IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the "Employer" or "GNWT")

-and-

The UNION OF NORTHERN WORKERS, a Component of the
PUBLIC SERVICE ALLIANCE OF CANADA

(the "Union" or the "UNW")

RE: GRIEVANCE #18- E -02221 – Meadus, Roland

AWARD

Heard: April 13, 14 and 15, 2021

Issued: June 24, 2022

Arbitrator: J. Alexander-Smith (the "Board")

Appearances:

For the Union:
Michael Penner, Counsel
Anne Marie Thistle, Representative
Avery Parle, Representative, Witness
Roland Meadus, Grievor
Candace Meadus, Witness

For the Employer:
Trisha Paradis and Joel Marion, Counsel
Camilla Offredi, Representative
Cheryle Donahue, Witness
Georgina Carr, Witness
Natasha Ramm, Witness
Haley Mathisen, Witness
John Nahanni, Witness

INTRODUCTION

[1] This grievance concerns an assault upon Mr. Roland Meadus, a correctional officer at the North Slave Correctional Complex ("NSCC" or the "Facility") in Yellowknife, NWT, in the early morning hours of December 9, 2017 (the "Assault"), at the hands of one of his direct supervisors, Mr. John Beck, and the sequelae arising therefrom.

[2] Both the grievor and the assailant, Mr. Beck, then a Deputy Warden of Operations ("DWO") at the Facility, were off-duty at the time of the Assault at the private residence of the grievor and his wife, Candace Meadus (the "Meadus Residence").

[3] The Union submits that the events that precipitated the Assault are inexorably tied to the workplace and, as such, Mr. Meadus experienced violence in the workplace at the hands of his direct supervisor, from which the Employer had failed to protect him. In addition, the Union asserts that Mr. Meadus suffered ongoing prejudice thereafter as a result of the Employer's failure to properly respond to the Assault in violation of one or more provisions of the *Collective Agreement Between The Union of Northern Workers and The Minister of Human Resources,* Expires March 31, 2016 (the "Collective Agreement"), a position which the Employer disputes.

[4] The grievance was heard by way of a virtual arbitration hearing on April 13, 14 and 15, 2021 (the "Hearing"). At its outset, the parties accepted the composition and jurisdiction of the Board to hear and determine the merits of grievance #18-E-02221 (the "Grievance").

[5] Should the Grievance succeed on the basis that the Employer breached the Collective Agreement, the Board is asked to remain seized as to the issue of relief flowing therefrom.

THE GRIEVANCE

[6] Mr. Avery Parle, a Service Officer with the UNW, authored and filed Grievance #18-E-02221 on behalf of Roland Meadus on January 17, 2018, just over a month after the Assault; the contents of which were largely based upon discussions with the Grievor.

[7] The Union characterized the Assault as an act of violence in the workplace pursuant to the Collective Agreement, and described the nature of the Grievance as "Harassment/Discrimination/Human Rights". The relief sought by the Union included that Mr. Meadus be compensated by the Employer for any and all lost time from work as a consequence of the Assault, including lost wages, benefits and for any and all periods of leave without pay.

[8] According to Mr. Parle, since the Assault occurred in the "workplace" or, at the very least, "in the course of employment", Mr. Meadus should have been covered under the *Workers' Safety & Compensation Commission* ("WSCC") with the Employer's support. Mr. Parle assumed that as the WSCC did not accept Mr. Meadus' claim, it was because the Employer disputed the claim; thereby denying the Grievor benefits to which he was entitled and causing him to suffer financial losses for which he is also entitled to be compensated by the Employer.

[9] In denying the Grievance at each level, the Employer maintained its position that the Assault upon the Grievor on December 9, 2017 between the hours of 2:00 am and 5:30 am at the Meadus Residence did not fall with the scope of Article 55 of the Collective Agreement, as the incidents neither occurred within the workplace nor during the course of Mr. Meadus' and/or Mr. Beck's employment.

[10] Perhaps not surprisingly given the passage of time, the evidence submitted to the Board during the course of the Hearing was inconsistent with respect to a number of matters in issue in this Grievance. Those matters have been organized by heading below for ease of reference.

FACTUAL BACKGROUND

[11] The job of a correctional officer was described by Mr. Parle as "unique", one which is generally well beyond the experience of members of the general public. While a considerable number of correctional staff duties may be repetitive and even mundane; the corrections work environment itself is exceptionally fluid and subject to sudden and unexpected disruptions, many of which may require immediate intervention(s) by correctional staff. It is a work environment substantially unlike the more traditional workplaces to which many, if not most, employees are accustomed.

[12] The Facility itself operates under a "chain of command" decision-making structure; oftentimes requiring specific approvals from those further up the chain within the Department of Justice.

[13] Correctional officers at the NSCC are assigned to a specific Team, which is conducive to establishing effective working relationships amongst Team members; which relationships can (and do) extend beyond regular work hours at the Facility.

[14] That said, NSCC staff are expected to meet the Standards of Professional Conduct set out in the NSCC – Standing Orders, Chapter 3.02, which provides, in part:

> *5.7 Warden, Managers and DWO's shall ensure staff are aware that behaviour, both on and off duty, is required to reflect positively on the Corrections Service, the Department of Justice and on the Public Service. All staff are expected to present themselves in a manner that promotes a professional image, both in words and actions.*

[15] Roland Meadus (the "Grievor") was first employed at the NSCC in 2013, initially under a year-long Transfer Assignment and thereafter, prior to the Assault, as a fulltime Indeterminate Corrections Officer 1. The Grievor worked in a variety of instructional roles, in addition to his duties "on the floor" as a member of Team 2.

[16] Mr. Meadus first became acquainted with Mr. Beck in 2013 as a co-worker at the NSCC, who later became one of his two direct supervisors, which he estimated to have occurred some 18 months prior to the Assault.

[17] The Grievor testified that his relationship with Mr. Beck was not strictly confined to the workplace. He described, both during the Hearing and through various documents submitted to the Board as

evidence in these proceedings, the various elements of his relationship with Mr. Beck, as "normal buddies", as a "friend", as a "client" and, as a "boss".

[18] By way of example, Mr. Meadus described Mr. Beck having taken him and his visiting parents on a fishing expedition up the river, causing them to spend several hours together on that particular day.

[19] Mr. Meadus held a journeyman ticket as a mechanic. He ran an automotive shop out of his home and members of the Facility accessed his services, amongst them John Beck. Mr. Meadus recalled that he replaced the headlights on Mr. Beck's vehicle, but only charged him for the parts without requiring Mr. Beck to pay for his labour. He described Mr. Beck as a "client" in that instance.

[20] On another occasion during the summer of 2017, the Grievor described an evening of beers with Mr. Beck, an event initiated solely by Mr. Beck. Mr. Meadus recalled that Mr. Beck simply showed up at his home to celebrate his birthday and have some beers with him. Mr. Meadus obliged Mr. Beck; they had beers together until about midnight at which time Mr. Beck's wife came by to drive him home.

[21] Aside from those incidents, Mr. Meadus did not otherwise recall having had a personal relationship with Mr. Beck, other than to say "hi and bye" when they encountered each other outside of the Facility. Nonetheless, he considered Mr. Beck a "buddy", having worked with him 12 hours a day at the NSCC, and felt he had a positive professional relationship with DWO Beck.

The Assault

[22] On the evening of December 8, 2017, approximately 90% of members of Team 2 (and their respective partners) attended an informal Christmas dinner/party at a local pub/restaurant in Yellowknife, NWT. The gathering was organized by a member of Team 2 with the expressed support of DWO Beck. All correctional officers in attendance at the dinner party were off-duty at the time, including both DWOs of Team 2 (Mr. Joe Macintosh and Mr. Beck).

[23] Mr. Meadus testified that he had not before attended a Team 2 Christmas party but decided to attend this time because he felt that this Team was "a really good team"; one which had fun together. He described the outing that evening as "…a really great party" and said that his interactions with Mr. Beck were friendly and normal throughout the evening. Mrs. Meadus also described the Team as "fairly close".

[24] As the party wound down, now in the early hours of December 9, 2017, and unbeknownst to the Grievor, Mrs. Meadus invited Mr. Beck and Mr. Cory Langer (also a Corrections Officer on Team2) to the Meadus Residence for an additional Christmas drink.

[25] Although Mrs. Meadus had not planned to invite anyone over, she did so because they had such a good time together throughout the evening, and not because she felt compelled to do so.

[26] Soon after arriving at their home, Mrs. Meadus went to bed. During these early hours of December 9, 2017, it is undisputed that while at the Meadus Residence Mr. Beck violently attacked Mr. Meadus, resulting in significant injury to the Grievor; both physically and psychologically.

[27] The Grievor had never before seen Mr. Beck demonstrate violent behaviour and was shocked by Mr. Beck's conduct; it was something he said he never could have expected to happen.

[28] Later that morning, once awakened by her spouse, Mrs. Meadus described herself as insanely upset when she discovered the injuries to her husband and recognized the need to take immediate action to assist him with his injuries and to clean up the home quickly, as their son was scheduled to return home from a sleep-over.

[29] Prior to cleaning their home, photographs of the interior and exterior were taken as well as Mr. Meadus' injuries, documenting the damage Mr. Beck caused during the Assault.

[30] Mr. Meadus sought emergency medical care at the local hospital that morning, which treatment continued for some weeks thereafter.

The Employer's Fact-finding Efforts and Investigation into the Assault

[31] During the morning of December 9, 2017 Mr. Meadus first contacted his other DWO supervisor, Mr. Joe Macintosh, to report the Assault. He informed Mr. Macintosh that he never wanted to work with John Beck again. Mr. Macintosh encouraged the Grievor to report the assault to the police, which he did.

[32] Mr. Meadus was next visited at his home that day by another member of management at the Facility, Mr. Chris Comeau, who attended him about mid-day. At the time Mr. Comeau was both the Duty Officer and the Acting Warden of the Facility, as its Warden Mr. John Nahanni was away.

[33] The Grievor explained that he did not remember much of the conversation with Mr. Comeau that day, but did recall him saying "…don't worry about nothing, take care of yourself, we'll get you through this and, take as much time as you need."

[34] During this home visit, Mr. Comeau took photos of the damage to the premises, reviewed the video record of the incident (porch camera) and asked questions about how the events of the previous evening had unfolded; described by Mr. Nahanni as more of a fact-finding exercise than a formal investigative process, although he also confirmed that Mr. Comeau had also spoken with Mr. Beck at that point.

[35] According to Mrs. Meadus, at this point her husband was seeking support and assistance from the Employer to guide him through all next steps in light of the identity of his assailant. However, it became clear to her that there was no separate process to address Mr. Meadus' injuries as he was tied to the Employer's investigation into the incident between him and Mr. Beck.

[36] Both Mr. and Mrs. Meadus recalled that during this initial visit, Mr. Comeau informed them that the medical attention sought should not include a reference to "Workers' Compensation", which Mrs. Meadus thought was an odd thing to mention at the time.

[37] Although Mr. Meadus acknowledged Mr. Comeau's direction on this issue, having made additional inquiries elsewhere, he later elected to file a WSCC claim regarding his injuries in the Assault.

[38] Mrs. Meadus recalled the topic of sick leave was discussed with Mr. Comeau during his visit. Having already been to the hospital for his injuries, Mr. Meadus relayed to Mr. Comeau the nature of the medical treatment prescribed to treat his injuries, which involved significant antibiotic treatments multiple times a day through stints inserted into his hands or arms.

[39] Mrs. Meadus was herself employed by the GNWT and had experience within the Department of Human Resources, although her direct role was in IT Projects and the Payroll System (2005-2018). Nonetheless, she had a familiarity with accessing health records and later assisted her husband in determining what sick leave might be available to him.

[40] On the issue of sick leave, the Board was informed that under GNWT policy employees can "go in the hole" on sick leave credits up to a maximum of 112.5 hours, following which the only available option is Sick Leave Without Pay ("SLWOP"). When in a deficit position, once an employee returns to work, they again accrue sick leave credits which would then be applied against any outstanding sick leave deficit.

[41] During Mr. Comeau's visit, Mr. Meadus inquired into the Employer's expectations for his return to work, not only because of his physical injuries but also because he was aware that he and Mr. Beck were scheduled to work together within a few days.

[42] Mr. Comeau encouraged Mr. Meadus to report the incident to the RCMP, which he had already done.

[43] Mr. Nahanni first learned of the Assault that morning, likely through Mr. Comeau. At the Hearing, he said he was both shocked by it and concerned for Mr. Meadus. As Warden of the Facility he was required to report the incident to others in accordance with NSCC protocols, and following which Mr. Nahanni called Mr. Meadus directly. Although he had no specific recollection of their conversation, he called the Grievor simply to check in with him, to see how he was doing. At some point he became aware that Mr. Meadus had reported the incident to the RCMP, a step which Mr. Nahanni fully supported.

[44] While Mr. Nahanni acknowledged that it was not a normal practice for a Duty Officer to go to a staff member's residence in response to an incident, he felt it was appropriate for Mr. Comeau to do so in this case, not only to gather information but to express support to Mr. Meadus.

[45] An RCMP officer also attended at the Meadus Residence that day. The Grievor testified that he was hesitant to press charges against Mr. Beck initially because he was a direct supervisor and a 22-year veteran at the Facility. He feared that if he did report the Assault and "…it turned out badly", he would

be subject to some form of retaliatory conduct. However, once the RCMP officer informed him that he would be laying charges against Mr. Beck regardless of whether or not Mr. Meadus supported that decision, Mr. Meadus felt this step was "a kind of clarification" that he had done nothing wrong.

[46] On December 10, 2017 Mr. Beck was charged by the RCMP under sections 267(b) and 430(4) of the *Criminal Code of Canada* for the assault upon Mr. Meadus.

[47] Once informed of the alleged assault upon Mr. Meadus, the Employer placed Mr. Beck on a Leave with Pay under sections 30 and 31 the *Public Service Act* RSNWT 1988, c.P-16, which provide:

> *Suspension where allegation of misconduct or incompetence*
>
> > **30.**(1) In any case where it is alleged that an employee has been guilty of misconduct or incompetence and the Minister considers it desirable to investigate the allegation, the Minister may
> >
> > (a) suspend the employee by an appropriate notice in writing for a period not exceeding 30 days; and
> >
> > (b) investigate the allegation.
> >
> > **31.** (1) An employee is entitled to remuneration in respect of any period during which he or she is under suspension pursuant to section 30.

[48] The Grievor testified that he raised the issue of his need for an accommodation with Mr. Comeau, Deputy Warden Security, right after the Assault and through telephone conversations with him over the course of the next seven days. Mrs. Meadus declared her presence on the telephone conversations between her spouse and Mr. Comeau and confirmed that her husband had specifically informed Mr. Comeau that he could not go back to work in his regular capacity at that point, and inquired into what accommodation options were being offered to him. Mr. Comeau informed him that he could only offer the Grievor work on the night shift at the Facility; which was in the Grievor's regular role but to be performed at different hours. This is not the accommodation that Mr. Meadus sought.

[49] In addition to his meeting with Mr. Comeau on December 9, 2017, the Grievor was asked to attend two additional Employer investigative meetings concerning the incident between Mr. Meadus and Mr. Beck; one held on December 14th and a second meeting on December 20, 2017. On each occasion he was accompanied by Mr. Parle of the UNW. Ms. Haley Mathisen, then a Labour Relations Advisor, attended and took notes of each meeting for the Employer. Mr. Parle's notes of the first meeting were also produced as an Exhibit.

[50] The Board noted that Mr. Parle's notes of the December 14, 2017 meeting were consistent with those of Ms. Mathisen, each indicating that according to Mr. Meadus, there were no issues between him and Mr. Beck, and who described their relationship, at least in part, as "we're friends, we go fishing together".

[51] Mr. Meadus explained that at the time of these meetings he was on heavy medication and did not feel well about going downtown with the stints in his hands, but he attended both meetings as requested. He found these interviews physically and emotionally draining.

[52] At the December 14, 2017 meeting, Mr. Meadus was asked whether Mr. Beck's behaviour at the Meadus Residence that night/morning was "out of character" and to which he replied, "We've been buddies for a while, never seen this type of behaviour before. Not at all."

[53] In that same vein, Mr. Nahanni testified that in the 25 years that he had known Mr. Beck he had never known him to be a violent person and was unaware of any violent incidents in the workplace which involved Mr. Beck. He described Mr. Beck as well-liked by staff in his professional role at the NSCC.

[54] On December 18, 2017 Mr. Meadus filed a Harassment Complaint under the Employer's *Harassment Free and Respectful Workplace* Policy (the "Policy").

[55] A second investigative meeting was held at the Employer's offices on December 20, 2017. Although this meeting was subsequent to his Harassment Complaint, Mr. Meadus could not recall any questions put to him about the complaint. He did however recall that he was again asked to describe and/or to clarify the circumstances of the Assault.

[56] Ms. Mathison was initially involved in the investigation into Mr. Beck's off-duty conduct during the early morning of December 9, 2017. She was also involved in interviews with Mr. Meadus (2), Mr. Langer (2) and with Mr. Beck (1).

[57] At the conclusion of the Employer's investigation into Mr. Beck's off-duty conduct at the Meadus Residence in the early hours of December 9, 2017, Mr. Beck was never returned to work as the Employer terminated his employment.

[58] In accordance with NSCC protocols, staff were not officially informed of the outcome on the investigation into Mr. Beck's conduct. However, largely through publicly available documents, Mr. Nahanni opined that staff likely became aware of Mr. Beck's fate through "common knowledge".

The Personal Harassment Complaint

[59] On December 18, 2017 Mr. Meadus submitted a Harassment Complaint (and statement) under the Policy on the basis of Personal Harassment, which is defined in the Policy as:

> …unwanted conduct that can be reasonably considered to have the purpose or effect of violating an individual's dignity and can reasonably be considered to result in creating an intimidating, hostile, degrading, humiliating or offensive environment. Personal harassment does not have to be based on a prohibited ground of discrimination listed in the *Human Rights Act.*

[60] In Mr. Meadus' statement [Exhibit 1, Tab 8], he described a telephone discussion with Greg Paul, Assistant Warden-Operations, shortly after the incident, inquiring if the Grievor would be returning to work on the Tuesday following the incident. He described his concerns at that prospect as follows:

> "…and advised [Mr. Paul] that he would likely be off for the entire set. until more information is known on what conditions NSCC is putting into place, including the duties required of him and the conditions around working with john beck, roland is concerned about going back to work for fear of the perception of calling supervisor conduct into question."

[61] Although the Employer had already removed Mr. Beck from the workplace upon becoming aware of the allegations of an assault December 9, 2017, it is unclear how or when Mr. Meadus was informed of Mr. Beck's employment status while the investigation into Mr. Beck's conduct was ongoing. Without doubt, such information may have eased Mr. Meadus' mind to know that he would not encounter Mr. Beck at the Facility.

[62] However, the status of internal investigations of this nature are generally not communicated to others beyond a need-to-know basis; moreso when the Employer is investigating a violent incident with criminal charges pending. Mr. Nahanni explained that it is not typical to have ongoing conversations with the employees involved in an investigation or its outcome in order to protect the integrity of the investigative process.

[63] The Employer responded to Mr. Meadus' Personal Harassment Complaint by acknowledging its receipt. In particular, Mr. Nahanni personally responded by both emailing and calling Mr. Meadus directly. Mr. Meadus recalled that Mr. Nahanni told him to "…take as much time as you need, that they were there for me". However, he did not discuss the matters under investigation with the Grievor.

[64] Mr. Meadus had feelings of abandonment by the Employer at this time. He felt that no one seemed to be checking in with him about how he was doing. However, Mr. Nahanni explained such direct contact with the Grievor would not fall within any assigned duties, but would be left to an individual's discretion depending on the nature of the relationship with Mr. Meadus. He further explained that the last thing one would want to do in contacting Mr. Meadus during this period would be to unintentionally exacerbate his situation.

[65] On January 25, 2018 by way of a letter from the Deputy Minister of Justice ("Mr. Goldney"), Mr. Meadus was informed that a preliminary assessment of his Personal Harassment Complaint determined that there was *prima facie* evidence to suggest that workplace harassment may have occurred "…to warrant an investigation, mediation or other course of action". However, Mr. Meadus was also informed that since a full investigation into the same incident was already underway, the Employer concluded that a second investigation was not required. Instead, the ongoing investigation would include the specific matters raised by the Grievor in the Personal Harassment Complaint (the "Complaint").

[66] The Employer assigned Haley Mathisen to conduct an investigation and assessment of the Complaint.

[67] At the time of the Hearing, Ms. Mathisen occupied the position of Manager, Employment Standards within the Department of Education, Culture and Employment since October 2019. At the time of the Assault, Ms. Mathison was a Labour Relations Advisor with the Department of Finance.

[68] A report of Ms. Mathisen's initial findings was issued on January 25, 2018, later adopted by Mr. Goldney. Under cross-examination, Ms. Mathison explained that she was unable to conclude that the Assault upon the Grievor by Mr. Beck constituted a workplace harassment issue, not just because they were off-duty, but also because they had both declared that they had a social relationship outside of work and therefore, outside of the employment relationship.

[69] By letter dated February 28, 2018, the Grievor was informed of the outcome of the Complaint, as follows:

> **Summary of the findings:**
>
> - Mr. Beck struck you in the face at your kitchen table.
> - Mr. Beck pushed you forcefully to the ground.
> - Mr. Beck bit your face.
>
> The investigators have concluded, using the balance of probabilities test, that the above allegations were substantiated. However, the evidence does not support that Mr. Beck's actions occurred "within the context of the employment relationship" and, as such, the complaint does not fall within the scope of the *Policy*.

[70] The Employer concluded that although the employee-organized Christmas party which preceded the events at the Meadus Residence **would** be considered to fall 'within the context of the employment relationship', that finding did not extend to the later assaults upon Mr. Meadus by Mr. Beck having been found to have occurred at a private, social occasion between admitted friends, off duty and outside of the workplace.

[71] The Employer also determined that although there was a sufficient nexus between Mr. Beck's off-duty conduct and the workplace to warrant discipline, his conduct did not constitute workplace harassment under the Policy.

[72] According to Mr. Parle, the events during and immediately after Team 2's Christmas Party on December 8 and into the early hours of December 9, 2017 definitively constituted a workplace event and Violence in the Workplace within the ambit of Article 55.01 of the Collective Agreement and within the scope of the Employer's Policy. In his words:

> It was a workplace Christmas Party that had been organized through the workplace. It was a continuation of that party…there wasn't a break; it wasn't like everyone went home and later reconvened.
>
> I don't know if this is written anywhere but we've always been under the understanding that anytime more than 50% of people are from the same workplace, [it] can be considered a workplace event. At the time [following the Christmas Party] everyone [at the Meadus Residence] were GNWT employees and three of four of them were NSCC employees; meaning 75%. In my mind, it constituted a workplace.

[73] At the time of the events relevant to the Grievance, it is of note that this Policy was not incorporated into the Collective Agreement then in place. Mr. Parle conceded this point during cross-examination. Nonetheless, he asserted that in the circumstances before the Board, the personal violence against Mr. Meadus can and should properly be described as violence in workplace.

[74] Mr. Beck was convicted of the criminal charges. Mr. Meadus was required to participate in the criminal trial, which was an exhausting experience for him to endure.

The WSCC Claim

[75] Mr. Nahanni explained that when an NSCC employee files a WSCC claim, an Employer is obliged to complete the Employer portion on the WSCC form within 72 hours, which it did.

[76] By letter dated December 18, 2017, the WSCC declined Mr. Meadus' claim and noted that the Employer disputed his claim on the basis that his injuries occurred during a physical altercation at "a party you hosted in your private residence…and that it was not a work related activity nor was it endorsed by the GNWT."

[77] Nonetheless, as a result of the injuries sustained in the Assault and the need for ongoing medical treatment, Mr. Meadus was off work from December 11, 2017 through to January 4, 2018.

Return to Work at the Facility: January 5, 2018 – May 9, 2018 inclusive

[78] On January 4, 2018 Mr. Meadus was cleared by the WSCC to resume fulltime regular duties.

[79] The Grievor contacted Mr. Nahanni in an effort to delay his return to work and to see if there were any other options available to him.

[80] At the time, Mr. Nahanni understood that Mr. Meadus' concerns were in connection with the fallout from the incident, including the attention that the visibility and the nature of his injuries inflicted by a direct supervisor would be perceived and discussed by both staff and inmates at the Facility.

[81] Upon his return to work the Grievor was engaged in training assignments during this period; albeit while working irregular hours. Mr. Meadus experienced difficulties when assigned to duties on the floor and sought assistance for his non-physical injuries through available resources through his NSCC benefit plan(s) and through his treating physician.

[82] He testified that the inmates at the Facility knew about the Assault before he returned to work, which negatively impacted upon him. He said he heard from inmates on a daily basis, asking him whether he wanted them "to take care of it" for him. He also felt that other officers blamed him. At times during this period he was assigned to the "control room" to open and close doors and away from floor duties. However, Mr. Meadus' concerns did not abate.

[83] Despite his ongoing anxiety upon returning to the NSCC, Mr. Meadus did not raise his concerns with management at that time, in part as he felt that he could not do so because Mr. Beck's criminal trial was approaching and understood management could not discuss these issues with him.

[84] The Grievor testified that he "was never ok" upon returning to work in early January 2018, but that he got through it. He explained that his training assignments with new staff members were easier for him than having to work with officers whom he knew, as they were aware of what had happened in December 2017.

[85] Despite his concerns in the workplace, the Grievor testified that he was not aware of any retaliatory acts arising from the Assault from those in management. However, he felt some level of harassment at the hands of his co-workers, who he felt blamed him in some way and treated him as if he had done something wrong when, in fact, Mr. Meadus knew he was the innocent victim. Again, he did not report his workplace concerns to management until some months later.

[86] By late April 2018, Mr. Meadus felt that he was unable to continue working at the Facility in any capacity. He did not feel safe at the Facility and had lost his trust in NSCC staff. He felt no one had his back and that he had been abandoned even though he was blameless in the unprovoked attack by a direct supervisor. This was a difficult time for the Grievor.

[87] On April 27, 2018, he wrote to Mr. Nahanni, saying in part:

> Over the past year I have had several family members become critically ill. I have been limited in my ability to provide support as I work irregular hours. Since the incident that occurred between myself and another NSCC staff member in December 2017, I have had an increasingly hard time in a full-time Correction Officer role. In addition to the duties, the pressures of shift work and interactions with inmates and staff continue to contribute to the difficulties. The low morale at NSCC contributes to my hardship even after hours. While I still believe in the importance of the position, I need to have a change in my daily work life.

[88] At that time Mr. Meadus also pointed out to Mr. Nahanni that he had applied for numerous positions within the GNWT, without success. He felt he had been black-listed on some level. As he had no accrued sick leave credits available, he requested an unpaid leave of absence for a year or a Transfer Assignment to an Indeterminate Relief Correction Officer position.

[89] Mr. Nahanni forwarded the Grievor's application for leave or change of position to Ms. Christy Campbell (Human Resources or ("HR)) and suggested that a Duty to Accommodate ("DTA") meeting with Mr. Meadus might be prudent. Mr. Nahanni expressed a concern that it "may appear that the employee is going to take a demotion for stress related reasons".

[90] In his view, a DTA meeting is warranted when a staff member appears about to give up on a career based upon an incident that had occurred. He felt that as an organization, the NSCC worked with employees to "help them through", a component of this being the DTA process.

[91] On May 4, 2018, a DTA meeting was held in response to Mr. Meadus' request for some form of accommodation, which Mr. Meadus appears to have attended with a Union representative but of which he had no recall.

[92] In attendance at the DTA meeting was Ms. Cheryle Donahue, in a DTA Advisor role, Ms. Christy Campbell (HR), Greg Paul (Assistant Director of Operations), Chris "Carson" (mis-named) as the UNW representative, and the Grievor.

[93] Ms. Donahue's notes of the DTA process meeting are set out in Exhibit 1, Tab 27. She testified that the purpose of the meeting was to explore the DTA process with the Grievor and to determine whether he wished to participate in that process.

[94] Ms. Donahue explained that the DTA process was intended to put accommodations in place to bring employees back to the workplace if currently not at work or to modify their existing position to accommodate any restrictions impacting their ability to do the role as set out in the job description, where and if possible.

[95] Ms. Donahue recalled that it was a very short meeting during which Mr. Meadus expressed disinterest in the DTA process, but agreed to discuss this issue with the Union before making a decision. Ms. Donahue's notes indicate that he would let Mr. Paul know of his decision.

THE LWOP May 10, 2018 – May 9, 2019

[96] Mr. Meadus became frustrated by the delay in assisting him to obtain a Transfer Assignment to a Relief role or personal leave if necessary. He recalled a telephone conversation with Greg Paul, the Assistant Warden, about his prospects of obtaining a Transfer Assignment into a Relief role as part of the DTA process. He was informed by Mr. Paul that he would first have to return to his full-time position before he could be moved into a Transfer Assignment.

[97] He followed up with Mr. Nahanni on May 7, 2018, expressing a pressing need to move away from his current work situation.

[98] At this point, the Grievor hoped that a year away from the NSCC would allow him to reset and hopefully return to his position as a Corrections Officer.

[99] On May 8, 2018, the Grievor sent an email to Mr. Nahanni, requesting a six month leave of absence without pay (LWOP"). As Mr. Nahanni was away at the time, Mr. VanMetre, the Assistant Director Facility Operations, assisted Mr. Meadus in processing this application.

[100] On May 9, 2018, Ms. Natasha Ramm, Benefits Specialist, emailed the LWOP documents for the Grievor to complete for his upcoming leave, with instructions of what he needed to complete and return

to her. These documents included a Request for Time Off Work, a Leave Without Pay Return to Service Agreement, and a Benefit Entitlements for Employees on Leave Without Pay – Personal Reasons form.

[101] Although Mr. Meadus acknowledged that he sought assistance from Mr. VanMetre on the LWOP because Mr. Nahanni was away, he believed it was Mr. Nahanni who assisted him in completing the LWOP forms on May 9, 2018, which Mr. Nahanni disputed during his evidence.

[102] According to the Grievor, the paperwork for his LWOP was sent to the Facility. Mr. Meadus testified that he attended at the Facility and whomever presented him with the paperwork simply told him to "sign here, here and here", and that was what he did. He believed that he met personally with Mr. Nahanni at the time.

[103] Mr. Meadus testified that he went to Mr. Nahanni's office and informed him that he did not want to have to pay anything in moving into a LWOP position. He said Mr. Nahanni "…told me, don't worry about nothing – you won't have to pay for anything; it should all be covered".

[104] Mr. Meadus recalled that he specifically mentioned to Mr. Nahanni that he did not need coverage for benefits while on the LWOP because he already had coverage through his spouse. Mr. Nahanni told him that he should just sign the paperwork and send it in "…and we'll take care of it".

[105] Mr. Meadus said he did not review the documents before signing them, did not contact Ms. Ramm with any questions and, no one explained the financial implications of signing these forms, apart from Mr. Nahanni who told him that he would not have to pay for anything. He said he took the word of the Warden and signed the documents on May 9, 2018 and Mr. Goldney authorized this first 6-month leave period on May 11, 2018.

[106] Mr. Nahanni forwarded the approved LWOP forms to Mr. Meadus on May 11, 2018 and the extension to the LWOP in October 2018.

[107] To Mr. Meadus' dismay, by letter dated February 13, 2020 he was notified by Financial and Employee Shared Services that he owed $2,680.63 for the insurance coverage that he applied for during the LWOP period (the "Debt"). He followed up with Mr. Nahanni and reminded him he was told there would be "no cost" to him associated with the LWOP. Mr. Nahanni responded in a group email which included the Griever that he was not aware of any costs that would have been passed on to the employee, and apologized to Mr. Meadus for the inconvenience.

[108] In his testimony before the Board, Mr. Nahanni disputed Mr. Meadus' recollections on this issue.

- He denied meeting personally with Mr. Meadus in his office or anywhere to discuss the LWOP forms sent to Grievor by Ms. Ramm or to instruct him on signing the forms.
- Although he did not see any costs associated with a LWOP; it was not his role to discuss any financial implications of doing so, as he is not a Benefits Specialist. He had no such discussions with the Grievor.

- Mr. Meadus did not initiate any discussions with him about any financial consequences of signing the forms.
- Mr. Meadus did not make statements to him about not wanting to incur any costs by signing the forms.

[109] It was Mr. Nahanni's evidence that any concerns that Mr. Meadus may have had in signing the LWOP forms only came up "way down the line" and only once the Grievor was made aware of the Debt.

[110] Mr. Nahanni pointed out that the LWOP approval process does not afford him any discretion to veto costs assigned to an employee arising therefrom by the Employer.

[111] Through the chain of command, Mr. Meadus was granted two successive six month terms of a Personal Leave Without Pay ("LWOP") from May 10, 2018 – May 9, 2019. The second six month term was approved in October 2018. Once again, Ms. Ramm sent the necessary forms for Mr. Meadus to complete for this extended LWOP period.

[112] Five days into the LWOP period, Mr. Meadus was offered an Automotive Service Manager position at Canadian Tire, which he accepted. He was tasked with organizing this department and hiring staff. He enjoyed this job.

[113] Throughout this year long period, members of NSCC's management would frequently attend upon Mr. Meadus' workplace with a request that he fix their vehicles, through the course of which they would chat about work at the Facility.

[114] Towards the end of the LWOP, the Grievor realized that he was not ready to return to work at the Facility as he did not feel safe there. He described feeling a lot of animosity, particularly when Mr. Beck was convicted and sentenced to jail, which caused a lot of "talk". He was approached to return in a training role, which he felt unable to pursue in the circumstances.

The Transfer Assignment to Relief Corrections Officer May 10, 2019 – May 9, 2020

[115] Mr. Meadus next sought a Transfer Assignment ("TA") to an Indeterminate Relief Corrections Officer immediately following the expiry of the LWOP. At that point he was informed that he would first need to resign from his full-time Indeterminate Corrections Officer position; which he submitted to Mr. Nahanni on April 30, 2019, effective May 10, 2019.

[116] However, in the interim the Grievor was offered a TA Relief position for a one year term, reporting to Mr. Justin Bailey. Mr. Meadus felt this opportunity would allow him an additional year to determine if he could return to the NSCC in a Corrections Officer role, or at all. Mr. Meadus rescinded his earlier resignation on May 1, 2019.

[117] The TA Relief position was approved by Mr. Goldney on May 31, 2019, for the period May 10, 2019 – May 9, 2020.

[118] In accepting the TA position, the Grievor was aware that he was not required to work any shifts during this one -year period. Nonetheless the Grievor informed Mr. Bailey that he anticipated being able to pick up a shift here and there, depending upon how he was feeling.

[119] Mr. Meadus maintained his full-time employment at Canadian Tire throughout the TA Relief assignment. At its conclusion, Mr. Meadus requested another year of Relief, which the Employer denied for the reasons set out in Mr. Bailey's email response of May 5, 2020, as follows:

> I have had the opportunity to consult with the management team and human resources on options available to the employer. At this present time the Department of Justice is unable to support an extension of your transfer assignment into the Relief Corrections Officer position for the following reasons:
>
> -Through the Covid-19 pandemic, we require officers on our teams for operational requirements.
> -Since you have begun your transfer assignment, you have not accepted any shift that have been offered. We rely on our relief officers to accept shifts to assist with meeting our operational requirements on a daily basis.

[120] Mr. Nahanni was involved in the decision to deny Mr. Meadus a second TA Relief contract, although he also noted that under the Collective Agreement an employee cannot be terminated from Relief unless they have not accepted any shifts within a two year period. He confirmed that Mr. Meadus had not violated the terms of the Collective Agreement at the conclusion of the one year TA Relief assignment.

[121] Mr. Meadus was informed that he was expected to resume his home position as a fulltime Corrections Officer upon the expiry to the TA Relief assignment on May 9, 2020; absent an underlying condition.

[122] On May 5, 2020 Mr. Meadus submitted his resignation to Mr. Bailey, which he rescinded on May 7, 2020, advising the Employer, "I cannot return to my full-time position for medical reasons and can obtain a doctors (sic) note if necessary". Mr. Parle assisted Mr. Meadus in rescinding his resignation on May 7, 2020.

[123] Mr. Nahanni understood that Mr. Meadus rescinded his resignation for medical reasons, which should have triggered the DTA process in response; but did not.

[124] On May 14, 2020, Mr. Meadus inquired of Mr. Bailey if the Department of Justice would forgive the Debt he incurred during the LWOP, unknowingly. He followed up with Mr. VanMetre in August 2020, having received no response to his earlier inquiry. He was advised that the matter was under review.

[125] Mr. Meadus' TA ended May 9, 2020. He had informed the Employer that he was unable to resume his full-time Indeterminate Corrections Officer 1 position as a result of his continued anxiety stemming from the Assault. For reasons which are unclear, Mr. Meadus' employment status at the NSCC was not

further addressed or the DTA process triggered until he was asked to attend a DTA meeting on October 8, 2020.

[126] In the interim, in August 2020, the Grievor wrote to his MLA and to the Minister of Justice to "escalate the matter". He also wrote to Mr. VanMetre. Specifically Mr. Meadus sought that the Employer forgive the Debt and any outstanding sick leave be written off.

[127] Mr. VanMetre responded to the Grievor on August 25, 2020, who advised that the LWOP issue was under review. In the interim, Mr. Meadus was asked to inform Mr. VanMetre what his intentions were regarding his full-time Indeterminate Corrections Officer position and was asked whether he had "officially tendered your resignation". There is no reported response to this inquiry.

[128] Mr. Meadus heard nothing from the Employer thereafter until it requested that the Grievor attend an Accommodation Meeting on October 8, 2020; a delay which Mr. Nahanni was unable to explain but which he described as "unacceptable". He further acknowledged that it was his responsibility to advance the DTA process and that the delay caused some harm to the Grievor.

Duty To Accommodate Meeting October 8, 2020

[129] According to Ms. Campbell's notes of the meeting, those in attendance via teleconference at the DTA Meeting in addition to herself were Ms. Georgina Carr, DTA Advisor; Mr. Parle, UNW; and Mr. Meadus. However, Mr. Nahanni also attended the meeting that day.

[130] Ms. Carr explained that her role as a DTA Advisor was to provide advice to the Employer on its duty to accommodate employees under the protected grounds under the *Human Rights Act,* short of undue hardship. She opined that if the Grievor was medically unable to return to his position as a Corrections Officer, the Department of Justice would have an obligation to determine if any alternate, available positions for which he was qualified met his restrictions and/or limitations. If not, the search would broaden to include the GNWT overall.

[131] She described the DTA process in the event of a disability (whether through injury, illness or accident inside or outside of the workplace) included the identification of a medical condition along with any restrictions and limitations.

[132] Mr. Nahanni recalled that the meeting did not go smoothly and that Mr. Meadus was upset. In Mr. Nahanni's view, the purpose of the meeting was to figure out how to move forward in response to the Grievor's situation; specifically on issues of accommodation and resignation; whether supporting his return to work through the DTA process or if not within Corrections, then elsewhere through another GNWT position.

[133] Mr. Parle described the DTA meeting as frustrating; one in which he felt the need to actively intervene as it appeared to him that the Employer's focus was to obtain Mr. Meadus' resignation as opposed to identifying viable steps in the accommodation process. He raised his objections quickly.

[134] The Grievor also sought a resolution of the Debt and the sick leave credit issue at this meeting which he had earlier raised with Mr. VanMetre and others since, in the Union's view, the injuries inflicted upon the Grievor on December 9, 2017 and thereafter, occurred during the course of employment.

[135] During the meeting Mr. Meadus agreed to obtain a medical prognosis of his restrictions and limitations, which resulted in an adjournment of the meeting pending its receipt.

[136] Mr. Nahanni forwarded the Employer's medical prognosis form on November 2, 2020, which the Griever had his doctor complete and which he returned to the Employer on November 6, 2020. His return to work restriction was identified as, "Mr. Meadus cannot return to work in Corrections".

[137] In Mr. Parle's view, since the Grievor was unable to return to Corrections, he was necessarily seeking an accommodation outside of the NSCC, which the Grievor confirmed.

[138] Although a further DTA meeting was scheduled for February 2021, the DTA process was mutually delayed thereafter.

[139] At the Hearing, the Grievor testified that he had no interest in returning to a position with the GNWT in any capacity and remained employed as Automotive Service Manager at Canadian Tire in Yellowknife, NT.

AUTHORITIES

[140] For the Union:

TAB 1 Adam Beatty, David M. Beatty & Donald J.M. Brown, "Off-duty Behaviour," *Canadian Labour Arbitration,* 5th ed (Toronto: Carswell, 2019) at para 7:3010

TAB 2 Adam Beatty, David M. Beatty & Donald J.M. Brown, "Aggressive and Abusive Behaviour," *Canadian Labour Arbitration,* 5th ed (Toronto: Carswell, 2019) at para 7:3430

TAB 3 *Hamilton-Wentworth (Regional Municipality) v I.U.O.E. Loc 772 (Hocking) Re.*, [1993] O.L.A.A. No. 81; 1993 CarswellOnt 1267

TAB 4 *Blouin Drywall Contractors Ltd. v C.J.A., Local 2486*, [1975] 57 DLR (3d) 199; OJ No. 31

[141] For the Employer:

TAB 1 *Bazley v Currey*, [1999] 2 SCR 534; 174 DLR (4^{th}) 45

TAB 2 *British Columbia (Public Service Employees Relations Commission) v B.C.G.E.U.*, 1996 CarswellBC 3168, (1996), 56 L.A.C. (4^{th}) 162 (B.C. Arb.)

TAB 3 Adam Beatty, David M. Beatty & Donald J.M. Brown*, Canadian Labour Arbitration,* 5th ed (Toronto: Carswell, 2019) at para 2:1203

TAB 4 *Cluff v Canada (Department of Agriculture),* [1993] FCJ No. 1337; 71 FTR 122

TAB 5 Collective Agreement between the Union of Northern Workers and the Minister Responsible for the Public Service Act, expires March 31, 2021 – excerpt

TAB 6 *Ekati and PSAC, Local X3050 (JG), Re,* 2018 CarswellNWT 31 (N.W.T. Arb.)

TAB 7 *The Northwest Territories Power Corp. and PSAC (Coleman), Re,* 2020 CarswellBC 3219, 147 C.L.A.S. 43

TAB 8 *Public Service Act*, RSNWT 1988, c.P-16

TAB 9 *Robertson v Manitoba Keewatinowi Okimakanak Inc*., 2011 MBCA 4

TAB 10 *Schofield v AltaSteel Ltd.,* 2015 AHRC 15

TAB 11 *Telus and TWU (Tubbs), Re*, 2013 CarswellNat 4511, [2013] CLAD No. 357 (Can. Arb.)

[142] For the Board:

1. *Human Rights Act*, SNWT 2002, c.18, s. 5
2. *Millhaven Fibres Ltd. v O.C.A.W., Local 9-670*, (1967) OLAA No. 1; 18 LAC 324 (Ont. Arb.)
3. *Westcoast Energy Inc. v The Queen*, 2020 TCC 116
4. *Midland Hutterian Brethren v R,* [2000] 195 DLR (4th) 450; FCJ No. 2098 (FCC)
5. *Laurent Duverger v 2553-4330 Quebec Inc. (Aéropro),* 2019 CHRT 18
6. *Leclair* v *Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97
7. *Kvaska v Gateway Motors (Edmonton) Ltd*., 2020 AHRC 94
8. *Serge Lafrenière c Via Rail Canada Inc*., 2019 CHRT 16
9. *Villebrun v BHP Billiton Diamonds, Inc*. 2009 CanLII 101362

SUBMISSIONS OF THE PARTIES

The Union

[143] The Union does not dispute that the assaults upon Mr. Meadus by a direct supervisor at the Meadus Resident in the early hours of December 9, 2017 occurred outside the workplace and while both Mr. Meadus and his assailant were off-duty.

[144] However it is the Union's position that these assaults occurred within the context of the employment relationship, as did the sequelae arising therefrom which manifested themselves in the workplace, serving as the foundation of the Grievance properly characterized as "Harassment/Discrimination/Human Rights" and not simply as an "assault *simpliciter".*

[145] Counsel for the Union submitted that notwithstanding the challenging legal issue raised by a Grievance of this nature, the factual background of relevant events establish the necessary nexus between the assault and the workplace in sufficient degree to allow the Grievance to succeed.

[146] In its simplest terms, the Union submits the basis for the Grievance is: Mr. Meadus was assaulted by his direct supervisor; the Assault caused Mr. Meadus harm; and, as a consequence of the Assault, Mr. Meadus had to be off work including time on sick leave without pay. In its view, these circumstances together constitute "workplace violence" in violation of Article 55.01 of the Collective Agreement, thereby entitling the Grievor to paid sick leave.

[147] The Union further asserts that in the Employer's mischaracterization of the Grievance, it failed the Grievor; in mishandling his Harassment Complaint under the Employer's *Harassment Free and Respectful Workplace Policy* and, in mishandling its duty to accommodate Mr. Meadus' physical and mental limitations as a result of the Assault.

[148] In assessing the nexus of the Assault to the workplace, it encouraged the Board to invoke a novel application of the test set out in *Millhaven Fibres*, supra, at paras 19-20; in essence analyzing relevant factors present as a shield in a non-disciplinary perspective, rather than as a sword in connection with Mr. Beck's off-duty conduct. The Union further submits that this analysis results in the following findings:

- Mr. Beck's off-duty conduct harmed the Employer's reputation or product.
- It rendered Mr. Meadus unable to perform his duties satisfactorily.
- It led to Mr. Meadus' refusal, reluctance or inability to work with Mr. Beck.
- Mr. Beck was guilty of a serious breach of the *Criminal Code*, rendering his conduct injurious to the general reputation of the NSCC and caused actual injury to the Grievor.
- It placed difficulty in the way of the NSCC properly carrying out its function of efficiently managing its enterprise, including its handling of Mr. Meadus' leave and transfer assignment.

[149] Counsel acknowledged that the normal application of the *Millhaven Fibres* test affords the Employer a means to apply punitive employment consequences to non-employment-related activity.

Nonetheless it submits that an equitable application of those principles may be applied in a non-punitive fashion to respond to the aftereffects of the assailant's off-duty conduct upon Mr. Meadus.

[150] The Union also sought to distinguish the jurisdictional reasoning in *Hamilton-Wentworth,* supra at paras 18-19, a case of an assault by a supervisor upon a union member at a golf tournament, in which the Arbitrator concluded, in part, "…*the fact that the matter arose during a social activity having a connection to the work place do not establish a sufficient nexus to the collective agreement and do not make the grievance arbitrable. The employee handbook provisions do not form part of the collective agreement and do not confer any jurisdiction on an arbitrator particularly when no disciplinary action has been taken that would establish a sufficient nexus or connection to the collective agreement."*

[151] In contrast, the Union asserts that the Meadus Grievance is squarely within the ambit of Article 55.01, which requires the Board only to determine whether the Grievor was in the course of his employment at the time of the Assault.

[152] It further argues that applying an inverse analysis to the typical off-duty conduct examination would find in the Grievor's favour on the basis of the Employer's imposition of discipline upon Mr. Beck for off-duty conduct because it was sufficiently connected to the workplace. It submits that its own investigation would not have proceeded otherwise since the Employer was aware when, how and where the Assault occurred and that the RCMP were already handling the matter.

[153] The Union asserts that the Employer mishandled Mr. Meadus' Harassment Complaint, filed December 18, 2017 by failing to conduct a separate investigation into the Complaint and erred in concluding that Mr. Beck's conduct did not occur within the context of the employment relationship but also because its analysis failed to recognize or address the manifesting consequences of the Assault.

[154] Counsel argued that the Employer-generated Standards of Professional Conduct set out in the NSCC's Standing Orders regulate the conduct of correctional staff both on-duty and off-duty in sufficient degree to render off-duty misconduct a workplace issue.

[155] In addition, the Union submits that the Employer wholly failed in its duty to accommodate the Grievor over a two year period, even if the Board concludes that the Assault in issue does not fall within the ambit of Article 55 of the Collective Agreement.

[156] The Union submits that as the Employer breached the Collective Agreement, the Grievance must be upheld and that the Board remain seized thereafter to address remedy following therefrom.

The Employer

[157] The Employer submits in its evaluation of the scope of the Grievance that although the Union has raised a myriad of issues spanning multiple distinct processes requiring separate evaluations by the Board, once those tasks are completed it will become apparent that the only issue relevant to the resolution of the Grievance is the application of Article 55 of the Collective Agreement.

[158] Counsel pointed out that Mr. Meadus' Personal Harassment Complaint, including its investigation and outcome, under the Employer's *Harassment Free and Respectful Workplace Policy* is a policy both explicitly absent from the Collective Agreement and therefore outside the scope of the Board's jurisdiction. As authority for the proposition that policies promulgated by an employer cannot give rise to a grievance unless they form part of the collective agreement, it referred the Board to *TELUS and TWU (Tubbs), Re,* supra at para. 84.

[159] The Employer also pointed that under Article 37.01(2), resolution of a grievance arising from the interpretation or application of a provision of an Act, or a regulation, direction or other instrument is the jurisdiction of the Minister responsible for the *Public Service Act,* and not the arbitrator.

[160] Although the nature of the Grievance was described in the grievance documents as "discrimination/harassment/human rights", counsel argued that grievances concerning discrimination/human rights under Article 3.02 of the Collective Agreement, must be tied to a prohibited ground or a protected characteristic under "the applicable legislation". Counsel further argued that the evidence presented to the Board failed to tie the assault upon Mr. Meadus or Mr. Beck's treatment of the Grievor to a prohibited ground of discrimination under Article 3.02 or applicable legislation. As such, a connection to human rights legislation or jurisdiction flowing from Article 3 has not been established.

[161] The Employer submits that immediately upon learning of the assault upon Mr. Meadus, the Employer placed Mr. Beck on a paid leave in accordance with the applicable provisions of the *Public Service Act*, thereby removing him from the workplace pending the outcome of its investigation into Mr. Beck's off-duty conduct under the Employer's North Slave Correctional Centre – Standing Orders (the "Code of Conduct").

[162] The Code of Conduct investigation resulted in the termination of Mr. Beck's employment at the NSCC.

[163] Turning now to Article 55 of the Collective Agreement, the Employer denies that it conducted an investigation into "Violence in the Workplace", having determined that the assault did not happen in the "workplace" or "during the course of employment", but rather at the Meadus Residence when both Mr. Beck and Mr. Meadus were off duty.

[164] Counsel submitted that applying the plain meaning of the words used in this provision of the Collective Agreement supports the Employer's interpretation of Article 55 and which, accordingly, has no application in determining the merits of the Grievance before the Board.

[165] It further argued that it is the Union which bears the burden of proof to establish that the Assault occurred either "in the workplace" or "during the course of his/her employment" in order to trigger the application of Article 55, and failed to satisfy that burden through its witnesses.

[166] It is the Employer's position that the only connection between the Assault and the workplace is the common employment of Mr. Beck and Mr. Meadus by the Employer, which on its face is insufficient to establish that the Assault occurred during the course of employment under Article 55.

[167] Rather, counsel submits that both the Grievor and Mrs. Meadus gave evidence about a relationship between the Grievor and Mr. Beck outside of the working relationship between them; whether as a social or as a client relationship and neither gave evidence that Mr. Beck ever attended at their home in connection with work or a duty owed to the Employer.

[168] The Employer submits that what occurred in the early hours of December 9, 2017 was an assault during a private social event at the Meadus Residence by one Corrections employee upon another, albeit a supervisor-subordinate professional relationship, causing injury to the Grievor. However much the Employer regrets the injuries suffered by Mr. Meadus at the hands of Mr. Beck, it submits that the incident occurred outside of the workplace and outside of "the course of employment". The evidence led by the Union failed to establish a connection to work (beyond a common employer) or to a duty owed to the Employer as either incidental to employment or within the scope of an authorized work activity.

[169] The Employer argued the principles of vicarious liability discussed in *Bazley v Curry, supra, ("Bazley")* and in *Robertson v Manitoba Keewatinowi Okimakanak Inc.,* supra, (*"Robertson")* will assist the Board in interpreting the meaning of "during the course of employment" as set out in Article 55 and the circumstances in which Mr. Meadus was assaulted by Mr. Beck.

[170] The Employer submits that the mere factor of establishing a supervisor-subordinate relationship is not itself sufficient to trigger principles of vicarious liability under *Bazley, Robertson* or under the evidence before the Board in this Grievance.

[171] The Employer disputes the Union's arguments that it is open to the Board to adopt the test set out in the *Millhaven Fibres,* supra*,* in determining whether Article 55 applies to the assault upon Mr. Meadus. It does so on the basis that the test in *Millhaven Fibres* is the basic test used to determine whether or not off-duty conduct may be subject to discipline, and nothing more.

[172] It submits that the fact that Mr. Beck was disciplined for the Assault does not equate to a determination that it occurred during the course of his employment, which is the issue before the Board.

[173] Should the Board conclude that the Assault upon Mr. Meadus by Mr. Beck triggers the application of Article 55, the Employer submits that it has met its obligations thereunder.

[174] It further submits that in any event, whether the Meadus Residence could be considered a workplace or the actions of Mr. Beck occurred during the course of Mr. Meadus' employment, the relief available to Mr. Meadus does not extend to the relief that the Union is seeking in the Grievance.

[175] In summary, the Employer submits that Article 55 has no application to Mr. Beck's assault upon Mr. Meadus and there being no other violations of the Collective Agreement established, it submits the Board should dismiss the Grievance in its entirety.

THE DECISION

[176] I have carefully considered the evidence of the witnesses presented during the course of the Hearing, the voluminous documentary evidence submitted through the Joint Book of Documents and/or through those witness, entered as Exhibits in these proceedings, as well as the comprehensive and helpful submissions and authorities provided by counsel to further assist the Board.

[177] The essential facts relevant to this Grievance are not in dispute. In the early morning hours of December 9, 2017, immediately following an informal Christmas party for members of NSCC's Team 2 correctional staff and partners, the Grievor's wife, Candace Meadus, unilaterally invited two members of the Team to their home for additional Christmas drinks. At the Meadus Residence, Roland Meadus was viciously assaulted by one of his direct supervisors at the time, John Beck, and suffered both physical and psychological injuries thereafter, for which he seeks compensation and damages arising therefrom.

[178] What is in dispute is the characterization of these facts, from which a determination of the individual and collective obligations of the parties and consequences arising therefrom will flow and which, in turn, will determine the merits of the Grievance.

[179] In order to do so, it is first necessary to undertake the following factual assessments:

- Was Mr. Meadus assaulted in the workplace or during the course of his employment, and if so, did the Employer meet its obligations under Article 55 of the Collective Agreement?
- Did the Employer's treatment of the Grievor throughout its investigative processes following the assault meet its obligations under Article 3.02?
- Does Mr. Meadus' Personal Harassment Complaint under the Employer's *Harassment Free and Respectful Workplace Policy* fall within the Grievance and therefore within the Board's jurisdiction?
- Did the Employer meet its Duty to Accommodate the Grievor arising from his injuries suffered in the Assault?

The Workplace or in the Course of Employment

[180] The Grievance asserts:

> *The assault occurred immediately following a workplace party which was sanctioned by the employer and the only individuals present were all employed by the Government of the Northwest Territories at the North Slave Correctional Complex making this a workplace incident.*

[181] The term "workplace" is not defined in the Collective Agreement, neither under Article 2 (Interpretation and Definitions) nor under Article 55 (Violence in the Workplace), or at all.

[182] In construing a contractual agreement, arbitral jurisprudence has identified a number of well-established guiding principles, amongst them as summarized in *The Northwest Territories Power Corp,* supra, at para. 22, as follows:

> In *Pacific Press*, [1995] B.C.C.A.A.A. No. 627, Arbitrator Bird set out a number of the guiding interpretive principles:
>
> 1. The object of interpretation is to discover the mutual intention of the parties.
>
> 2. The primary resource for an interpretation is the collective agreement.
>
> 3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
>
> 4. Extrinsic evidence may clarify but not contradict a collective agreement.
>
> 5. A very important promise is likely to be clearly and unequivocally expressed.
>
> 6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
>
> 7. All clauses and words in a collective agreement should be given meaning, if possible.
>
> 8. Where an agreement uses different words, one presumes that the parties intended different meanings.
>
> 9. Ordinarily words in a collective agreement should be given their plain meaning.
>
> 10. Parties are presumed to know about relevant jurisprudence.

[183] It is generally accepted that the plain meaning of "workplace" is the place where work is performed; and depending on the nature of the work itself, a workplace may be at a specific physical location (office, plant, premise, home office) or a variety of locations (branch offices, virtual offices, other workplaces or where "work" is undertaken), to name a few. It can also amount to a gathering of workers at an outside location, such as at a conference, a trade show, or even at a social event sponsored or endorsed by an employer, directly or indirectly.

[184] I am guided in this exercise of determining what the parties intended by the agreed wording in Article 55.01 of the Collective Agreement, which provides:

> *The Employer and the Union recognize that every employee has a right to freedom from violence* ***in the workplace****. Violence refers to any conduct directed towards a staff member that hurts or causes harm through verbal, physical, sexual or psychological means. Workplace violence involves any incidents where an employee is abused, threatened, or assaulted* ***during the course of his/her employment****. This includes the application of force, threat with or without a weapon and severe verbal abuse.* [emphasis added]

[185] Clearly, the parties contemplated two distinct components to the "workplace"; at a physical location (NSCC) or possibly elsewhere, when an employee is "in" or "during" the course of employment.

[186] In reaching this conclusion I considered the scope of the Employer's *Harassment Free and Respectful Workplace Policy*, some provisions of which, including Personal Harassment, were later incorporated into a subsequent collective agreement. This Policy expressly extends the protections from workplace harassment to "... **at or away from the work place during or outside of working hours within the context of the employment relationship."** [emphasis added]

[187] I am persuaded that the plain meaning of the "workplace" would either constitute at an established physical location (the NSCC) or whenever an employee is in or during the course of their employment.

[188] I am also persuaded that the Team 2 Christmas Party held during the evening of December 8, 2017 reasonably constituted a "workplace event". Although Mr. Nahanni testified that this social occasion was not directly sponsored or endorsed by the Employer, in the Board's view it need not be to constitute a workplace event.

[189] Rather, in making such a determination it is first necessary to analyze the circumstances surrounding the establishment of the event and then identify the capacity in which the attendees participated in the Christmas party at Hot Shots that evening.

[190] In this case, I note that on November 11, 2017, Stuart Mawby, a member of NSCC's Team 2 staff, circulated an email to other members of Team 2, inquiring if there was an interest in "*having a Christmas Brunch or Party*" and, if so, he volunteered to organize it. On November 12, 2017, DWO Beck responded to the invite by email as follows*, "Thanks Stuart sounds like a good time."* [Exhibit 1, Tab 16]

[191] The invitation to Hot Shots was extended only to members of Team 2, along with their partners. The party was implicitly approved by one of Team 2's direct supervisors, DWO Beck. Mr. Meadus testified that approximately 90% of members of Team 2 attended the Christmas party.

[192] This evidence persuasively established that the members of Team 2 who attended the Christmas party at Hot Shots on December 8, 2017 did so in their capacity as corrections officers of Team 2; establishing an informal workplace event.

[193] The next issue before the Board is determining whether the Assault upon Mr. Meadus at the Meadus Residence also constituted a workplace incident as asserted by the Union.

[194] While I acknowledge that Mr. Parle, a UNW Service Officer, had developed an understanding of an "unwritten rule" that had circulated within the NSCC for an unknown period of time amongst an unknown number of NSCC staff, I am not persuaded that such a "rule" has been established, as described by Mr. Parle or at all.

[195] Although I accept that Mr. Parle believed that an alternate "workplace" was constituted whenever and wherever a majority of attendees at an event outside of the workplace were NSCC correctional officers, which the Employer denied, no evidence was introduced to support that belief, however honestly

held. Nor was any authority identified to support such a proposition. In my view, a "workplace" or being in the "course of employment" is something other than a mathematical calculation.

[196] I am unable to conclude that the Assault at the Meadus Residence on December 9, 2017 had a sufficient nexus to the workplace to allow me to conclude that a "workplace incident" is reasonably established in order to trigger the application of Article 55.

[197] I have concluded that since the Assault occurred away from the workplace, outside of work hours and while both Mr. Meadus and Mr. Beck were off-duty, to succeed on this issue it is necessary to establish that Mr. Meadus was "in the course of employment" when the Assault occurred.

[198] In *Cluff,* supra, at para. 17, criteria to assess whether an incident or event took place "in the course of employment" was outlined, as follows:

> *An employee is in the course of employment when, within the period covered by the employment, he or she is carrying out:*
>
> *(1) activities which he or she might normally or reasonably do or be specifically authorised to do while so employed;*
>
> *(2) activities which fairly and reasonably may be said to be incidental to the employment or logically and naturally connected with it;*
>
> *(3) activities in furtherance of duties he or she owes to his or her employer; or*
>
> *(4) activities in furtherance of duties owed to the employer where the latter is exercising or could exercise control over what the employee does.*
>
> *An employee is still in the course of employment when he or she is carrying out intentionally or unintentionally, authorised or unauthorised, with or without the approval of his or her employer, activities which are discriminatory under the CHRA and are in some way related or associated with the employment. However, an employee is considered to have deviated from the course of his or her employment when engaged in those activities which are not related to his or her employment or are personal in nature.*
> (emphasis added).

[199] In assessing whether Mr. Meadus was within the "course of employment" when the Assault occurred, I have considered Mrs. Meadus' evidence concerning her sudden and unplanned invitation extended to Mr. Beck and to Mr. Langer to come to their house immediately following the informal Team 2 Christmas party. Under cross-examination, Mrs. Meadus stated that she extended the invite because they sat with Mr. Beck and Mr. Langer throughout the evening and had such a good time in doing so, that she invited them to their home. She expressly denied that she felt "compelled" to invite Mr. Beck.

[200] Mrs. Meadus' evidence lends itself only to the establishment of a personal social occasion, outside the scope of employment and outside of the employment relationship.

[201] I have also considered that while the dinner was organized for Team 2 members, the invite to the Meadus Residence was extended only to the 2 members of the Team with whom they sat throughout most of the evening, enjoying what Mr. Meadus referred as a "great party".

[202] In addition I have considered the evidence concerning the other facets of Mr. Meadus' relationship with Mr. Beck, outside of the employment relationship whether as Mr. Beck was characterized by the Grievor as a "client" or as a "friend" or "buddy".

[203] I have considered the recent case *Westcoast Energy Inc. v The Queen*, supra, which considered *Cluff v Canada (Department of Agriculture),* supra, at para 52, citing *Midland Hutterian Brethren v R,* supra, as follows:

> *It was accepted in Cluff* [citation omitted] *that it was relevant to a determination of whether an employee was "in the course of" his or her employment for the purpose of this provision to consider whether the person was engaged in activities that were related to his or her employment, as opposed to those that were personal in nature."*

[204] I have considered the comments in *Laurent Duverger v 2553-4330 Quebec Inc. (Aéropro)*, supra, on this issue at para 146:

> *What is clear is that in Abrams, Schofield and Cluff, the complainants concerned were still employees. At issue was whether the incidental activities (travel, strike vote meeting, reception) during which the alleged discriminatory practices took place were covered by the law. In other words, were these incidental activities in any way related to the employment?*

[205] I have considered the Supreme Court of Canada's analysis of the circumstances in which it is appropriate to apply principles of vicarious liability within an employment relationship in *Bazley v Curry,* supra, at para 57:

> *The appropriate inquiry in a case such as this is whether the employee's wrongful act was so closely connected to the employment relationship that the imposition of vicarious liability is justified in policy and principle. From the point of view of principle, a prime indicator is whether the employer, by carrying on its operations,* ***created or materially enhanced the risk of the wrong that occurred, such that the policy considerations of fair recovery and deterrence are engaged. In answering this question, the court must have regard to how the employer's enterprise increased opportunity to commit the wrong, and how it fostered power-dependency relationships that materially enhanced the risk of the harm.*** (emphasis added)

[206] The evidence of Mr. Meadus and Mr. Nahanni persuasively established that Mr. Beck's past conduct, both within and outside of the employment relationship gave no hint of the violent conduct inflicted by him upon the Grievor on December 9, 2017, which in this case constituted "the employee's wrongful act". That being the case, there is nothing in the evidence before the Board that suggests (never mind establishes) that the Employer created or materially enhanced the risk of the harm to Mr. Meadus in this case.

[207] As in *Robertson v Manitoba Keewatinowi Okimakanak Inc.,* supra, the Manitoba Court of Appeal had occasion to consider a sexual assault by a supervisor upon a subordinate outside of the workplace and outside of work hours and having applied the factors in *Bazley*, supra, concluded, as follows, at para 50:

> *While the plaintiff focussed on the supervisor-subordinate relationship, the reality is that, in the working world, every employee has a supervisor, and the essence of that relationship is that the supervisor will exercise power and authority over the subordinate for the successful operation of the business. There is nothing in that relationship, by itself, that results in a material enhancement of the risk that the supervisor will commit a sexual assault on the subordinate or takes the employment situation out of the category of "provid[ing] the locale or the bare opportunity for the employee to commit his or her wrong" and into that of "materially enhanc[ing] the risk, in the sense of significantly contributing to it" (Bazley, at para. 40). Further, the allegation that the nature of the employment encouraged Mr. Hart to stand in a position of respect and trust to the plaintiff is common to all supervisor-subordinate relationships, and probably to co-workers as well, and does not constitute a material enhancement of the risk that the supervisor will commit a sexual assault on the subordinate. To find otherwise would constitute every employer an involuntary insurer of every subordinate.*

[208] Similar to the findings in *Robertson*, supra, the "bare opportunity" generated by a common employer, without more, even between a supervisor and a subordinate is simply insufficient to constitute a material enhancement of the risk that the supervisor will commit an assault upon the subordinate.

[209] I cannot help but conclude that the Union has failed to lead sufficient evidence to establish that the Assault occurred either "in the workplace" or "during the course of employment" for the purpose of Article 55 of the Collective Agreement when Mr. Meadus was assaulted by John Beck on December 9, 2017.

[210] Applying the criteria adopted in *Cluff,* supra at para 17, I am not persuaded that the private invitation extended by Mrs. Meadus to Mr. Beck and Mr. Langer to visit their home for additional Christmas drinks nor Mr. Beck's later conduct can constitute "activities that he would normally or reasonably be specifically authorized by the Employer to do"; nor "activities logically connected to employment or incidental to employment"; nor "in furtherance of duties owed to the employer".

[211] The Union argued that a "narrow reading of Article 55.01 was inappropriate" and that it was open to the Board to apply the test set out in *Millhaven Fibres*, supra, as a "shield" to link the Assault to the workplace. Even if that were so, of which the Board is not persuaded, it declines to do so in any event.

[212] The Board is persuaded that *the Millhaven Fibres* case is authority for the proposition that there are times when off-duty conduct can result in discipline, which is the investigation undertaken by the Employer vis-à-vis Mr. Beck's conduct at the Meadus Resident during the early hours of December 9, 2017, and which resulted in the termination of Mr. Beck's employment with the GNWT.

[213] The Union provided no authority for the proposition that *Millhaven Fibres* can and should be applied in a non-disciplinary situation, as in the case of the Grievor, to establish a connection to the

workplace, thus triggering Article 55 of the Collective Agreement. Arbitral jurisprudence does not lend itself to such a novel analysis and the Board declines to adopt the Union's application of the test in *Millhaven Fibres*, supra.

The Sequelae of the Assault – Manifestations in the Workplace

[214] The Union further asserted that the Employer mischaracterized the Assault upon the Grievor by failing to recognize that the Assault was further linked to the workplace by its subsequent manifestations in the workplace, thereby transforming the Assault into a workplace incident entitling the Grievor to paid sick leave.

[215] The Board was urged to apply the reasoning and characteristics set out in *Re Blouin Drywall Contractors Ltd.,* supra, as authority for its novel proposition, however the Board declines to do so.

[216] As detailed above, the Board is persuaded that the Assault did not constitute a "workplace incident" for all of the reasons set out above.

[217] However, in further response to this aspect of the Union's argument, the Board is persuaded that the Employer's obligation to accommodate employee injuries, accidents and illness arising outside of the workplace remains.

[218] Specifically, the evidence reasonably established that Mr. Meadus' initial period of sick leave between December 11, 2017 – January 5, 2018 was accommodated by the Employer. His difficulties returning to work "on the floor" because of the visibility and nature of his injuries, his perceptions of how he was/might be treated by staff and inmates, and his feelings of concern and anxiety were at least in some degree accommodated during this period; through training assignments with new employees who did not know him and assignments to the Control Room, thus removing the Grievor from the floor. While the evidence during this period is less than fulsome, such is the evidence before the Board.

[219] In light of the Board's findings concerning the Employer's duty to accommodate the Grievor as detailed herein, the Board is equally persuaded that the "manifestation of symptoms" arising from the Assault into the workplace following the Assault simply does not translate into a "workplace injury" and the Union provided no authority for such a proposition. Nonetheless, the Employer's duty to accommodate injury and disability is not limited to "workplace" injuries, but rather is a duty owed "…due to the consequence of a disease, injury or condition, **an employee's ability to do their job has been impaired**" (*Duty to Accommodate Injury and Disability Policy,* Exhibit 1-76). [emphasis added]

[220] Regardless of whether an injury to an employee occurred outside the workplace or during the course of employment; the sequelae of such an injury is frequently manifested in the workplace through absences, restrictions or difficulties undertaking and performing usual duties. It is the Employer's obligation to take reasonable and adequate steps to respond to the employee's limitation(s) or need for accommodation under the Employer's DTA responsibilities short of undue hardship pursuant to Article 3.02 and/or the *Human Rights Act,* supra; as discussed below.

[221] In connection with the LWOP and the documents that Mr. Meadus signed resulting in benefit coverage during this period; the Board notes that although Mr. Meadus did not read the forms, he acknowledged that he signed and submitted the forms. He also acknowledged that he received instructions regarding whom to contact with questions regarding the documents, but did not make any inquires of those authorized to respond.

[222] I recognize that Mr. Meadus felt an urgent need to be away from the NSCC at the time he signed the documents in May 2018, that later resulted in the Debt of some $2,600.00. Mr. Meadus testified that he signed the documents because Mr. Nahanni told him to do so. Mr. Nahanni denied having had a meeting with Mr. Meadus about these documents and said he would not have advised him whether to sign the documents or not, as he is not a benefit specialist. At the same time Mr. Nahanni testified that he was not aware of any costs that would accrue to the Grievor in any event.

[223] While the evidence is not entirely satisfactory on this issue, I am persuaded that Mr. Nahanni's version of events is the more reliable in the circumstances, thus establishing the Debt.

The Harassment Free and Respectful Workplace Policy (the "Policy")

[224] In addition to the Grievance, Mr. Meadus filed a Complaint under the Policy, alleging that he suffered act(s) of Personal Harassment by John Beck at the Meadus Residence on December 9, 2017, causing him personal injury and requiring him to be off work.

[225] The Union argued that the Employer reduced the Harassment Complaint merely to the physical assault by Mr. Beck and ignored "the manifesting consequences" of that assault, including his need for time off from work and his concerns in the workplace for having "called his supervisor's conduct into question" once he returned to work.

[226] Although the Union led evidence (both through testimony and documentary materials) in relation to Mr. Meadus' Complaint under the Employer's Policy, I am persuaded by the Employer's argument and authorities on the limits to the Board's jurisdiction where an Employer policy is outside of the scope of the Collective Agreement.

[227] In *Telus and TWU (Tubbs),* supra, the arbitrator analyzed the law as it relates to the use of ancillary documents, at para 90-91, as follows:

> Incorporation of Ancillary Document into a Collective Agreement
>
> *90 A dispute arising from the alleged violation of an ancillary document is not arbitrable unless it can be shown that: 1. there is a violation of the collective agreement outside of the ancillary document; 2. there is a breach of statute or common law that may be enforced at arbitration; or 3. the ancillary document is incorporated into the collective agreement by reference.*
>
> *91 Simply referencing an ancillary document or a plan is insufficient to establish that it has been incorporated into a collective agreement. Rather, clear language must be used to establish the incorporation, of an ancillary document into a collective agreement. Here, the Union alleges a*

breach of the Relocation Policy. The Employer's position is that the Relocation Policy was not incorporated into the 2011 Collective Agreement and therefore does not form a part of that Collective Agreement. In that regard, Article 15.05 specifically provides that the Employer's relocation practices, which would include the Relocation Policy, do not form part of the Collective Agreement. Further, the Employer can make unilaterally changes to its relocation practices at will. Therefore, the Union cannot grieve an alleged violation of the Relocation Policy unless it can show a breach of another part of the Collective Agreement or the common law.

[228] I have also considered the provisions of Article 37 of the Collective Agreement which provides, in part,

ARTICLE 37

ADJUSTMENT OF DISPUTES

37.01 (1) The Employer and the Union recognize that grievances may arise in each of the following circumstances:

(a) By the interpretation or application of:

(i) a provision of an Act, or a regulation, direction or other instrument made or issued by the Employer dealing with terms or conditions of employment;

(ii) a provision of this Collective Agreement or Arbitral Award.

(b) Disciplinary action resulting in demotion, suspension, or a financial penalty.

(c) Dismissal from the Public Service.

(d) Letters of discipline placed on personnel file.

(2) The procedure for the final resolution of the grievances listed in (1)(a) above is as follows:

(a) Where the grievance is one, which arises in circumstances outlined in (1)(a)(i) or in (d), the final level of resolution is to the Minister responsible for the *Public Service Act.*

(b) Where the grievance is one which arises out of the interpretation or application of the Collective Agreement the final level of resolution is to arbitration.

(c) Where the grievance arises as a result of disciplinary action resulting in demotion, suspension, or a financial penalty or dismissal from the Public Service, the final level of resolution is to arbitration.

37.02 If he/she so desires, an employee may be assisted and represented by the Union when presenting a grievance at any level.

[229] The Board is persuaded that an arbitrator's jurisdiction is limited to those matters set out in Article 37.01(2) (b) and (c); meaning the Policy referred to in the Grievance is outside of my jurisdiction as it has not been incorporated into the Collective Agreement before me.

[230] Although Mr. Parle testified that in his view, Personal Harassment is within the scope of Article 51 of the Collective Agreement, which is entitled Sexual Harassment, the Union offered no authority for that proposition.

[231] Article 51.02 defines sexual harassment as **any conduct, gesture or contact of a sexual nature** that:

> (a) is likely to cause offence or humiliation; or
> (b) that might, on reasonable grounds, be perceived by an employee as **placing a condition of a sexual nature** on employment or on any opportunity for training or promotion.
> [emphasis added]

[232] There is no evidence before the Board which satisfies the definition of Sexual Harassment in order to trigger the application of Article 51 to the substance of the Grievance in issue.

[233] Accordingly, the Board has concluded that protections extended against acts of Sexual Harassment under Article 51 of the Collective Agreement are outside of the scope of the Grievance.

Discrimination/Human Rights – Article 3.02

[234] The nature of the Grievance before the Board was described as "discrimination /harassment/human rights".

[235] The Board has already concluded that Sexual Harassment under Article 51 does not include acts of "Personal Harassment" under the Employer's Policy and that the Policy itself is outside of the Board's jurisdiction in any event.

[236] As such, to the extent that the Grievance alleges acts of discrimination, harassment or a breach of human rights, it is necessary to establish a violation of the Collective Agreement, which protected characteristics are set out in Article 3.02, which provides:

> DISCRIMINATION
>
> 3.02 The Employer and the Union agree that there shall be no discrimination, interference, restriction, harassment or coercion exercised or practiced with respect to any employee by reason of **age, sex, race, colour, creed, national or ethnic origin, marital status, family status, sexual orientation, disability, gender identity, conviction for which a pardon has been granted, religious or political affiliation, or any other grounds proscribed by applicable legislation**, by reason of Union membership or activity, nor by exercising their rights under the Collective Agreement. [emphasis added]

[237] For the sake of completeness, I note that under the *Human Rights Act*, supra, (the "Act") the protected grounds are set out as follows:

> Discrimination and Prohibited grounds of discrimination
>
> 5. (1) For the purposes of this Act, the prohibited grounds of discrimination are race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual

> orientation, gender identity or expression, marital status, family status, family affiliation, political belief, political association, social condition and a conviction that is subject to a pardon or record suspension.
>
> Pregnancy
>
> (2) Whenever this Act protects an individual from discrimination on the basis of sex, the protection includes, without limitation, the protection of a female from discrimination on the basis that she is or may become pregnant.
>
> Disability
>
> (2.1) Whenever this Act protects an individual from discrimination on the basis of disability, the protection includes the protection of an individual from discrimination on the basis that he or she (a) has or has had a disability; (b) is believed to have or have had a disability; or (c) has or is believed to have a predisposition to developing a disability.

[238] Accordingly, acts of discrimination (or harassment) must fall with the protected characteristics set out in Article 3.02 of the Collective Agreement or the Act, which includes by incorporation those additional protected characteristics prescribed in "applicable legislation".

[239] Although the Grievance submitted to arbitration described its nature as discrimination /harassment/human rights, the Union did not expressly lead evidence identifying which specific grounds of discrimination upon which it asserts the Employer engaged in and therefore discriminated against the Grievor.

[240] The Union also submitted that on some level Mr. Meadus suffered discrimination in light of the different treatment afforded to the assailant, who was placed on leave with pay and while at the same time the Grievor was not. The Board is not persuaded of the merits of this argument.

[241] Under sections 30-31 of the *Public Service Act* set out above at para 47, when there is an investigation into an allegation that an employee engaged in **misconduct**, he/she must be removed from the workplace and placed on paid leave pending the outcome of the investigation. This is precisely what occurred in this case.

[242] In contrast, this legislative provision has no application to Mr. Meadus as his conduct was not under investigation. In addition, Mr. Meadus did not return to the workplace before January 5, 2018 as a result of the injuries suffered in the Assault and received what accumulated sick-leave credits available to him as well as those advanced as permitted under Article 20.06 of the Collective Agreement.

[243] For these reasons, the Board is unable to conclude that the treatment of the Grievor and assailant arising from the Assault constituted discriminatory conduct under Article 3.02 or at all.

Disability – A Protected Characteristic

[244] In reviewing the evidence that is before the Board, I am persuaded that Mr. Meadus informed the Employer about his need for time off work immediately after the Assault as a result of his injuries suffered therein until he returned to work on January 5, 2018, once cleared to do so by the WSCC. I am persuaded that the nature of Mr. Meadus' injuries at the time established a "disability" within the meaning of Article 3.02, up to and including this clearance to return to work on January 5, 2018.

[245] Upon his return to work during this period, the Board accepts that Mr. Meadus was provided with duties "on the floor" and "off the floor" for some of that period; duties which included training assignments and assignment(s) to the "Control Room". What is lacking in the evidence before the Board is how these assignments came to be; whether through accommodations requested by the Grievor or otherwise. There is simply insufficient evidence to establish a "Duty to Accommodate" situation during this period in order to assess whether the Employer's efforts during the Grievor's initial return to work were sufficient to meet its legal obligations under Article 3.02 or under the Act. Accordingly, in such circumstances, the Board is unable to conclude that breach of Article 3.02 between January 5 – May 9, 2018 is established.

[246] In reaching this conclusion the Board has considered Mr. Meadus' testimony that although his return to work was not easy for him during this period, he "got through it" and performed such duties as were assigned to him between January 2018 through to May 2018, at which time the Employer was informed that Mr. Meadus again required time away from work. The Board noted that in approving a LWOP, the Employer did not seek nor was any medical submitted in support of this period of leave.

[247] The Board also accepts Mr. Meadus evidence that he did not inform the Employer of his concerns in the workplace during the period January 5 – May2018.

[248] The Board accepts that Mr. Meadus, being ineligible for paid sick leave and having exhausted his accrued sick leave benefits and have depleted the sick leave credits advanced by the Employer, concluded that he had little recourse but to seek a LWOP or a Transfer Assignment to a Relief position at this time in response to his need to remove himself from the Facility.

[249] However, the Board also accepts the testimony of Ms. Donahue, then a Duty to Accommodate ("DTA") Advisor for the Employer, that the Employer made efforts to initiate its DTA process with the Grievor at that time.

[250] Although the Grievor had no recollection of his attendance at the DTA meeting on May 4, 2018, the Board accepts that he did attend and was accompanied by a UNW representative at the meeting. The Board further accepts that Mr. Meadus did not pursue an involvement in the DTA process at that time.

[251] The Employer's duty to accommodate an employee's established limitations to perform assigned duties in the workplace, short of undue hardship, is set out in its *Duty to Accommodate Injury and Disability Policy* ("DTA Policy") at Exhibit 1-76, which identifies both employer and employee obligations thereunder.

[252] While Employer obligations under the DTA Policy are reflective of its obligations under the *Human Rights Act,* supra, the DTA Policy also identified the shared responsibilities under its DTA process. For example, under section 5(2)(e), employee responsibilities are identified as follows:

> Employees
>
> i. Advise employer of any restrictions or limitations to performing the job related to disability or injury.
> ii. Respond in a timely manner to employer requests for appropriate medical information in regard to restrictions, limitations and prognosis.
> iii. Work collaboratively with the employer in identifying and accepting reasonable accommodation measures.

[253] I am mindful that upon Mr. Meadus' initial return to work (Jan-May 2018), he experienced difficulties "on the floor"; particularly with interactions with staff and inmates. I am equally mindful that Mr. Meadus' determination allowed him "to get through it" although, without doubt, it was a difficult time for him.

[254] At the same time, I acknowledge Mr. Meadus' admissions that he did not raise his difficulties or need for accommodation at that time with the Employer until May 2018, when he informed the Employer that he needed to get away from his duties at the NSCC without delay.

[255] For these reasons I am unable to conclude that the Employer breached its DTA obligations owed to the Grievor prior to May 7, 2018 as the evidence does not reasonably establish same.

[256] However, I am persuaded that once the Grievor informed the Employer **that he could not continue working at the NSCC on or about May 7 or 8, 2018**, the Employer's Duty to Accommodate Mr. Meadus was triggered.

[257] Under the DTA Policy, the Employer was obliged to apply the Principles set out at section 2 of the DTA Policy, which include:

> #2: The GNWT should work with the employee in identifying and providing safe, timely and reasonable accommodation measures.
>
> #5: In order to accommodate the employee in a timely and appropriate manner, medical information regarding the employee's restrictions, limitations, and prognosis is needed.

[258] Accordingly, I am persuaded when Mr. Meadus requested a LWOP and/or a Transfer Assignment because he needed to get away from the Facility, the Employer was obliged, at the very least, to consider a request for medical information at that time, to determine if the employee's limitations were something the Employer could accommodate under both the DTA Policy and the Act; rather than merely processing the LWOP for the period May 2018-May 2019, without more.

[259] In reaching this conclusion I have considered how human rights tribunals and arbitral jurisprudence have addressed psychological injuries within a Duty to Accommodate situation.

[260] In *Serge Lafreniere c Via Rail Canada Inc.,* supra, the board concluded at paras 140-142:

> 140 The Respondent says the Complainant never applied for disability-related accommodation even though the Respondent has an accommodation policy with special forms for this purpose. It also cites the Collective Agreement, most notably Article 15.
>
> 141 This argument does not hold up as it is not easy for someone with a mental health issue to make such requests, for any number of reasons. Some may even deny the problem outright. If an employee shows clear signs of a problem, it is up to the employer to offer accommodation.
>
> 142 In this case, there were many reasons the employer should have perceived that the Complainant had a problem: he had prior mental health issues and even took a medical leave (with a doctor's note) a few months earlier…

[261] Similarly, in the matter before me, I am persuaded that Mr. Meadus informed the Employer that he needed to be away from the Facility as a result of his injuries suffered in the Assault at the hands of John Beck.

[262] In *Leclair v. Deputy Head (Correctional Service of Canada)*, supra, the Board concluded at paras 78-79:

> 78 The employer has the duty to accommodate a disabled employee; the employee and his or her union must cooperate with the employer in its attempts to accommodate the employee. In this case, the employer is best placed to determine a suitable accommodation as it knows the workplace, the budget, and the employee's needs and is responsible for running the institution….
>
> 79 When an employee has a psychological disability, he or she cannot be treated the same as others in the accommodation process, particularly when communication issues and lack of judgement are hallmarks of this type of disability. **The grievor cannot be faulted for not participating fully with the employer's return-to-work process**, as outlined in its policy (Exhibit 18), when he was precluded from doing so by the symptoms of his disability. [emphasis added]

[263] In *Kvaska v Gateway Motors (Edmonton) Ltd.* supra, the Commission had this to say about an employer's need to explore accommodation options, at paras 54 and 56:

> 54 Although there is some jurisprudence suggesting that there is not an independent procedural duty in the duty to accommodate analysis, **a respondent will usually need to explore accommodation options in order to prove that it could not provide substantive accommodation without incurring undue hardship.**
>
> **….**
>
> 56 Here, the respondent took no steps to consider accommodation whatsoever. It conducted no investigation into alternatives to termination and never considered what its options were in the circumstances. Having not engaged in any accommodation process, it does not have the evidence to show that it could not have accommodated the complainant to the point of undue hardship. [emphasis added]

[264] The shared obligations between the employer and the employee in a DTA situation have long been recognized. The decision in *Villebrun* v. *BHP Billiton Diamonds, Inc. (No. 3),* supra*,* sets out the components of these obligations in a concise manner, as follows:

> [61] Zinn, R.W., in his treatise, *The Law of Human Rights in Canada: practice and procedure,* Canada Law Book, 2006, says that the duty to accommodate is:
>
> > …the responsibility of one party to adapt or adjust facilities, services or employment requirements to meet the needs of an individual or group have a characteristic that is protected under human rights legislation.
>
> [62] People who suffer from disabilities are a group protected from discrimination in employment under the *Act and so employers have an obligation to accommodate their needs in the workplace.*
>
> [63] The duty to accommodate has both a substantive and a procedural content. By "substantive" I mean the aforementioned duty to adapt working conditions to meet the needs of workers protected under the *Act.*
>
> ….
>
> [68] Employees, too, have a role to play in the accommodation process. In cases where an employee is experiencing discrimination in employment, he or she is expected to bring such circumstances to the attention of the employer. He or she must also participate in the search for accommodation and where reasonable accommodation is proposed by the employer, the employee must facilitate its implementation: *Renaud*, p. 31.
>
> [69] Most recently, in *National Capital Commission v. Brown,* 2008 FC 733 [reported 63 C.H.R.R. D/359] at para. 146, the Federal Court of Canada stated:
>
> > It is trite law that the duty to accommodate is not an absolute endeavour anchored in an ideal world of perfection. It calls, like the facts of this case compel, for reasonableness, flexibility and a healthy dose of common sense.
>
> [70] The duty to accommodate must therefore engage the parties – employer and employee – in a carefully planned, collaborative search for alternative means of balancing the employers' workplace objectives and the employee's individual needs. If the search ends in a reasonable means of accommodating those needs, the employee must facilitate that means and participate in carrying out the plan so long as he or she is able to do so.

[265] In the Board's view, the fact that the Grievor accepted two consecutive 6 month terms of LWOP (May 10, 2018 – May 9, 2019), which were approved by the Deputy Minister, does not itself remedy the Employer's failure to take any steps in the DTA process. Shortly after Mr. Meadus commenced his first term on LWOP, he was offered full-time employment as an Automotive Service Manager at Canadian Tire, where he worked thereafter.

[266] Towards the end of the year long LWOP, Mr. Meadus testified that he again felt unable to return to work in the NSCC and pursued a Transfer Assignment to a Relief position. Again, in the Board's view, once the Employer was again informed that Mr. Meadus was unable to return to work at the NSCC, the DTA process should have been triggered to, at least, request medical information to determine if a medical restriction or limitation prevented Mr. Meadus from returning to work.

[267] Instead, Mr. Meadus was offered a one-year contract in the Relief position, which he accepted. During this period Mr. Meadus continued to work at Canadian Tire and accepted no relief position

assignments between May 10, 2019 – May 9, 2020; however there was no provision under the Collective Agreement at that time that required him to do so.

[268] At the end of the Transfer Assignment, Mr. Meadus sought a further 1 – year contract in the Relief position, which was declined for business reasons. At that point Mr. Meadus informed the Employer that he continued to feel unable to resume work at the NSCC for medical reasons and offered to provide medical documentation to support his inability to return to work at the NSCC.

[269] The Board is persuaded that following the events of 2018 and 2019, in May 2020, Mr. Meadus in all practical terms declared a continued disability in terms of an inability to return to work at the NSCC and offered to submit medical documentation in support of his claim.

[270] Under Employer DTA protocols, it had to draft the letter that Mr. Meadus was required to submit to his physician for completion. Although Mr. Nahanni acknowledged that it was his responsibility to move the DTA process forward, no further steps were initiated by the Employer, without explanation, until October 8, 2020, when Mr. Meadus was asked to attend a DTA meeting, as described chronologically above.

[271] Mr. Nahanni described this period of delay (May – October 2020) as "unacceptable" and opined that this delay likely caused harm to the Grievor.

[272] On November 2, 2020 the Employer provided the necessary medical letter for completion by Mr. Meadus' physician, which was submitted back to the Employer on November 6, 2020. Mr. Meadus' medical restriction was described as an inability to resume work as a Corrections Officer.

[273] The Board has concluded that in failing to initiate the DTA process between May 10, 2018 – May 9, 2020, even in the absence of medical documentation, the Employer did not meet its obligations thereunder as required under Article 3.02 and under the Act.

[274] The Board has also concluded that the Employer's approval of the LWOP period and the one year Relief Transfer Assignment were insufficient to meet those obligations in the absence of any investigation into whether the Employer could otherwise accommodate Mr. Meadus in another position.

[275] In reaching this conclusion the Board is also mindful that the approved LWOP and Transfer Assignment were approved in response to Mr. Meadus' explicit request for additional time away from Corrections to continue to assess whether he could return to work at NSCC in the future and that throughout this period Mr. Meadus worked full-time at Canadian Tire.

[276] Such matters may be addressed in any relief sought arising from the partial success of the Grievance.

[277] Ms. Ramm confirmed in her testimony that the Employer was aware of its obligation to accommodate disabilities short of undue hardship. The Board accepts that evidence.

[278] The Board is also persuaded that the Employer did not meet its obligations to reasonably initiate the DTA process from May 10, 2018 – May 9, 2020.

[279] The Board is also persuaded that at the end of the Relief Transfer Assignment once the Grievor again informed the Employer that he was not able to resume his full-time position as an Indeterminate Corrections Officer and offered to submit medical to support his restrictions, the Employer again failed to initiate the DTA process or take any steps or any reasonable steps to accommodate the Grievor's medical restrictions short of undue hardship from May 10, 2020 – October 8, 2020, in violation of Article 3.02 of the Collective Agreement.

[280] It was only at the DTA Meeting with the Employer on October 8, 2020 that the parties met to discuss "resignation" and "accommodation" and steps were undertaken to obtain a medical prognosis under the DTA process.

[281] On November 2, 2020 the Employer forwarded the newly drafted Medical Prognosis form to the Grievor to have his physician complete. Once in receipt of Mr. Meadus' medical restrictions on November 6, 2020, the evidence before the Board is equally unsatisfactory as to what steps the Employer took to find an alternate role for the Grievor which accommodated those medical restrictions, outside of Corrections but within the GNWT, short of undue hardship.

[282] The Board is mindful that as of the Hearing of this Grievance on April 14, 15 and 16, 2021, the Grievor testified that he had no interest in returning to the GNWT as an employee in any capacity. The Board accepts Mr. Meadus' evidence on this issue.

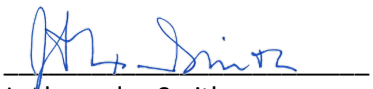
[283] In conclusion, the Board finds that the Employer failed to reasonably meet its obligations to initiate the DTA process and make reasonable or any efforts thereafter to accommodate Mr. Meadus' medical restrictions short of undue hardship between May 10, 2018 up to and including April 16, 2021, in violation of Article 3.02 of the Collective Agreement.

[284] In the result, this Grievance succeeds on this limited basis, while the remaining components of the Grievance are dismissed, for the reasons set out above.

[285] The Board shall remain seized to address any issues of remedy arising from this Award without temporal limits that the parties are unable to resolve.

[286] The Board wishes to acknowledge the able and helpful assistance of counsel throughout the course of this matter.

Dated this 24th day of June 2022.



J. Alexander-Smith
Arbitrator