that the grievor was only one of hundreds of employees seeking some level of accommodation. Most of them no doubt wanted to return to their home department, it being rare for anyone to require a cross-departmental search.

109. Nevertheless, despite Mr. Walsh's able submission to the contrary in argument, as the months rolled by I can only conclude there was no appreciable and reasonable effort expended by the Employer to place the grievor anywhere within the NTHSSA operations, or elsewhere. The evidence, in my view, shows there was a painfully inadequate search effort by the DTA in arriving at any accommodation solution, no realistic offers, and never inviting either the Union or the grievor into the picture. This would be the situation, even from the management perspective that the grievor should be permanently disqualified from working at Stanton, and even if one were to accept that it would be undue hardship for the Employer to return him to his home position or department on any basis given what was assessed to be an inadequate performance and patient safety record. This two-fold issue was documented and acted upon by 2016, and admittedly there had been no 100% medical clearance as at March 10, 2020 by the only attending physician who was tasked to provide medical reports, family physician Dr. Mansouri.

110. Dr. Mansouri had always provided responses to the diagnosis and prognosis related questions posed to her by management. Her final report of March 10, 2020, although certainly positive in detailing her view that the grievor had successfully overcome his medical disability, and was a candidate for immediate reintegration back to his home position in the manner she described, she gave no absolute assurance there would be no relapse. Her past reports were not confidence inspiring in that she had given assurances allowing for the grievor's reintegration into MRT duties which was shown not to be long-lasting. Notably, there were no second medical opinions entered in evidence, no assigned specialists who provided any reports, at least not that the Employer was made aware of.

111. More particularly, it cannot be missed that lying at the core of management's doubts over the grievor's performance shortcomings was the realistic serious patient safety concern that had led to his being removed from the workplace following the latest April 11, 2019 incident involving his seriously over-radiating an infant patient. There followed a suspension during the investigation period. Ms. Cullen's decision at the end of September 2019 was for the Employer to take the non-culpable approach requiring reasonable accommodation efforts. Thereafter the grievor removed himself from the workplace on his doctor's advice with accompanying medical reports, eventually leading to the February and March 2020 reports recommending his return. One can certainly appreciate local management's reluctance to consider Dr. Mancouri's final report sufficiently reassuring, but no other medical information was sought. Management, it might be said, decided to take a halfway approach. Ultimately it did not seek to terminate the grievor on a deficient performance basis, or for undue hardship reasons, after having noted the serious patient safety issue presented. Following the investigation, in finding there could be a medical basis to his concentration and memory difficulties, it also accepted Ms. Sutherland's caution that any such accommodation should not be in his home department, likely not at Stanton, and in her view not in healthcare. There is no question that working through the cross-departmental approach presented a serious placement problem going forward which is not something that the DTA team decided to tackle with any reasonable urgency. The eventual "researched" proposals in January 2021 suggested that no serious attempt at placement was being made at that point.

112. In all, I must reject the Employer's attempt at shifting the blame for this failure to relocate the grievor away from his home position and department, which by its own assessment was considered necessary. By

its own process the solution rested solely with the DTA team without needing to seek any consultative involvement by either the grievor or the Union representative. Again, this would be the situation at least until Mr. Yates became involved. Further, the Employer apparently had not been interested in any additional medical assessment in any timely or realistic fashion. It instead chose to centre its position on the family physician's failure to provide any absolute medical assurance over there being no possibility of relapse. The Employer's approach as it played out over many months, requiring no chance for any return to the home position or to a job at Stanton, or probably even somewhere else in NTHSSA operations in my view, suffers from there having been no sufficient pursuit of further medical assessment.

113. Once it had decided to take the non-culpable route and reasonably accommodate by reason of medical infirmity, the obligation surfaced to look beyond the past disability driven performance issues and properly assess future recovery prospects. I do not see that this was ever done in any orderly or reasonable fashion. It is not enough to rely on the personal physician not giving 100% clearance in March 2020. It also bears considering that neither the grievor or his Union has ever provided any updated medical assessment information following the position taken by the Employer in June 2020. There were no specialist reports able to be assessed where one would be looking for appropriate assurances respecting his mental health situation going forward, given the paramount and realistic concern for patient safety.

114. After setting out the evidence as I have in substantial detail and the comprehensive arguments presented by counsel, including the case law submitted for my review, in all, I must conclude that the Employer failed the grievor by undertaking its accommodation efforts in the manner described in evidence. In my view, overall the DTA team as the Employer's representative in accommodation scenarios, failed to meet those accommodation requirements so often reviewed by arbitrators and Courts as requiring a comprehensive reasonableness in the approach taken, all things considered. The Union played a partial role, but then again does not appear to have been realistically invited into the process. The grievor, in my view, bears no personal blame for the Employer's own failure to act, although presumably he could have eventually actioned his own researched transfer request. The issue of undue hardship may well have disqualified him from his home position at the point that the accommodation search needed to land him elsewhere following the June 25, 2020 meeting, Mr. Pike admitting as much early in the grievance process, but whether that recognition should have been the permanent solution was unknown, and not yet sufficiently assessed. It was

something which should have been medically explored in more comprehensive fashion, as the Employer's approach would be to remove him altogether away from Stanton and even the NTHSSA operations as a whole. In the meantime more immediate accommodation efforts should have been applied, and over the ensuing many months.

115. The grievance is successful on the evidence and for the reasons set out in this Award. At this point I conclude that a declaration should issue as follows:

1. On June 25, 2020, and at least for some un-assessed and unknown period of time thereafter, there was undue hardship associated with returning the grievor to his home position due to legitimate patient safety reasons, possibly ongoing, possibly not. This required further medical assessment, and it still does.
2. As the weeks dragged on into months following the June 25, 2020 meeting where the Employer's accommodation position was announced, it violated the admitted legal obligation to apply reasonable and timely efforts towards accommodating the grievor's medically assessed disability in some appropriate GNWT position commensurate with his skills, talent and education. I accept that a placement, if only temporary at that point, should have been located and acted upon over the summer of 2020 or shortly thereafter, even without any further medical information at that point. Certainly, given the COVID situation across the GNWT operations, there were numerous transfers and new hires available to be researched and assessed.
3. The Employer has failed in its duty to apply legitimate and ongoing efforts to fully understand the nature of the grievor's disability and whether he can be safely accommodated back in his home position at any point, or department, with appropriate training/refreshing/work hardening during reintegration, noting the long accepted one year time frame in that respect for returning employees; or if not able to fulfil the competence or patient safety aspects then in some appropriate alternative position within Stanton Hospital, the NTHSSA operations, or elsewhere within the

GNWT.

4. The Union was not invited or expected to be a tripartite partner in a consultation process which was considered by the Employer to be the sole responsibility of the DTA team. However, I also accept that once the prolonged nature of the delay was understood as providing no solution the Union could have been more proactive in attempts at insinuating itself into the process sooner than Mr. Pike's eventual interaction with Mr. Yates, and locating a placement possibility, the grievance process aside. Nevertheless, in the main, this responsibility still rested with the Employer, its having a wide scope of in-house assessment tools available to hiring managers and operating the DTA team.
5. The grievor showed himself to be cooperative throughout, whenever approached for medical evaluation or other input, and cannot be taken as having been obstructive of the Employer's accommodation process. He continues to be cooperative.
6. The grievor was unreasonably forced to access his illness benefits' protection for too long, whether by exhausting his casual sickness leave, or needing to have reasonably turned to his long-term disability coverage which he chose not to do, after the only reporting physician declared him capable of being accommodated by March 2020.

116. After careful consideration, I also accept that there should be a compensatory aspect to this award in this specific case situation, given the unacceptable length of the accommodation delay, all things considered. I direct as follows:

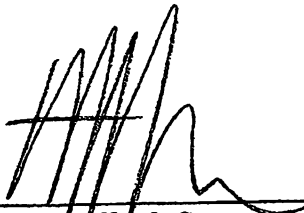
1. The grievor's casual illness benefits should be reinstated back to what I consider to be a reasonable time for placement into at least a temporary working situation, possibly permanent by that time. I accept that something positive should have happened within a three-month window following the June 25, 2020 announcement

after their receiving and assessing the latest Dr. Mansouri report. It includes my having recognized that there were numerous hirings into available positions, and transfers, during the COVID epidemic, none of which the grievor was considered as a candidate.

2. There should also be a compensatory award in damages recognizing some aspects of the grievor's financial loss due to the Employer's failure to move the accommodation process more swiftly towards assessment and placement. There would be many things to take into account, such as the difficulty with the medical information going forward in there being no absolute clearance which may well have required more comprehensive medical assessment prior to an acceptable placement being arranged; the lingering patient safety issue in considering any return to his home department at some point; the realistic difficulty in locating something suitable outside his home department meeting the grievor's talents and technical education, and his past earnings' level; the high numbers of other bargaining unit employees needing their accommodation situations sorted out, including the several coworkers who were seeking cross-departmental placement; the numerous hirings and transfers ongoing within the GNWT operations; the length of time that his own physician took the grievor out of the workplace following the accommodation requirement being announced in September 2019; the possibility of the Union needing to have taken reasonable steps to mitigate in some fashion by actioning a transfer request, or the grievor doing so on Union advice, or even seeking outside temporary replacement employment when no accommodation was forthcoming or contact being regularly maintained; the Union's apparent failure to insinuate itself into the accommodation process until March 2022, the grievance aside. In all, I consider the preferable approach is to make a lump sum award for the grievor having his right to a reasonably efficient and expeditious accommodation breached, in the manner described in evidence, with some measure of continuing financial loss reasonably attaching thereto. I award the grievor the amount of \$20,000.00.

117. Such is my Award in this matter, and I remain seized pending implementation and in the event there is any need for further directions or clarification, including were the accommodation to remain stalled going forward.

Dated this th 20 day of July, 2022.



Thomas Jolliffe, Q.C.