NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Environment) v. Wakeham*, 2018 NSCA 86

Date: 20181114
Docket: CA 466477
Registry: Halifax

Between:

Nova Scotia Department of the Environment

Appellant

v.

Sandra Wakeham, Kathryn Raymond, in her capacity as Nova Scotia Human Rights Board of Inquiry Chair, the Nova Scotia Human Rights Commission and the Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia

Respondents

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	April 18, 2018, in Halifax, Nova Scotia
Subject:	Human Rights. Human Rights Act. Duty to Accommodate.
Summary:	A Human Rights Board of Inquiry found that the Nova Scotia Department of the Environment had failed to implement physician recommended accommodations resulting in an adverse effect for the respondent, Sandra Wakeham, who was unable to return to work thereafter.
Issues:	(1) Was the Board's finding that the Department failed to implement recommended accommodations, resulting in adverse effect for Ms. Wakeham, reasonable? (2) Was the Board's finding that Ms. Wakeham was able to work with accommodation reasonable?
Result:	Appeal allowed.

Ms. Wakeham had been unable to work regularly and predictably, even with accommodations, for some years. She suffered from chronic physical and cognitive disabilities that prevented her from working. The Board's conclusions that she could do so with accommodations and that failure to accommodate had rendered her permanently unable to work were contrary to the evidence and therefore unreasonable.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 42 pages.

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Judges:	MacDonald, C.J.N.S.; Oland and Bryson, JJ.A.
Appeal Heard:	April 18, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring
Counsel:	Andrew D. Taillon for the appellant, Sandra Wakeham, respondent in person Jason T. Cooke and Marina Bruggeman (articled clerk) for the Nova Scotia Human Rights Commission Kathryn Raymond, Q.C., respondent (not participating) Edward Gores, Q.C. for the Attorney General of Nova Scotia (not participating)

Reasons for judgment:

Overview

[1] Sandra Wakeham used to work as a clerk for the Department of the Environment. On March 9, 2012, she left, never to return. She said she was unable to work owing to the Department's failure to accommodate her physical disabilities. She was never dismissed, but has been on long term disability ever since.

[2] Ms. Wakeham's main duties were clerical, involving data entry and retrieval as well as file creation and tracking. She also did some accounting, administrative support and client service. She answered the telephone. She was also supposed to collect, open, date stamp and log mail, and write receipts, although she rarely did so.

[3] On May 10, 2012 Ms. Wakeham made a complaint to the Human Rights Commission alleging that she was discriminated against beginning on February 21, 2012 because the Department had required her to perform mail duties which she was unable to do given her physical condition at the time.

[4] The Commission appointed Kathryn Raymond as Chair of a Board of Inquiry to look into Ms. Wakeham's complaint. Ms. Wakeham attempted to expand her complaint by effectively backdating it to 2001 and adding mental disability as a second ground of alleged discrimination. The Board allowed the amendments which this Court later overturned on appeal: *Nova Scotia (Environment) v. Wakeham*, 2015 NSCA 114, (hereafter *Wakeham* #1).

[5] The Board of Inquiry proceeded. It took 18 days. The hearing was preceded by 12 case management conferences and a two-day motion, resulting in two preliminary written decisions. There are thirty Appeal Books. The Board rendered two lengthy decisions, one on liability and another on remedy. They total 233 pages.

[6] Ultimately, the Board agreed with Ms. Wakeham and found that she had been discriminated against because the Department had failed to implement all physician-recommended accommodations. Ms. Wakeham's inability to work was attributed to the Department's failure to accommodate her disabilities. General damages were awarded of $35,000 together with $51,000 for "loss of income".

[7] The Department has appealed, arguing that the Board erred in law because its findings are unreasonable in two fundamental respects. First, the Board's factual findings lacked evidentiary support, and second, the legal obligations ascribed to the Department were wrong in law.

[8] The Department argues that it is contradictory for the Board to find on the one hand that Ms. Wakeham was capable of returning to work on February 20, 2012 with accommodations, but, on the other, became totally unable to work less than three weeks later simply because she performed some mail duties. Such a conclusion ignores both common sense and the medical evidence.

[9] The Department elaborates that much of the Board's factual findings depended on the evidence of Ms. Wakeham's general physician, Dr. Lewis. The Department says Dr. Lewis' evidence was vague and contradictory as she relied primarily upon Ms. Wakeham's own reporting of her disabilities and the accommodations accorded her at work. Diagnoses and prognoses changed. Ms. Wakeham herself was an unreliable witness. Dr. Lewis described her conversations with Ms. Wakeham as "convoluted and confusing", sometimes "very, very chaotic" with which the Board appeared to agree when it said, "The Complainant has mental disabilities that impact, to some extent, her memory and recall".

[10] By February 2012, the Department resolved to seek other advice. They wanted an independent medical examination. Two were obtained in May and June of 2012 from psychiatrist, Dr. Scott Theriault and occupational health physician, Dr. Kevin Bourke. Drs. Theriault and Bourke did not testify but their reports were admitted and relied upon by the Board. The Department also had a physiatrist, Dr. Edvin Koshi, review Ms. Wakeham's medical files.

[11] Although Dr. Bourke thought Ms. Wakeham was a reasonably good historian, Dr. Theriault described her as a "poor historian", an opinion which Dr. Lewis shared. Ms. Wakeham's testimony confirms this assessment; her memory was poor and on some points her evidence even changed from day to day.

[12] Accordingly, because Dr. Lewis relies so heavily on what Ms. Wakeham told her, the Department submits that Dr. Lewis' expert opinion lacked the reliability of a sound factual foundation. Moreover, it was contrary to other compelling and uncontradicted medical evidence from Drs. Bourke and Theriault, with which Dr. Lewis largely agreed.

[13] The Department concludes that there was no evidence that Ms. Wakeham could work on February 20, 2012 but was completely unable to do so on March 9, 2012. In fact, the Department submits that the evidence was uncontradicted that Ms. Wakeham was not able to work and should not have attempted to do so, with or without accommodation.

[14] The Department listed eight grounds of appeal in its Notice of Appeal. These were reorganized in its factum as follows:

1. The Board's findings regarding Ms. Wakeham's disability and treatment of that disability by the Department were unreasonable because they were unsupported by the evidence and contrary to law. In particular, reliance on Dr. Lewis regarding the nature of Ms. Wakeham's disability and related accommodation issues, was unreasonable. The Board placed the burden of proof on the Department to extensively monitor Ms. Wakeham and make inquiries of her condition rather than having Ms. Wakeham and her doctors "bring the facts" to the Department's attention.

2. The Board erred in law by ruling that long term disability was not an adequate accommodation for Ms. Wakeham.

3. The Board erred in law when applying the "crumbling skull" principle to Sandra Wakeham.

4. The Board erred in law regarding the quantum of general damages awarded to Ms. Wakeham.

5. The Board erred in law by awarding damages for lost income to Ms. Wakeham.

The Department says the absence of evidentiary support for factual findings and the errors of law render the Board's conclusions unreasonable.

[15] The Commission counters that the standard of review protects the Board from review by the Court in this case because the Department is simply re-arguing the facts and asking us to come to a different conclusion. The Commission says that the evidence supported the Board's findings that Ms. Wakeham had suffered adverse effects because she had not been fully accommodated. Therefore, the Board's factual findings were grounded on the evidence and cannot be attacked as "unreasonable".

[16] The Commission adds that the Board did not err in law when identifying and applying the tests for discrimination in a case of inadequate or no accommodation. Nor did it err in law when awarding damages.

[17] The Commission urges dismissal of the appeal.

[18] Ms. Wakeham who was unrepresented endorsed the Commission's submissions.

[19] After considering the standard of review and the applicable law, these reasons will:

a) review the employment disability and accommodations background prior to Ms. Wakeham's last return to work in February 2012;

b) review the events of Ms. Wakeham's last return to work between February 20 and March 9, 2012;

c) address whether the Department failed to accommodate Ms. Wakeham and if so, whether she experienced an adverse effect;

d) address whether Ms. Wakeham was able to work in February 2012.

Standard of review

[20] Section 36(1) of the *Human Rights Act*, R.S.N.S. 1989, c. 214 permits an appeal to this Court on a question of law.

[21] The standard of review which this Court ordinarily applies to decisions of a human rights tribunal is well-settled. Subject to a contrary legislative intent (*Tri-County Regional School Board v. Nova Scotia (Human Rights Board of Inquiry)*, 2015 NSCA 2, ¶ 12), the standard of review is reasonableness (*Tri-County*, ¶ 11-14; *Izaak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18). In *Wakeham* #1, (2015 NSCA 114) this Court quoted a well-known summary of the standard:

> [14] All parties are in agreement that this issue attracts a reasonableness standard of review. This was recently confirmed in *Tri-County Regional School Board v. Nova Scotia (Human Rights Board of Inquiry)*, 2015 NSCA 2. In that case, this Court noted a line of authority to that effect (¶11-14) and concluded by citing *IWK v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18 (*IWK*), as follows:

> [14] Reasonableness is "… concerned mostly with the existence of jurisdiction, transparency and intelligibility within the decision making process. But it is also concerned with whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, ¶47). The reviewing court should not conduct two separate analyses — one for reasons and another for result. Rather the exercise is "organic"; the "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes, (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, ¶14).

[22] The Board's factual findings are insulated from review by the Court unless they lack any evidentiary support (*International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6, ¶ 42; *Nova Scotia Liquor Corporation v. Nova Scotia (Board of Inquiry)*, 2016 NSCA 28, ¶ 23). This Court may look at the record in assessing whether an outcome is reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, ¶ 15, cited in *Nova Scotia Liquor Corporation* at ¶ 32).

Employment discrimination based on disability

[23] An employer cannot discriminate against an employee with physical or mental disabilities. Section 4 of the *Human Rights Act* describes "discrimination":

> **Meaning of discrimination**
>
> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

[24] Section 5 prohibits employment discrimination on various bases, including disability:

> **Prohibition of discrimination**
>
> 5 (1) No person shall in respect of
>
> [. . .]
>
> (d) employment;

> discriminate against an individual or class of individuals on account of
>
> (o) physical disability or mental disability;

[25] The *Act* defines these terms in s. 3(l):

> (l) "physical disability or mental disability" means an actual or perceived
>
> > (i) loss or abnormality of psychological, physiological or anatomical structure or function,
> >
> > (ii) restriction or lack of ability to perform an activity,
> >
> > (iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device,
> >
> > (iv) learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
> >
> > (v) condition of being mentally impaired,
> >
> > (vi) mental disorder, or
> >
> > (vii) dependency on drugs or alcohol;

[26] To succeed in a claim like this one, Ms. Wakeham had to establish that:

- She had or was perceived to have a physical or mental disability;
- She experienced an adverse impact with respect to her employment;
- Her disability was a factor in that adverse impact.

[27] When applying the law in this case, it is important to recall that *Wakeham* #1 excluded mental disability from consideration by the Board because not doing so would have offended the *Act*:

> [19] The effect of the amendments is to have a complaint which circumvents all of the procedures under the human rights regime, including intake, investigation, attempts at resolution, consideration for referral, and ultimately referral or dismissal by the Commissioners. As I will explain, this is inconsistent both with the *Human Rights Act* and settled jurisprudence. While a Board of Inquiry has significant powers, it is ultimately a statutory tribunal governed and limited by the provisions of the parent legislation – in this case the *Human Rights Act*. The

> *Human Rights Act* simply does not allow a Board of Inquiry to approve substantive amendments.

[28] This is important because many of Ms. Wakeham's disabilities were cognitive or psychological—as Dr. Lewis' evidence makes plain.

Background to 2012 return to work

[29] Ms. Wakeham was injured in two car accidents, one in 1999 and a second in 2005. As a result of the 1999 accident, she missed three years of work. As of 2006, Ms. Wakeham had no more specific diagnosis than myofascial pain. According to Dr. Lewis, she had seen numerous specialists, including:

> Dr. Christine Short (physical rehab medicine, August 2000);
> Dr. David King (neurologist, November 2000 and September 2005);
> Dr. Clive Creager (TMJ specialist);
> Dr. Alex Finlayson (pain management);
> Dr. Douglas Legay (ortho);
> Dr. Mike Fong (ENT);
> Dr. T. O'Neill (psychiatrist, August 2001);
> Dr. David Clark (neurosurgeon, November 2001);
> Dr. Loane (physical rehab medicine specialist: diagnosis of chronic anxiety, sleep disturbance and myofascial pain syndrome);
> Dr. A. Mishra and Dr. C. Maxner (ophthalmology and neuropthalmology June 2005 and September 2006 (Dr. Mishra only));
> Dr. Brownstone (neurosurgeon, January 10, 2006).

In addition, as of 2012, Ms. Wakeham had seen at least ten different other health care specialists, including physiotherapists, occupational therapists, chiropractors, osteopaths and psychologists.

[30] Following Ms. Wakeham's second accident, the Department accommodated her by appointing her as a secretary—later reclassified to "Clerk III". Dr. Lewis supported this change, describing it as having "suited her well" and advising that it would appear that the secretary position "is the best fit for Sandra with her health issues".

[31] Beginning in 2009, Ms. Wakeham began to experience lengthy health-related work absences. Between 2009 and 2012, Ms. Wakeham had worked less

than 45 percent of the time. A chart prepared by the Department summarizes Ms. Wakeham's absences:

Dates	% time worked
April 01, 2008 – March 31, 2009	90.61%
April 01, 2009 – March 31, 2010	43.47%
April 01, 2010 – March 31, 2011	23.60%
April 01, 2011 – February 19, 2012	10.60%

[32] In 2011, Ms. Wakeham made two unsuccessful attempts to return to work. Extensive accommodation efforts were made in January 2011 to ensure Ms. Wakeham's successful return to work. A previous accommodated attempt to return to work in September of 2010 had been unsuccessful.

[33] In order to understand an employee's disability and accommodation needs, the Department relied on two types of form which would be completed and signed by the employee's physicians. The employee would also sign for consent purposes. One form was known as a "Fitness for Work Assessment"; the other was a "Certification by Attending Physician". The first was required if the employee was returning to work; the second if short term disability was requested.

[34] On January 5, 2011, Dr. Lewis completed a "Fitness for Work Assessment Form" for Ms. Wakeham. She ticked off boxes indicating reduced functional ability with respect to sitting, standing, walking, bending/twisting, lifting, carrying, reaching, pushing/pulling. She did not elaborate on these limitations, for example by indicating how much time Ms. Wakeham might be able to do any or all of these things. With respect to Ms. Wakeham's medical condition affecting her capacity to attend and perform work, Dr. Lewis wrote "has chronic derangement neck plus shoulder girdle". She added that Ms. Wakeham was depressed, unable to multitask and did not tolerate a lot of background noise and distress. She recommended changes with respect to Ms. Wakeham's desk, work area and multitasking.

[35] On January 26, 2011, the Department's district manager, Norma Bennett, wrote to Ms. Wakeham outlining a "return to work plan". She advised that an ergonomic assessment would be completed at Ms. Wakeham's workspace with renovations scheduled to be completed in February. She described interim accommodation measures until then. Ms. Wakeham was given modified duties, which included:

- No responding to customers at the front desk;
- Exclusion of telephone duties;
- Work in a quiet location;
- Sitting for no more than two hours without a break;
- No standing for more than 30 minutes without a break;
- No walking more than one hour without a break;
- Maximum lifting of five lbs.

Ms. Wakeham was encouraged to contact Ms. Bennett immediately if she was having any difficulties.

[36] Apparently, Ms. Wakeham became concerned that her modified job duties would require her to learn a new job. She expressed these concerns to her psychologist, Olga Komissarova, who then wrote to the Department to say that Ms. Wakeham could perform front desk duties. Front desk duties included handling the mail. Although this evidence was uncontradicted, the Board makes no mention of it. Regardless, the Department did not require Ms. Wakeham to perform front desk and mail duties when she returned to work at the end of January 2011. Nevertheless, it is relevant because, contrary to her psychologist's advice in 2011, the Board faulted the Department for allowing Ms. Wakeham to perform mail duties in 2012.

[37] In April 2011, Ms. Wakeham left work again. In addition to being treated by Dr. Lewis, she was then being seen by an occupational therapist and a psychologist.

[38] In June of 2011—when Ms. Wakeham had been off work for two months—Dr. Lewis referred her to a mobile mental health unit because she was "acutely stressed and I was concerned about [her] mental health".

[39] In September 2011, Ms. Wakeham attempted to return to work against her physician's advice. In Dr. Lewis' words, "I explained to her I felt that she was setting herself up for failure if she went to work fulltime". Regardless, Dr. Lewis did as Ms. Wakeham asked. She completed a "Fitness for Work Assessment Form" in which she advised the Department that Ms. Wakeham's expected return to work would be September 1, 2011. She noted that Ms. Wakeham's sitting should be limited to 60 minutes, lifting and carrying limited to 5 lbs infrequently,

reaching, pushing and pulling infrequently, writing and typing "limited by posturing".

[40] Dr. Lewis described Ms. Wakeham's medical condition as "chronic pain syndrome" with "ongoing neck and shoulder weakness".

[41] When asked why she felt Ms. Wakeham was not ready to return to work full time in September, Dr. Lewis said, "I felt she had too much stress and anxiety and I didn't think that physically she was ready for it". To this point in 2011, Ms. Wakeham had fully accommodated work from January to April and then had not worked for almost five months.

[42] Unsurprisingly in light of Dr. Lewis' opinion, Ms. Wakeham only lasted a few weeks before she left work again.

[43] On October 15, 2011, Dr. Lewis' associate, Dr. Matthew Watson, completed a "Certification by Attending Physician" for Ms. Wakeham in which he diagnosed stress and anxiety and also ticked "psychological condition" under diagnosis. He added "poor concentration, poor focus, feeling overwhelmed by multiple stressful life circumstances". Her return to work date was described as "unknown". A similar Certification was completed by Dr. Watson on November 7, noting that Ms. Wakeham was to be reassessed in January of 2012.

[44] On January 9, 2012, Dr. Lewis completed a Certification by Attending Physician in which she diagnosed "adjustment disorder, chronic pain/cervical strain", also ticking off boxes "musculoskeletal" and "psychological condition". Ms. Wakeham's impairment was described as "impaired concentration". Dr. Lewis reported that Ms. Wakeham was seeing a psychologist and an osteopath. She said Ms. Wakeham's expected return to work was April 2012.

[45] Dr. Lewis' opinion changed quickly. In a Certification dated February 14, she said Ms. Wakeham could return to work on February 20.

[46] Dr. Lewis noted that Ms. Wakeham would require accommodation for posturing, noise, stress, work environment, but added "functioning well independently". She recommended "ease back to work four hours a day x two weeks". With respect to work restrictions she said, "limited lifting, reaching right arm, needs various positions to work, quiet, less distracting work environment would greatly benefit".

[47] In a Fitness for Work Assessment Form of February 9, under end dates for Modified/Alternative Duties, Dr. Lewis wrote: "March 5/12". That would coincide with her earlier Certification note of "ease back to work 4 hrs/day x 2 weeks". Dr. Lewis reported that Ms. Wakeham had chronic pain and depression. She ticked the box "yes" in answer to a query about whether Ms. Wakeham had impairments. Under "Please Expand" she wrote "Much improved at present. Outlook very positive".

[48] Under "Work Restrictions", she wrote "limited lifting, reaching ® arm. Needs various positions to work. Quiet, less distracting work environment would greatly benefit".

[49] As we know, Ms. Wakeham left work on the morning of March 9, 2012. Dr. Watson completed a Certification by Attending Physician dated March 15 in which he diagnosed "employment stress/anxiety" describing it as a "psychological condition". The cause of her impairment was ascribed to "anxiety, stress". Her return to work date was "unknown". Dr. Watson observed "the past several months having difficulty with anxiety". Ms. Wakeham had not been working for most of that time.

[50] A week later, Dr. Watson completed another Certification adding an additional diagnosis of "neck and shoulder pain and employment stress/anxiety, lumbar back pain". The diagnosis was now both psychological and musculoskeletal. With respect to cause he observed "excessive pain with shoulder/arm movements such as stamping/opening mail burning pain in lumbar spine with sitting". He concluded that Ms. Wakeham would "need to be seen by her GP (Dr. Lewis) to assess any return to work plan".

[51] Ms. Wakeham never returned to work after March 9, 2012. So what transformed Ms. Wakeham from being able to work with accommodation on February 20 to being permanently unable to do so on March 9? Or was she really able to work at all?

February 20-March 9, 2012

[52] This was Ms. Wakeham's last return to work. She only worked three full days during this time.

[53] On February 20, 2012, when Ms. Wakeham returned to work for the last time, she met with the Department's Director, Norma Bennett and Human

Resources Manager, Laura Forrest. Ms. Bennett gave Ms. Wakeham a letter dated February 20, 2012, regarding the "return to work/accommodation plan". In accordance with Dr. Lewis' advice, the letter confirmed that Ms. Wakeham was to work four hours a day until March 5, 2012 when she could resume her regular hours/duties. Accommodations were to include:

- No sitting longer than 30 minutes
- No bending more than 10 minutes per hour
- Limited lifting, carrying, reaching and pushing (may be done occasionally).

[54] Ms. Wakeham's discussions with Norma Bennett and Laura Forrest were followed by a February 21 letter to Ms. Wakeham from Norma Bennett, in which Ms. Bennett noted Ms. Wakeham's extensive absenteeism over the previous three years and summarized the accommodations made for her to date. More will be said about this letter when considering the Board's findings that it had an "adverse effect" on Ms. Wakeham.

[55] Ms. Bennett expressed the expectation that Ms. Wakeham's "attendance improve substantially upon your return from STL leave on February 20, 2012". She added that an independent medical examination was required to identify if there was anything further that the Department could do to support Ms. Wakeham in achieving regular and consistent attendance in the immediate future.

[56] It is important to recall that Ms. Wakeham did not work full time when she returned on Monday, February 20, 2012. For two weeks, in accordance with Dr. Lewis' recommended accommodation, she only worked four hour days. Monday, March 5 was her first full day's work; her last was Friday, March 9. There is no evidence of anything remarkable or unexpected occurring during this brief time. She took time off Thursday, March 8 to see her psychologist, Jacqueline Milner-Clerk. Ms. Milner-Clerk noted on March 8, "does not want to be at job – can't physically do it & emotionally handle it". The next day at 10:15 a.m. Ms. Wakeham was found in tears on the floor of the washroom. She was physically ill. She complained of a painful tailbone. She was driven home by Norma Bennett. She never returned.

[57] Ms. Bennett made notes of the events of March 9. She reported that Ms. Wakeham said, "She was sick of being sick"; that she blamed her injuries on her

car accidents; and that she had not been able to attend osteopathic weekly sessions. This latter point is discussed further below. But there is no note of Ms. Wakeham complaining of mail duties or writing receipts.

[58] The Board inferred from the evidence that Ms. Wakeham must have aggravated her "physical and mental disabilities" and ultimately ascribed fault for this to the Department. Whether there was evidence to support these inferences and conclusions and, accordingly, whether it was reasonable to find that these few days of work rendered Ms. Wakeham permanently unable to do her job will be addressed later. At this point, it is only important to reiterate that there was no precipitating event that provoked her departure. Ms. Wakeham's return from February 20 to March 9 was part of a longstanding pattern of failed attempts to work. It was nothing new.

Did the Department fail to accommodate Ms. Wakeham in February 2012, and if so, did this create an "adverse effect"?

[59] A failure to accommodate employees with a disability is not discriminatory unless it adversely affects them. It is not enough for Ms. Wakeham to show a lack of accommodation—she must also show that she was adversely affected by the alleged failure to accommodate. Her disability must be a factor in that adverse effect.

[60] The Board found that the Department had not accommodated Ms. Wakeham. The Board decided that Ms. Wakeham suffered adverse impacts in several ways.

[61] First, Ms. Wakeham was unable to work, although required to do so, because the Department did not accommodate her. Second, the Department's failure to accommodate her resulted in exacerbation of Ms. Wakeham's symptoms, causing her to leave and be unable to return to work. Third, placing her on an attendance management plan, in all the circumstances, constituted an adverse impact, owing to the anxiety it caused, worsening her disability.

Failure to accommodate/adverse effect causing inability to work

[62] The Board blamed the Department for not implementing all the physician recommended accommodations. But the only accommodation identified by Dr. Lewis in her February 14, 2012 Fitness for Work Assessment that was not implemented was removal of Ms. Wakeham to a quieter working space. That

accommodation had been made in January 2011, and was apparently ineffective because it did not prevent Ms. Wakeham from taking most of the year off for medical reasons. A quieter work space was not mentioned by Dr. Lewis in her Certification of August 2011, January 9, 2012 or February 14, 2012. Nor was this the basis of Ms. Wakeham's human rights complaint where she said:

> Doing mail duties caused me to go back off work on March 9, 2012 without pay.

[63] Dr. Lewis had not directed in 2012 that Ms. Wakeham be excused mail duties. Indeed, the last advice the Department had received about front desk duties—which included mail—was from psychologist Olga Komissarova on January 24, 2011 who advised that Ms. Wakeham could perform these duties. In any event, with the possible exception of March 5, Ms. Wakeham had done very few mail duties. The Board rejected the Department's documented evidence that Ms. Wakeham had taken it upon herself to perform excessive mail duties on March 5. Despite Ms. Wakeham's human rights complaint, the Board effectively dismissed the relevancy of mail duties:

> If the complainant did not write any receipts, that would not remove the issues related to accommodation in this case. It would not negate the fact that a broader failure to accommodate had an adverse effect on the complainant.

[64] Having minimized Ms. Wakeham's own explanation in her human rights complaint for her departure on March 9, the Board later resurrected that complaint, relying upon Dr. Watson to link the performance of mail duties with Ms. Wakeham being off work:

> 372. The form completed by Dr. Watson provides medical evidence that writing receipts and doing mail duties was part of the reason that the Complainant was off work. I recognize that this may have been based upon the subjective reporting of the Complainant. However, Dr. Watson had access to the Complainant's file and had treated her before. If he believed that what she reported was not relevant to her ability to remain at work or was otherwise unreasonable, he presumably would have addressed this issue in a more questioning manner in his completion of the form.

[65] The Board's speculation that Dr. Watson's note is "medical evidence"—implying that it was Dr. Watson's opinion—is contradicted by:

- The Board's rejection of Department evidence that Ms. Wakeham, on her own initiative wrote 23 or 24 receipts on March 5 (the Board

rejected this because there was no record of any complaint or any adverse effect at the time);

- The absence of any complaint of any adverse impact upon Ms. Wakeham during the week of March 5 respecting mail duties;
- The absence of any reference in Ms. Milner-Clerk's clinical notes of March 8 to mail duties or ill effects from doing them;
- The absence of any reference in Ms. Bennett's notes of the March 9 departure of Ms. Wakeham, ascribing her distress to mail duties;
- The absence of any reference to mail duties in Dr. Watson's March 15 Certification of Attending Physician which notes Ms. Wakeham's "impairment" as "stress/anxiety" and describes her condition as "psychological".

[66] There are no chart notes of any testing or corroboration performed by Dr. Watson that could support any diagnosis on March 20, 2012 of physical impairment related to performance of mail duties. There is no basis for concluding that Dr. Watson did anything other than repeat what Ms. Wakeham told him on that day.

[67] Most importantly, and unlike January 2011, there was no recommendation that Ms. Wakeham should avoid performing mail duties. Any adverse effect from doing so, cannot be linked to a failure to implement a recommended accommodation.

[68] The Board did not describe what alleged failures of accommodation by the Department were recommended by Dr. Lewis and caused Ms. Wakeham's permanent inability to work. The Board recognized the shortcomings in the medical evidence, but attributed legal responsibility for those shortcomings to the Department. The Board held that the Department:

> 303. [. . .] had in its possession knowledge and information respecting the Complainant's need for accommodation ***and knew or ought to have known that both movement and lack of movement was an issue for the Complainant. The Respondent did not seek expert analysis of the movement or lack of movement required by the tasks of her position***. The Respondent did not seek clarification from Dr. Lewis respecting her impairments and her job duties to determine what accommodations should be made to the Complainant's job duties. The Respondent's implementation of the described accommodations consisted of

> informing the Complainant that she was not to do certain things in a generalized fashion, such as she was only to reach occasionally. [. . .]
>
> [Emphasis added]

[69] Here, the Board reversed the legal obligation of the parties and effectively required the Department to do what Ms. Wakeham and Dr. Lewis had failed to do. The generic character of the Board's criticism in the emphasized language vindicates the Department's request for independent medical opinions in February 2012.

[70] Employers are required to make accommodation for employees with health conditions that impair their function at work. But employers are not clairvoyant and are not required to intuit an employee's medical condition and functional limitations. As Justice Sopinka said in *Central Okanagan School District No. 23 v. Renaud*, 1992 S.C.J. No. 75:

> [43] ***The search for accommodation is a multi-party inquiry***. Along with the employer and the union, ***there is also a duty on the complainant to assist in securing an appropriate accommodation***. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At page 555, McIntyre J. stated:
>
> > Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. ***Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.***
>
> [Emphasis added]

[71] Ms. Wakeham admitted—and the Board found—that she never discussed with Dr. Lewis the forms completed by Dr. Lewis for the Department, nor did she discuss what her recommendations would be. This is a clear failure by Ms. Wakeham to "bring the facts" to the Department's attention.

[72] The employer's obligation to accommodate only arises and can only be implemented with the employee's cooperation by bringing forward facts necessary to permit implementation of the duty to accommodate. In *Snow v. Cape Breton – Victoria Regional School Board*, 2006 NSHRC 6:

> 74. The Complainant has the initial obligation to bring the facts relating to her disability to the attention of the employer so that the employer has the opportunity to offer accommodation. The employer has the responsibility to initiate the process of accommodation. The employee has the duty to work in good faith with the employer to attempt a workable accommodation, and the duty not to reject a proposed accommodation simply because it is not the one preferred by the employee.

[73] To similar effect is *Halliday v. Michelin North America (Canada) Ltd.*, [2006] N.S.H.R.B.I.D. No. 6:

> 97. The BOI finds Dr. Dean failed to "bring the facts" to Michelin. Dr. Dean was in the unenviable and demanding position of the "prism" through which Mr. Halliday's medical care was conducted. He was in a key position to "bring the facts" to Michelin regarding the information on Mr. Halliday's disability that Michelin needed to "fashion" an accommodation solution. However, the BOI finds that ***Michelin received an incomplete and confusing picture of the source of Mr. Halliday's disability from Dr. Dean's APR's***. [. . .]
>
> [Emphasis added]

[74] Also see: *Trask v. Nova Scotia (Department of Justice, Correctional Services)*, 2010 NSHRC 1; *Toronto Board of Education v. Canadian Union of Public Employees, Local 4400*, [2000] O.L.A.A. No. 326 at ¶ 115; *McNeil v. Treasury Board (Department of National Defence)*, 2009 PSLRB 84.

[75] The Board faults the Department for not making further inquiries of Dr. Lewis. But the record shows that Dr. Lewis' medical opinions and advice changed and following her advice—particularly in 2011—had borne no fruit. The Department resolved to seek other medical advice by involving Drs. Theriault, Bourke and Koshi. In effect, they were doing what the Board suggested, by seeking medical clarification about Ms. Wakeham's condition and function, but from independent—and respectfully—better qualified sources.

[76] Then the Board criticized the Department for relying upon the most recent medical forms provided by Dr. Lewis for accommodation purposes, rather than taking into account all previous such forms. Imposition of such a duty on the Department was unreasonable.

[77] First, it only makes sense that the Department would rely on the most recent medical information with respect to an employee's medical condition because in principle that could always change. And in Ms. Wakeham's case, it did change, as the Board itself found. Moreover, it is unreasonable to expect an employer to sift

through years of medical reports and cobble together its own list of possible accommodations based on dated information that may or may not still be relevant. This is especially so with Ms. Wakeham, whose extensive absences and accommodations went back many years.

[78] The Board's reply that Ms. Wakeham suffered from "chronic pain" so accommodations could be expected to carry over is not reasonable on the facts of this case. If that were so, Dr. Lewis' diagnoses, prognoses and recommendations could be equally unchanging—they were not.

[79] Ms. Wakeham's physicians' descriptions of her medical condition and diagnoses were inconsistent and confusing. A few recent examples are illustrative: in January of 2011, Dr. Lewis' Fitness for Work Assessment Form diagnoses "chronic derangement of neck and shoulder girdle". Dr. Lewis added:

> [. . .] posturing at work aggravates problem [. . .] depressed unable to multitask. Does not tolerate a lot of background noise and distress.

Her condition is described as "permanent".

[80] In April 2011, Dr. Lewis' Certification by Attending Physician diagnoses "myofascial pain syndrome". In June, the diagnosis is "chronic pain syndrome", now described as "temporary" expected to last "3-4 months".

[81] In August of 2011, the diagnosis of chronic pain syndrome is repeated, but now it is "permanent". In October, Dr. Watson diagnoses "stress, anxiety", described as a "psychological condition". In January of 2012, the diagnosis becomes "adjustment disorder, chronic pain/cervical strain". It is now both "psychological" and "musculoskeletal".

[82] When deciding that the Department had not accommodated Ms. Wakeham by failing to incorporate former medical recommendations, the Board speculated on what they were:

> 292. By my reading of the medical forms, Dr. Lewis wanted the Complainant's hours reduced until March 5, 2012, but conveyed that her right neck and shoulder pain and depression were chronic, that there were ongoing problems focusing in a noisy, stressful work environment, and that the Complainant required ongoing accommodation for posturing, noise, stress and work environment. It was Dr. Lewis's testimony that, if the Respondent was able to accommodate the Complainant, the Complainant would be able to attend work consistently and

> meet the demands of the position***. For a patient with chronic symptoms, Dr. Lewis's expectation must have been that accommodations beyond the ease back to work would continue.***
>
> [Emphasis added]

[83] Dr. Lewis' expectation—inferred or not—was not relevant. What is relevant is what she said at the time. If the emphasized passage were true, Dr. Lewis could have said so. She said the opposite. On February 14, the Fitness for Work Assessment Form describes the end date for modified duties as "March 5, 2012".

[84] Secondly, Ms. Wakeham had been told that it was important for each medical report to fully inform the Department of her condition and accommodation needs. Previous reports were "wiped out" by subsequent ones.

[85] The Board's ill-concealed scepticism about this evidence appears in the decision:

> 311. Ms. Forrest was unable to testify with certainty respecting when this discussion allegedly took place. If it was discussed with the Complainant in 2009 or 2011, there is no evidence that the Complainant understood this in 2012. Given her cognitive issues, it would have been reasonable to take steps to ensure that the Complainant understood this in advance of her return in 2012.

[86] In fact, there is also an internal Department email of August 31, 2011 confirming Norma Bennett's telephone advice that day to Ms. Wakeham ". . . that she should identify with her doctor any accommodations from her previous leave that need to be carried over as this new form wipes out any previous accommodation requirements for the employer".

[87] Notwithstanding the Department's advice to Ms. Wakeham about the need for Dr. Lewis to set out all required accommodation, no recommendations about mail duties or a different work space appear in Dr. Lewis' recommendation to the Department in September 2011. The Board's reasoning that Ms. Wakeham needed to be reminded about the completeness of medical reports did not result in "no mail" or "quiet work space" recommendations from Dr. Lewis in September 2011, despite reminders to Ms. Wakeham that former recommendations should be set out if they were to be "carried over". Recommendation for a less distracting work space does reappear on a February 14, 2012 Fitness for Work form, but nothing about mail duties.

[88] As previously described, when Ms. Wakeham returned to work in February 2012, the Department requested independent medical examinations and a medical file review in order to better identify Ms. Wakeham's medical challenges with the hope of accommodating them. In the meantime, she was told—and acknowledged in her evidence—that she was not to do anything that would aggravate her injuries. The Board faulted the Department for not "supervising" or "watching" Ms. Wakeham. The Department had no duty to "watch" or "supervise" Ms. Wakeham to ensure she did not aggravate injuries of which only she would be aware. In view of the conflicting medical evidence from her physician, it was reasonable—although not legally required—for the Department to seek independent medical advice.

[89] The Board is correct that Ms. Wakeham's workstation was not moved to a quieter, more remote location, presumably to reduce distraction and stress. But there is no evidence that this triggered her departure on March 9, let alone caused total disability. First, to reiterate, absence of a quieter work space was not the basis of her human rights complaint. Second, she was not at work for long and only worked three full days. Third, although on March 15, 2012 Dr. Watson diagnosed "anxiety, stress" he added "past several months having difficulty with anxiety". For most of that time, Ms. Wakeham was not working. Fourth, we know from all the medical evidence that Ms. Wakeham's disabling anxiety did not make a sudden appearance in March 2012. Fifth, no contemporary medical evidence links this suggested accommodation of a quieter work space to Ms. Wakeham's departure, let alone her permanent inability to return to work. More will be said about this when Ms. Wakeham's ability to work is addressed. In sum, no adverse effect to Ms. Wakeham is apparent on the record because she was not given a different workspace.

Did the attendance management plan discriminate against Ms. Wakeham?

[90] The Board found that, in all of the circumstances, imposing an attendance management program on Ms. Wakeham constituted an "adverse effect".

[91] As previously described, upon her return to work on February 20, 2012, Ms. Bennett and Laura Forrest met with Ms. Wakeham to discuss concerns about Ms. Wakeham's excessive absenteeism. That was followed up with a letter on February 21, 2012, setting out the accommodations already extended. Because the Board decided the attendance management plan constituted an adverse impact, the letter is reproduced here:

February 21, 2012

Dear Ms. Wakeham:

This letter is in follow up to our conversation on February 21, 2012 in which we discussed concerns with respect to your excessive level of absenteeism from work. A review of your attendance over the last three (3) years (2009, 2010, 2011), shows that you have not worked more that (sic) 45% of regularly scheduled hours. In 2010 and 2011, you worked less than 25% of your scheduled hours. Furthermore, in the last three years, you have not worked the months of July and August and in 2010 and 2011, you did not work in the months of October, November, and December. I have attached a list detailing all of your absences in the last 3 years (please see attached). Although all of your absences are medically supported, your excessive absenteeism level is unacceptable and is a concern for myself and the Department.

When an employee and employer enter into an employment relationship, there is an obligation on both parties. The employer has an obligation to provide employment and remuneration for work performed while the employee is expected to report to work on a regular and consistent basis and to complete assigned tasks. Your position is critical to our organization and to meet your obligation, you must attend work on a regular, timely and consistent basis. Your continued excessive absences from the workplace places a significant challenge on the office to meet its operational requirements. As you know, the period from April to September tend to be the busiest time of the year for the EMC division (such as increased volume of applications). As you have been absent those months in the last three years, the Department has had to hire additional staff to help with the workload. Furthermore, your absences from the workplace places additional work pressures on your coworkers who have to assist with the workflow.

In order to assist you in improving your level of attendance at work, the Department has made several accommodations for you since 2008. On the basis of medical information, you were permanently placed in the Secretary I (later reclassified to Clerk III) position in 2008 as an accommodation. You were previously working in the Clerk II position. Unfortunately, there continued to be attendance concerns in this new role. Additionally, over the last 3 years, several ergonomic assessments have been conducted on your workstation. Based on medical recommendations from your physician, changes were made to your cubicle and workflow to accommodate the workplace based on your medical needs.

To date, specific accommodations that have been put in place to assist you include the following:

- two (2) ergonomic chairs were purchased to your specific needs
- a specific keyboard, foot stool, and larger monitor were purchased for you

- your cubicle was modified ergonomically to your specific needs and to reduce pulling, stretching, and bending
- a wireless headset was provided to aid in mobility
- higher walls have been built into your cubicle to decrease noise and distraction
- noise reduction headphones were provided
- you were placed in a specific cubicle in a corner to further limit distraction and noise
- adjustments were made to your schedule in order to enable you to receive ongoing treatments
- your work was segmented to allow for concentration
- additional training was provided to you (including one on one training) on data entry for EIMAS, Foremost, ATS, Matrix, File creation, etc.

While we are willing to continue to work with you to help you achieve success and improved attendance in the workplace, ***it is expected that your attendance improve substantially upon your return from STI leave on February 20, 2012 and that you will take the necessary steps to attend work on a regular and consistent basis. Accordingly, an Independent Medical Examination is required upon your return to the workplace to identify if there is anything further the employer can do to support you to ensure that you are able to achieve regular and consistent attendance at work in the immediate future.*** As I indicated in our conversation, your health is a concern and we want you to get the support you need to be healthy. However, we cannot continue to support the level of absenteeism that has taken place in the last 3 years.

Please be advised that continued excessive innocent absenteeism could lead to further action, up to and including termination of your employment. Once you return to work, we will be meeting with you on a regular basis to review your attendance.

As a reminder, for your information, an Employee Assistance Program is available to all employees and can be reached by calling 1-800-777-5888.

I have attached a copy of the Attendance Management Policy for your reference.

Please feel free to contact me if you have any questions or concerns.

Sincerely

Norma Bennett
District Manager, EMC

[Emphasis added]

[92] The Board found the attendance management plan constituted adversity in fact, discriminating against Ms. Wakeham. In principle, advising of the

implementation of an attendance management plan does not constitute, in law, an adverse impact. Indeed, an employer has an obligation to provide warning prior to taking any action that would have an adverse impact on the employee, (*Munro v. IMP Aerospace Components*, 2014 CanLII 41257 (NS HRC).

[93] The Board acknowledged the law was generally unsupportive of its finding:

> 425. I agree that an attendance management program, as a standard in a workplace, is not systemically discriminatory if, as a standard, it is adopted in good faith for a purpose rationally connected to operational needs in a workplace and if it is "reasonably necessary", as that has been defined in the case law respecting the issue of undue hardship to the employer: *Meiorin*. This is well supported by the case law relied upon by the Respondent, including *Hydro-Quebec v. Syndicat des employees de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000*, 2008 SCC 43 (CanLII) ("*Hydro-Quebec*"). I agree that it is not an adverse impact or inherently discriminatory to tell an employee that they have an attendance problem that is negatively impacting the employer's operations, to inform them of an attendance management program and to place them on such a program. ***It is also clear, based on the case law, that the fact an employee experiences stress from being informed that they are being placed on an attendance management program does not constitute an adverse impact.***
>
> 426. However, the proposition that being placed on an attendance management plan is not in and of itself an adverse impact must be considered in the context of the facts of this case in relation to the manner this attendance management plan was applied to this Complainant.
>
> [Emphasis added]

[94] The Board distinguished the authorities on the ground that Ms. Wakeham was medically directed to avoid stress and was "particularly vulnerable". The Department was faulted for advising Ms. Wakeham immediately upon her return of the attendance management plan. The Board also criticized the Department for the absence of a "support person" which made the meeting "more stressful". She went on to find that the employer's expectations of attendance in the letter were unreasonable in light of Ms. Wakeham's chronic disability.

[95] The Board disbelieved Laura Forrest's sworn testimony that she had spoken to Elizabeth Kinqua, the NSGEU representative who declined to attend the February 20 meeting because it was not a disciplinary meeting. Neither the general law nor the Collective Agreement in this case required union representation.

[96] It would have been an easy matter to call Ms. Kinqua to contradict this evidence, if it was important. But it wasn't because there was no legal obligation to have union representation at the meeting. It is disquieting that the Board went out of its way to disbelieve Laura Forrest on a legally irrelevant point in the absence of any contradictory evidence.

[97] When Norma Bennett and Laura Forrest met with Ms. Wakeham, she was given a chart detailing all her absences from work since 2009. The Board mischaracterizes the chart as showing "every absence due to disability as if it were a culpable absence". This is incorrect. In fact, the Department recognized in its February 21 letter that Ms. Wakeham's absences were "medically supported". The chart makes no distinction between culpable and non-culpable absences. Nevertheless, *Hydro-Québec* establishes that non-culpable absences may be a ground for dismissal.

[98] The Board's reasoning amounts to this: although capable of working, Ms. Wakeham could not be told what her employer's work expectations were because it would be too stressful for her to know what they were. Here the Board's interpretation of the duty to accommodate precludes the employee from knowing what her fundamental employment obligations are. This is plainly wrong. If Ms. Wakeham was so psychologically fragile, she could not do her job. Indeed, as we shall see, this was the conclusion of psychiatrist, Dr. Scott Theriault.

[99] Merely informing Ms. Wakeham of the Department's attendance management plan could not constitute an adverse effect. The Board erred in law in so finding.

[100] The Board also found that the Department's attendance requirements caused Ms. Wakeham to experience stress because she stopped attending osteopathy appointments in March 2012 owing to the Department's attendance management plan. The Board found that this contributed to her "health episode" on March 9. This finding originates with Norma Bennett's notes of that day regarding what Ms. Wakeham said. But it was an unreasonable finding because it does not accord with Ms. Wakeham's own direct evidence, which the Board did not reject.

[101] The Board's finding here is unreasonable for four reasons. First, Ms. Wakeham only worked four hours a day to March 5. As Ms. Wakeham said, that would have accommodated osteopathy treatments during her first two weeks back. Second, Ms. Wakeham did not say that she missed any osteopathy appointments. Third, Ms. Milner-Clerk's clinical notes of March 8 record that Ms. Wakeham was

still seeing her osteopath. Fourth, when Ms. Bennett's notes were put to Ms. Wakeham, she denied this would have had any adverse health effect:

> Q. "She began to cry indicating that she is so tired of being sick all the time and that ***she was sick today because she was unable to attend her osteopath appointment*** on Tuesday, March the 6th."
>
> Do you recall telling her that?
>
> A. No.
>
> Q. Okay. And can you say today whether that's the case, that you attributed being sick on...
>
> A. ***No, that is not the case***.
>
> Q. And why not?
>
> A. Because, just because I missed an osteopath appointment would not do that to me. I've missed osteo, I've had osteopath appointments rescheduled and I'm not going to fall and kill myself.
>
> [Emphasis added]

And further:

> Q. And in the second paragraph Ms. Bennett says, "During Sandra's episode on Friday she indicated she is unable to attend her sessions with her osteopath as we have indicated that she is to attend work and schedule her medical appointments outside of work hours. ***She indicated that her episode is a result of not being able to attend her weekly sessions, every Tuesday full day with her osteopath***."
>
> What do you say about that?
>
> A. ***Incorrect.***
>
> Q. Okay.
>
> A. I don't have, first of all, every Tuesday I don't have full days. The osteopath's appointments are 45 minutes to an hour. I only have them, well, two days a week and they, yeah.
>
> [Emphasis added]

[102] The Board also found that the Department was insisting on 90 percent attendance immediately upon return from medical leave:

> 436. The attendance management letter also indicates that the Complainant's attendance needed to improve "in the immediate future" and "upon her return from short term illness". I find as fact that the Respondent imposed a work-related

> standard of a 90% attendance rate upon the Complainant effective immediately upon her return to work.

That was not the evidence. Norma Bennett's letter of February 21 describing the Department's expectations does not say that. It asks Ms. Wakeham for "substantially" improved attendance.

[103] The February 21 letter goes on to seek independent medical examinations ". . . to identify if there is anything further the employer can do to support you to ensure that you are able to achieve regular and consistent attendance in the immediate future." The Department does not say it will not tolerate medically supported absenteeism—only "excessive" absenteeism. No specific standard is immediately imposed because the plan was to meet regularly to review Ms. Wakeham's attendance. That never happened because she left soon after.

[104] Norma Bennett's notes of the February 20 meeting with Ms. Wakeham and Laura Forrest say "you need to be at work more than 10 % of the time—you need to be where you were in 2008—90% attendance at work". Laura Forrest explained in her testimony that 90 percent attendance is what is expected of all employees. That general expectation of all employees had never been imposed on Ms. Wakeham in previous years, nor was it the Department's demand in 2012, as Ms. Forrest described:

> . . . if we see an employee with improvement in their attendance, then we would support them in that process so that if there's shows progress [sic] . . . we're working in the right direction.

[105] This is not evidence of an immediate imposition of a 90 percent attendance rate. Moreover, the Board's finding is manifestly inconsistent with the four hour days during the first two weeks of return, recommended by Dr. Lewis and accepted by the Department as well as Ms. Wakeham's authorized attendance at a medical appointment on March 8. The Board's "finding" of an immediately required 90 percent attendance rate is contrary to the evidence and therefore unreasonable.

[106] To conclude on accommodation and adverse effect: the only recommendation made by Dr. Lewis in February 2012 which the Department did not implement was removal to a quieter workspace. Neither Ms. Wakeham nor her doctors said this was why she left on March 9.

Could Ms. Wakeham work in 2012?

[107] This is relevant because if Ms. Wakeham could not work, she could not be accommodated.

[108] There is no direct evidence that Ms. Wakeham suffered any permanently disabling injury during her two part-time weeks or three days of full-time work. That she left after such a brief and attenuated schedule suggests that she was not able to work.

[109] As the Board noted, Ms. Wakeham had no clear explanation of why she left:

> 370. The Complainant was asked under cross-examination if her departure from work on March 9, 2012 could be related to one particular reason and whether it was related to writing receipts. She testified that "she did not know". She also stated, "it was all the causes".

[110] Relying primarily on Dr. Lewis' later opinion (¶ 133 below), the Board found that the Department failed to accommodate Ms. Wakeham in February-March 2012, causing her to be permanently unable to return to work. This was an unreasonable finding because:

a) It is inconsistent with Ms. Wakeham's inability to work for much of the previous three years;

b) It contradicts two independent medical opinions obtained shortly after Ms. Wakeham left work in March 2012, and relied upon by the Board; and

c) Dr. Lewis' opinion lacked a reliable factual foundation.

[111] In brief, the Board's conclusions were not grounded on the evidence.

Ms. Wakeham's inability to work prior to 2012

[112] To recall—in 2009, 2010 and 2011, Ms. Wakeham worked less than 45 percent of her scheduled hours. In 2010 and 2011, it was less than 25 percent. Between April 2011 and February 2012, it was 10 percent. Her absences were for medical reasons. Both Dr. Lewis and the Board made general statements that Ms. Wakeham was not accommodated, which presumably explained her inability to work. But in fact, in 2011, when she worked only four months, Ms. Wakeham

received the most extensive accommodations since her 2008 clerical placement—itself an accommodation thought by Dr. Lewis to "best suit" her medical condition.

[113] Ms. Wakeham left again in April 2011. As the Board noted, Dr. Lewis described her as experiencing "exacerbation of chronic condition". Ms. Wakeham needed a "modified workspace". But she already had one, in accordance with Dr. Lewis' January 2011 recommendations.

[114] There is no specific medical evidence linking Ms. Wakeham's absences in 2011 with any Departmental failure to accommodate her. There are two references in the evidence to accommodation in this period. The Department's records include a reporting email to Ms. Bennett in June of 2011 that Ms. Wakeham advised that accommodation "seemed to be working fine" but she was "not ready to return so soon".

[115] During the hearing before the Board, Ms. Wakeham commented that when she came back to work briefly in September 2011, she was not given a quieter work place. That would not explain her departure in April 2011 or her five-month absence since then. Nor is there any contemporary evidence that her workspace had anything to do with the brevity of her September appearance at work—an appearance which Dr. Lewis advised against.

[116] Moreover, there is no accommodation recommendation from Dr. Lewis in September of 2011 respecting a "quieter work space". Most pertinently, there is no medical record attributing her departure from work in September to any lack of accommodation. As we have seen, Dr. Lewis thought Ms. Wakeham was setting herself up for failure by returning to work. That prediction is supported by other medical evidence. Ms. Wakeham had been treated by her psychologist, Jacqueline Milner-Clerk, since at least 1999, who reported to Dr. Lewis on November 3, 2011:

> Sandra is again seeking counselling due to experiencing difficulties coping at work and overall. Sandra reported that she is currently off work after another unsuccessful attempt at returning. ***According to Sandra, she was not fully ready to return to work when she went back as she was still attempting to heal her physical well-being and found that her thought processes were "delayed"***. This led to her feeling easily overwhelmed and anxious and unable to perform her job. Her stress increased and as a result, her physical well-being decreased.
>
> At the time that Sandra was attempting to return to work she reported that she was attempting to come off her psychotropic medication, she had two siblings that became seriously ill and she was experiencing marital difficulties. The

> combination of all these factors increased the overall stress she was experiencing to the point where she reportedly was unable to work.
>
> [Emphasis added]

Plainly, Ms. Wakeham had many non-work related stressors in her life that prevented her from working.

[117] Significantly, the Board made no findings that any failure to accommodate by the Department caused any of Ms. Wakeham's lengthy absences in 2011. The record is replete with extensive efforts by the Department to accommodate Ms. Wakeham in January of 2011. These are listed in the February 21, 2012 letter from Ms. Bennett (¶ 91 above). There is no connection between Ms. Wakeham's almost total absence in 2011 and any failure by the Department to accommodate her. This supports the Department's position that accommodations or the lack thereof had nothing to do with Ms. Wakeham's absenteeism. The Department does not say that Ms. Wakeham was not ill or did not experience chronic pain; simply that Ms. Wakeham's absenteeism and ultimate departure had nothing to do with the adequacy of accommodations afforded her by the Department.

[118] In sum, even with the extensive accommodations listed by Ms. Bennett in her letter of February 21, 2012, Ms. Wakeham could not work for most of 2011.

Independent medical opinions say Ms. Wakeham was unable to work

[119] With respect to the independent medical opinions obtained in 2012 the Board found that this medical evidence was ". . . consistent with a finding that working without proper accommodation would likely aggravate [Ms. Wakeham's] symptoms and lead to her inability to work". The reports do not say this; indeed, they describe longstanding medical and psychological conditions, clearly pre-dating 2012, which rendered Ms. Wakeham unable to work, accommodated or not.

[120] Ms. Wakeham's inability to work in 2011 and 2012 is supported by Ms. Milner-Clerk, who agreed in cross-examination that as of November of 2011 Ms. Wakeham was unable to function at work and that her condition did not change thereafter. Ms. Milner-Clerk was well-placed to make this comparison because she saw Ms. Wakeham on March 8, 2012, the day before she left work for the last time.

[121] Dr. Koshi diagnosed Ms. Wakeham with somatization. This is a psychological condition which manifests itself in physical symptoms for which the

patient seeks medical advice. Dr. Koshi did not think that Ms. Wakeham was experiencing a physical illness. The Board rejected Dr. Koshi's opinion, but not those of Drs. Theriault and Bourke. Their opinions were telling. Dr. Theriault offered:

> … [Ms. Wakeham] has significant difficulties in concentration and focus as well as memory***. If she performed in her day-to-day work duties as she did on her mental status examination with me, she would be completely unable to attend to any of the cognitive requirements of her job***.
>
> [Emphasis added]

[122] With respect to the permanency of her condition, Dr. Theriault said:

> ***Ms. Wakeham's condition*** appears to fluctuate over time; however, on the whole the evidence is that it ***has persisted now over several years*** and observations by those that have known her for a long period of time, such as her psychologist suggest that they are not improving and, in fact, there is some decline. Her condition ***should be considered to be permanent*** . . .
>
> [Emphasis added]

He did not think that she could do her job. He concluded:

> With respect to her cognitive issues ***I do not see anything that could successfully allow Ms. Wakeham to perform the basic functions of her job, even with accommodation***.
>
> [Emphasis added]

[123] For his part, Dr. Bourke was extremely pessimistic about Ms. Wakeham's prospect of a successful return to work. To the question:

> What can the employer do to facilitate a successful return to work for the employee on a regular and consistent basis in the foreseeable future?

Dr. Bourke responded:

> The likelihood of this employee's successful return to even part-time in her previous role(s) is exceedingly small in my opinion. I have no recommendations in this regard.

[124] The Board downplayed these conclusions, noting that Dr. Bourke provided a list of accommodations and that Dr. Theriault suggested that a further

neuropsychological assessment with a PhD level neuropsychologist to assess Ms. Wakeham cognitively may allow possible accommodations.

[125] With respect to Dr. Bourke's recommendations, the Board said:

> 529. Presumably, Dr. Bourke meant that he had no further recommendations beyond the medical restrictions that he had just recommended. Again, his opinion, that the Complainant is highly unlikely to be able to return to even part-time work, is based on the premise that the Complainant would return to her role as a Clerk III at the office. Dr. Bourke then recommended the trial use of sympathetic blocks or attendance at a formal chronic pain program (which he notes was recommended by neurosurgery in January 2006) and assessment of the Complainant's right arm by a physician skilled in chronic regional pain syndrome.

[126] Dr. Bourke's "recommendations" included a comment that even with them, Ms. Wakeham would still be absent for "days or weeks at a time". This is not the accommodated attendance described in *Hydro-Québec*. Even then, Dr. Bourke's conclusions were much more pessimistic. He ended his list with this caveat, "Even within this framework, I have concerns regarding this employee's ability to attend work on a regular and consistent basis". He added that "this employee would appear to be fit for only the most sedentary employment, and likely not on a full-time basis". He concluded with his view that it was unlikely Ms. Wakeham could return to her job, as quoted above.

[127] The Board inferred that "Dr. Theriault thought that there was a possibility that there could be accommodation". But his whole report suggests the opposite. When responding to the question whether Ms. Wakeham had a medical condition that impacted her ability to attend work on a regular and consistent basis, that would affect her ability to meet the demands of her work and prevent her from performing some or all of her tasks, he replied "yes". He considered her compromised health to be longstanding and permanent.

[128] Dr. Theriault did say that neuropsychological testing to assess Ms. Wakeham cognitively "may allow" possible accommodations. But this faint hope is not evidence of Ms. Wakeham's then condition or likely condition. Dr. Theriault added with respect to cognitive difficulties:

> ***It was quite apparent on an interview with me and has been a persistent symptom for Ms. Wakeham for some period of time—indeed years***. These cognitive difficulties with concentration, memory and focus constitute the primary psychological condition impacting Ms. Wakeham's ability to attend work on a regular and consistent basis.

> [. . .]
>
> With respect solely to psychological functioning, in my opinion Ms. Wakeham would have limitations in doing any of the cognitive demands of her current employment.
>
> With respect to her cognitive issues, ***I do not see anything that could successfully allow Ms. Wakeham to perform the basic functions of her job, even with accommodation***.

[129] Dr. Theriault concluded:

> I have no further suggestions as to how to facilitate a successful return for Ms. Wakeham. ***It may be appropriate for Ms. Wakeham to consider whether return to employment is in fact in her best interest psychologically***.
>
> [Emphasis added]

[130] The physical and cognitive problems described by Drs. Theriault and Bourke all predate Ms. Wakeham's return to work in February 2012. There is no evidence that they arose as a result of her attendance at work at that time or as a result of any alleged failure to accommodate her.

[131] The Board perceived the challenge this evidence presented, observing:

> 530. It could be inferred from those reports that the Complainant was unlikely to be unable to successfully return to work when she returned on February 20, 2012. However, the medical evidence at the time was that the Complainant was able to work when she returned to work in February 2012. Dr. Lewis testified and recorded in her notes at the time that the Complainant was functioning well independently.

"Functioning well" is not explained either by Dr. Lewis or the Board and could not apply to Ms. Wakeham's work because she had not been working for at least three months when Dr. Lewis made this comment.

Dr. Lewis' opinion lacked a reliable factual foundation

[132] With respect, Dr. Lewis' opinion was not factually based. Unlike the independent medical opinions, Dr. Lewis did not conduct a review of all the medical evidence; nor did she do any of the testing that Drs. Bourke and Theriault did. Dr. Lewis simply repeated what Ms. Wakeham told her supported by her own observations. Ms. Wakeham had two unsuccessful attempts to return to work in 2011, when she was being accommodated. To reiterate: there is no medical

evidence that her absences during that time resulted from a failure to accommodate her. As the record shows, Dr. Lewis "facilitated" Ms. Wakeham's wishes by telling the Department that she could return to work in September 2011 with accommodation, while privately telling Ms. Wakeham that she thought she was "setting herself up for failure". An apt prediction.

[133] Three-and-a-half years later in September 2015, Dr. Lewis expressed the opinion that Ms. Wakeham had been "completely disabled since 2012 and has two Independent Medical Evaluations that support this. [. . .] Failure to accommodate certainly caused more anxiety, stress and pain which resulted in more time away from work over the years. It materially contributed to complete disability in 2012."

[134] Again, this generic opinion lacks any factual foundation. Dr. Lewis does not describe any medical connection between Ms. Wakeham's return to work and her permanent departure. She does not say how Ms. Wakeham was accommodated. Nor did she even know.

[135] During direct examination about her opinion of materially contributing to "complete disability in 2012" all Dr. Lewis could offer was:

> I felt that if they-, there had been a possible accommodation, that time away from work would have been less.

[136] Dr. Lewis does not say that with accommodation Ms. Wakeham could work regularly or predictably; simply that she would be away from work less. Nor does she describe any medical condition or physical limitation that Ms. Wakeham had after March 9 that she did not already have on February 20.

[137] Dr. Lewis' opinion ignores the evidence of 2011 when Ms. Wakeham's returns to work were unsuccessful, despite extensive accommodation based on her recommendations. Ms. Wakeham's inability to work in 2012 was not novel. It was historical and longstanding.

[138] Ms. Wakeham's medical and work history together with the opinions of Drs. Theriault and Bourke show that Ms. Wakeham was not able to work consistently or permanently in February 2012 or for the foreseeable future. When pressed with respect to this in cross-examination, all that Dr. Lewis could suggest was:

> A. She ***looked*** well, she ***looked*** happy, she ***looked*** engaged. I was ***hopeful*** that she would be able to maintain her function.

> Q. Why did you think that it would be successful this time?
>
> A. I was ***hoping*** that we would have a graduated return to work, that she'd continue working with her physiotherapist, her osteopath. I believe at this point she was off all of her medications, which appeared to have had a negative at times in the past.
>
> [Emphasis added]

[139] Dr. Lewis' wishful thinking is not a medical opinion.

[140] Dr. Lewis was questioned about Dr. Theriault's opinion that Ms. Wakeham had been reluctant to accept her limitations which had led to "tentative returns to work when perhaps this was not advisable". Dr. Lewis' hopeful response highlights the psychological character of Ms. Wakeham's disability:

> I tried to-, I tried to encourage her to go back to work because ***mentally***, going to work and ***being productive is very important***. And being away from work is-, is not helpful many times.
>
> [Emphasis added]

[141] In the end, Dr. Lewis agreed with Dr. Bourke's opinion that Ms. Wakeham should not return to work. Although she did not have that view in February 2012, she did not explain how such a dramatic change could occur in Ms. Wakeham's ability to work during her abbreviated return in February-March of 2012. When questioned about having Ms. Wakeham go back to work over time, Dr. Lewis again alluded to psychological motivation:

> I mean, when you try to send somebody back to work with a chronic pain syndrome and you're trying to support them and encourage them, I mean, ***you're trying to get them to buy into the plan, right***.
>
> [Emphasis added]

[142] During re-direct, Commission counsel suggested to Dr. Lewis that Dr. Bourke implied Ms. Wakeham could perform a more sedentary type of employment. Dr. Lewis responded:

> ***Right, but it's hard to imagine something more sedentary than what we've described. Hadn't that been the problem?***
>
> [Emphasis added]

[143] Indeed so.

[144] Finally, the Board attempted to buttress Dr. Lewis' opinion that Ms. Wakeham could work in February 2012 by noting that Dr. Koshi shared this opinion. But, of course, he did so only because—unlike Dr. Lewis—he did not think Ms. Wakeham was physically disabled. It is illogical and therefore unreasonable for the Board to invoke Dr. Koshi's opinion to support that of Dr. Lewis while simultaneously rejecting the very basis of Dr. Koshi's opinion.

[145] A very live issue, not fully addressed by the Board, was whether Ms. Wakeham chose to return to work for financial reasons even though she could not work. Although long term disability was available to her, it was less remunerative than her regular pay and short term disability.

[146] One of the Department's submissions was that Ms. Wakeham's returns to work were financially motivated, coinciding with exhaustion of short term disability payments which, unlike long term disability, were "topped up" so that she would not experience any loss of income. The Board obliquely addressed this argument:

> 23. I have not included all of the evidence, the submissions or my conclusions respecting disputed facts or arguments that I considered to be without merit or upon which I placed limited relevance or weight. For example, the Respondent submits that the Complainant returned to work on several occasions when she should not have, because she did not want to apply for long-term disability. Long-term disability provided reduced financial support to the Complainant. The evidence was that on each such occasion the Complainant's physicians put her back to work. It was acknowledged at the hearing that this medical advice was accepted by the Respondent's witnesses at the time. There was no direct evidence to support the Respondent's allegation. Accordingly, I did not consider this submission to have a sufficient evidentiary basis and, therefore, do not intend to address it in detail in these reasons. In summary, I have only included the submissions of the parties that were required to be addressed and only included the facts that are necessary to understand the conclusions I reached.

[147] There was substantial evidence supporting the Department's submissions of financial motivation for Ms. Wakeham's return to work in December 2010, September 2011 and December 2011. To recall the most recent, in September 2011 Ms. Wakeham went back to work despite Dr. Lewis' opinion that she was "setting herself up for failure". Ms. Wakeham's decision to return to work followed immediately after Department advice to her that short term disability payments would be exhausted by the end of September 2011. Again, on January 6, 2011, Dr. Lewis initially advised the Department that Ms. Wakeham would not be

returning to work until April. On January 25, 2012, the Department wrote to Ms. Wakeham to say that her short term disability payments would cease on February 24. After that, Dr. Lewis' opinion changed.

[148] On February 14, 2012, Dr. Lewis recommended an accommodated return to work on February 20, just before short term disability payments would stop. She made a note that Ms. Wakeham "has to return to work".

[149] This evidence was corroborated by other medical evidence. Ms. Wakeham's psychologist, Ms. Milner-Clerk, reported that:

> [. . .] Ms. Wakeham returned to work due to financial reasons on February 20, 2012 even though Ms. Wakeham was not fully physically or psychologically ready to do so.

[150] At the hearing she testified:

> [. . .] She [Ms. Wakeham] had reported that was the primary reason why she was returning to work … because I believe in my recollection that her disability benefits or funds were going to cease.

[151] Ms. Milner-Clerk's file note at Ms. Wakeham's February 17, 2012 visit says ". . . no pay after Feb. 24 . . ."

[152] It was put to Ms. Milner-Clerk that Ms. Wakeham had denied any financial motivation for returning to work. Ms. Milner-Clerk who had been called as a witness by the Commission did not change her evidence but confirmed her notes and testimony of what Ms. Wakeham had told her.

[153] Ms. Wakeham asked Dr. Lewis in cross-examination whether she (Dr. Lewis) formed the impression that Ms. Wakeham was returning to work "because of money". Dr. Lewis did not answer the question. So the Board itself clarified:

> [. . .] I'll be more specific. That the amount an employee obtains on – on short-term disability is greater than … long-term disability … the reason there's a return to work is because Ms. Wakeham's going to – or perceives she's going to receive less money … as long as you're back for a long enough period of time, retriggers your entitlement to short-term disability . . .

[154] Dr. Lewis never directly answered the question, although she conceded that Ms. Wakeham went back to work on one occasion when Dr. Lewis felt she was not ready.

[155] The Board completely ignores this compelling evidence that Ms. Wakeham was unable to do her job in February of 2012, but returned to work for financial reasons. Ms. Wakeham should not be criticized for trying to minimize the financial impact of her condition by returning to work. But nor should the Department be faulted for "discrimination" if those returns were doomed to fail.

[156] The Board's disconcerting silence about this evidence implies rejection of it, but it is certainly consistent with the medical opinions accepted by the Board that show Ms. Wakeham could not work in February 2012, and is consistent with Ms. Wakeham's unsuccessful return to work at that time.

[157] *Hydro-Québec* provides that an employee may be dismissed for absenteeism if she cannot return to work in the reasonably foreseeable future despite attempted accommodation:

> [14] [. . .] ***the goal of accommodation is to ensure that an employee who is able to work can do so***. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
>
> [15] However, ***the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration***. …
>
> [. . .]
>
> [17] [. . .] ***in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.***
>
> [18] Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively ***or if an employee with such an illness remains unable to work for the reasonably foreseeable future*** even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non‑discriminatory. [. . .]
>
> [19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. ***The employer's duty to accommodate ends where the employee is no longer able to***

> ***fulfill the basic obligations associated with the employment relationship for the foreseeable future.***
>
> [Emphasis added]

[158] The Board distinguished *Hydro-Québec* by referring to the evidence of the complainant's own physician in that case:

> 536. Before leaving this issue, I acknowledge the Respondent's submission that *Hydro-Quebec* is a similar case and that consistent with that decision, I should make a finding that the employment contract was frustrated. In *Hydro-Quebec*, the Court found no conflict between the duty to accommodate and the law of frustration of contract in an employment context based on an inability of the employee to be able to return to work in the foreseeable future. On the facts of the *Hydro-Quebec* case, any recommended accommodations that had not yet been implemented were unreasonable and were almost certainly to be ineffectual. ***The medical evidence of the employer's own physician was clear in advance that the employee could not work in the foreseeable future.*** That is not the case here.
>
> [Emphasis added]

[159] Respectfully, that is not what the complainant's physician said in *Hydro-Québec*. He reserved his prognosis and tied his advice to a work-related dispute:

> [4] At the time of her dismissal on July 19, 2001, the complainant had been absent from work since February 8 of that year and had been seen by her attending physician, who recommended that she stop working for an indefinite period, [TRANSLATION] ***"until the work related dispute is resolved"***.
>
> [Emphasis added]

[160] But in *Hydro-Québec*, like here, there was a psychiatric opinion of an inability to work:

> [4] [. . .] ***The employer had also obtained a psychiatric assessment, which included a conclusion that the complainant would no longer be able to [TRANSLATION] "work on a regular and continuous basis without continuing to have an absenteeism problem as . . . in the past".***
>
> [Emphasis added]

[161] The only professional qualified to comment on Ms. Wakeham's psychiatric condition was Dr. Theriault. In his opinion, Ms. Wakeham's cognitive impairment—which he described as disabling her from work—was unrelated to depression or anxiety:

> It would be difficult to know what treatment plan would be available to her with respect to her difficulties in the area of cognition. It doesn't appear to be secondary to depression . . . and it does not appear to be a function of anxiety

[162] When this was put to Ms. Wakeham's psychologist in cross-examination, Ms. Milner-Clerk agreed that Ms. Wakeham's cognitive difficulties were not related to depression or anxiety.

[163] This uncontradicted evidence is crucial in two respects. First, it shows that Ms. Wakeham's mental disability prevented her from working. In *Wakeham #*1, this Court limited Ms. Wakeham's complaint to physical disability so an inability to work owing to a mental disability disposes of a complaint founded on physical disability. Second, because her cognitive disabilities were unrelated to depression or anxiety, it is plain that accommodations aimed at reducing anxiety—for example, working in a quieter workspace—would have no impact on her cognitive challenges.

[164] Employers are entitled to expect some regularity of work from their employees if they accommodate them. Dr. Lewis could only hope that Ms. Wakeham's accommodated work would result in fewer absences—not regular attendance (¶ 136 above).

[165] *Hydro-Québec* says that chronic absenteeism may frustrate the employment contract when the employee remains unable to work for the foreseeable future. To recall the court's summary: "The . . . duty to accommodate ends when the employee is no longer able to fulfill the basic obligations [of] . . . the employment relationship for the foreseeable future." This does not mean that an employee can preserve the relationship by making brief, intermittent and unpredictable appearances at work. That had been Ms. Wakeham's pattern. Indeed, the trend was to fewer and briefer returns. February 2012 was nothing new. It was the conclusion of a lengthy tendency. It had nothing to do with any discrimination by the Department.

[166] The history of Ms. Wakeham's absenteeism, the failure of accommodation to mitigate that absenteeism and the medical evidence all show that in February 2012 Ms. Wakeham could not resume work in the "foreseeable future".

[167] In light of the record, the Board's finding that Ms. Wakeham was not accommodated in February-March 2012 and that this caused her to leave work permanently, is an unreasonable outcome.

Conclusion

[168] Ms. Wakeham has endured a number of traumatic accidents and other personal stressors in her life. Despite the devoted attention of a host of medical care providers, she was unable to work for the majority of time between 2009 and March 2012. Her returns were relatively brief and getting briefer even with employer accommodations. Those accommodations were most extensive in 2011—and yet Ms. Wakeham missed almost eight months of work that year.

[169] Notwithstanding the perennial optimism of Dr. Lewis, Ms. Wakeham's return in early 2012 was unsuccessful. Both the independent medical examinations and Ms. Wakeham's psychologist confirm that her mental and physical disabilities were chronic and pre-dated her 2012 return to work. There is no evidence that this return caused an inability to work that had persisted for some years. Indeed, the opinion of psychiatrist Dr. Scott Theriault was that Ms. Wakeham's disabling cognitive problems were long-standing, prevented her from working, and were not related to anxiety or depression—an opinion shared by Ms. Wakeham's psychologist, who had been treating her since 1999.

[170] The Department did not discriminate against Ms. Wakeham by failing to accommodate her. They tried to facilitate her returns to work. The medical evidence confirms that further accommodations would have been ineffective, particularly with respect to cognitive function. *Québec-Hydro* is apposite.

[171] Because the Department has been successful on liability, it is unnecessary to address the Board's remedial award. But comment is warranted regarding the "immense cost to the Crown" of this case about which the Department's counsel expressed concern in his closing submissions to this Court.

[172] Although confined to alleged discrimination in a three week period in 2012—and to repeat from this decision's overview—this matter occupied 18 days of hearings, not counting the 12 case management conferences. There are thirty appeal books. Ms. Wakeham is an experienced litigant. She has advanced her claims in the courts through litigation regarding her motor vehicle accidents. She has filed worker compensation claims; she has brought grievances under her collective agreement. Then she brought this human rights complaint. It may not have been the best means of vindicating her claims. And if so, surely it could have been conducted more expeditiously and inexpensively than it was. A casual acquaintance with the news tells us of the serious human rights issues confronting Nova Scotians. Unlimited resources are not available to rectify these wrongs.

Careful expenditure of scarce public resources would suggest a better solution than the process pursued in this case.

[173] I would allow the appeal and set aside the orders of the Board.

Bryson, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.