

BCLRB No. B153/2017

BRITISH COLUMBIA LABOUR RELATIONS BOARD

JOANNE BRANDON

(the "Complainant")

-and-

TRANSIT POLICE PROFESSIONAL ASSOCIATION

("TPPA")

-and-

TRANSLINK SECURITY MANAGEMENT LTD.

("TSML" or the "Employer")

PANEL: Koml Kandola, Vice-Chair

APPEARANCES: Rachel H. Roy and Carmela Allevato, for
the Complainant
Sebastien Anderson and Sherry Shir, for
the TPPA
Donald J. Jordan, Q.C., for the Employer

CASE NO.: 70197

DATE OF HEARING: June 29 and 30, July 31, and August 1,
2017

DATE OF DECISION: September 1, 2017

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Complainant applies under Section 12 of the *Labour Relations Code* (the "Code"), and alleges the Union breached its duty of fair representation with respect to handling the accommodation of her medical condition, and the eventual termination of her employment (the "Complaint"). The Union denies it breached Section 12 of the Code.

2 As there were several material facts in dispute, an oral hearing was held. On the eve of the hearing, the parties provided an extensive agreed statement of facts ("Agreed Statement of Facts"), and also provided a joint book of documents at the hearing. I thank the parties for their efforts in this regard. As noted in the Agreed Statement of Facts, the parties agree that the facts contained in it "are admitted as proven as if those facts had been established in evidence", and that the documents referred to are also admitted as proven.

3 The Union called three witnesses: Sergeant Bryce Graham, who was the TPPA Treasurer at the relevant time ("Sgt. Graham"); Sergeant Dan Young, who was the TPPA Police Director at the relevant time ("Sgt. Young"); and Sergeant Daffydd Hermann, who was the TPPA Recording Secretary at the relevant time ("Sgt. Hermann").

4 The parties advised that, in addition to the Complaint, the Complainant has an active complaint before the BC Human Rights Tribunal alleging discrimination on the basis of disability, and in which the TPPA and TSML are respondents. As a result, the parties agree I am not to determine issues such as: whether the Complainant's medical condition constitutes a disability under the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "Human Rights Code"); whether TSML discriminated against her in her employment on the basis of a disability; and whether TSML had or fulfilled its duty to accommodate the Complainant.

II. EVIDENCE

5 The background history leading to the termination of the Complainant's employment and the filing of the Complaint is extensive. Much of it is set out in the Agreed Statement of Facts. I set out below a non-exhaustive summary of the material facts and evidence, and those necessary to provide context for the issues raised in the Complaint.

GENERAL BACKGROUND

6 TSML is a wholly owned subsidiary of the South Coast British Columbia Transportation Authority ("TransLink"). Other TransLink subsidiaries include Coast

Mountain Bus Company Limited ("CMBC") and British Columbia Rapid Transit Corporation ("SkyTrain").

7 TSML employs all civilian employees and sworn members of the South Coast British Columbia Transportation Authority Police Service ("Transit Police"). Transit Police provide designated policing services to TransLink's transportation service region. The TPPA is the certified bargaining agent for the Transit Police bargaining unit. The bargaining unit includes both civilians and Transit Police officers.

8 The TPPA has an Executive Board, which is comprised of: the TPPA President, Vice-President, Police Director, Treasurer, Recording Secretary, and two civilian positions (the "Executive Board"). At the material times, Sgts. Graham, Young and Hermann were all members of the Executive Board. The two civilian positions were not involved in this matter in order to maintain privacy surrounding the Complainant's medical situation.

9 The Complainant was employed by TSML as a general duty police constable from December 31, 2008 until October 31, 2016. Throughout the relevant time period, she was a member of the TPPA. Her position primarily involved patrol duties in relation to SkyTrain cars and stations, heavy-rail, SeaBus, commuter vessels, transit buses and transit bus facilities, and transit maintenance facilities.

10 TSML has two main offices: the Sapperton office ("Sapperton" or "Headquarters"), which is located in New Westminster near the Sapperton SkyTrain station; and the Bridgeport office ("Bridgeport"), which is located in Richmond near the Bridgeport SkyTrain station. Transit Police constables select, on the basis of seniority, to work out of either Bridgeport or Sapperton. They begin and end their shift at their selected office. TSML requires Transit Police constables to attend at their selected office for briefings at the commencement of each shift. The first portion of the briefing is jointly held, conducted by video link. After that, the video link is disconnected and each office conducts its own separate in-person briefing. At the conclusion of the briefing, constables depart to perform their assigned duties.

11 In addition, at their selected office, Transit Police constables meet with supervisors and perform tasks such as writing policing reports, drafting reports to Crown Counsel, interviewing witnesses or suspects, and logging exhibits.

12 Transit Police constables wear designated uniforms while on duty and may also carry a firearm. Facilities are provided at both Sapperton and Bridgeport for changing into and out of uniforms, for storing equipment, including firearms, and for exhibit storage.

13 In addition to the Sapperton and Bridgeport offices, TSML has eleven sub-offices, which are located below SkyTrain stations. The sub-offices are intended primarily as places of respite so that constables, while on patrol, may use the washroom, write a report, or meet with a member of the general public. The sub-offices

are not equipped with locker rooms, firearms storage, facilities for processing exhibits, or video facilities for interviewing witnesses.

THE COMPLAINANT'S MEDICAL ISSUES

14 In or about February 2014, the Complainant advised TSML that she was experiencing adverse reactions, which she attributed to air quality issues at Sapperton. She requested a transfer to Bridgeport.

15 Clark Glassford is TSML's Manager, Human Resources ("Glassford"). Glassford advised the Complainant that, prior to any transfer, TSML required medical documentation supporting her symptoms, and a description of the specific triggers of her symptoms. As requested by TSML, the Complainant provided a medical note from her physician, dated February 24, 2014, to CMBC's occupational health nurse ("OHN"). The note stated the Complainant "has an allergy to something in her work environment. She needs to work in an alternative environment to prevent progression of her symptoms".

16 Glassford received this information from the OHN and advised the Complainant that, without having specific information about the cause of her symptoms, it was difficult to determine if a transfer would minimize her symptoms. In November 2014, the Complainant used the shift sign up process to change her assigned office to Bridgeport.

17 On November 22, 2015, the Complainant worked five hours of overtime. Her selected office on that date was Bridgeport. She subsequently booked off sick for her next scheduled shifts.

18 On November 27, 2015, she contacted the TPPA and outlined her concerns about the air quality within Bridgeport and Sapperton, and the adverse reactions she experienced as a result. She requested advice and assistance from Sgt. Graham, who was also her supervisor at the time. She also requested that the personal health information she was sharing with the TPPA be kept as confidential as possible.

19 The Complainant returned to work from December 5 to 8, 2015, and wore a particulate mask when she was inside Bridgeport. TSML's human resources personnel were neither advised nor aware that she was wearing a particulate mask. During this time, she also met with Sgt. Graham, though she was not wearing a particulate mask at that time. The Complainant also made a claim with WorkSafeBC at approximately this time.

20 The evidence was that in late 2015, Sgt. Graham raised the Complainant's situation with the Executive Board. After meeting with the Complainant, Sgt. Graham sought information from TSML regarding the maintenance of the heating, ventilation and air conditioning ("HVAC") filters in Bridgeport and Sapperton, and any air quality testing that may have been done at the facilities. Sgt. Graham had some email correspondence with Alex Ginogino, TSML's Manager of Facilities and Asset Management ("Ginogino") in this regard.

21 On December 10, 2015, the Complainant was seen by her physician, who referred her to an allergy specialist. On the same day, the Complainant advised Sgt. Graham that her physician told her it was unhealthy for her to attend at either Sapperton or Bridgeport. On December 12, 2015, she advised TSML that she was experiencing adverse reactions when she worked at Bridgeport.

INVESTIGATION INTO THE COMPLAINANT'S MEDICAL ISSUES

22 TSML sought further medical documentation regarding the Complainant's condition before it would consider accommodation. It requested that her physician complete the Employer's return to work fitness assessment, or M186, form. The Complainant's physician completed the M186 form, dated December 22, 2015, and it was provided to the OHN. On the M186 form, the physician indicated the Complainant could return to work, but with the following restrictions:

Must have full body coverage –incl. hands, eyes, face – to limit exposure to toxins. Required to wear goggles and carbon filter mask at all times while in building or cannot work in either headquarters at [Sapperton] or [Bridgeport].

23 In response to the question "patient is able to engage in physical confrontations, suspect apprehension and restraint?", the physician responded "yes".

24 The TPPA did not receive a copy of the completed M186 form at the time. However, I note that on the form, the Complainant indicated her manager or supervisor was Sgt. Graham, and she provided written consent for the release of the form to, among others, her manager.

25 Also in December 2015, the Complainant sent emails to both Sgt. Graham and Glassford to follow up on Ginogino's correspondence regarding workplace air quality testing. Sgt. Graham told the Complainant he was awaiting air quality testing reports and information from Ginogino. Sgt. Graham also gave her information relating to her sick leave and short-term disability entitlements, and WorkSafeBC benefits.

26 On January 6 and 7, 2016, the Complainant and Sgt. Graham had extensive email correspondence. Among other things, Sgt. Graham summarized the steps he had taken to date in relation to her requests. He advised her she did not need to do everything through him and could make requests of TSML herself, such as contacting the health and safety committee. The Complainant told him she was keeping the TPPA involved because she believed the TPPA was part of the solution. She told him it was her understanding from TSML not to contact the health and safety committee as TSML was not at the stage of discussing accommodation. The Complainant also told Sgt. Graham she had been in contact with WorkSafeBC. Sgt. Graham told her to focus on her application for short-term disability benefits, as he did not believe her WorkSafeBC claim would be accepted. He also stated as follows:

Basically as it sits right now with your current limitations the employer cannot accommodate you back to work so except [sic] this process will go on for some time.

27 On or around January 9, 2016, the Complainant used up her last day of accrued sick leave. Shortly thereafter, her claim for short-term disability benefits was denied as she was considered to have recovered from her symptoms.

28 In a letter dated January 15, 2016, the OHN wrote to the Complainant's physician seeking additional medical information "to assist the Company in understanding Ms. Brandon's limitations and/or restrictions". In response, the physician listed the Complainant's current diagnosis as "adverse reactions to work environment; allergic in nature; flushing, headaches, nasal congestion, eye irritation, cough". The physician also identified the specific allergens causing the Complainant's reactions as "suspected 1. carbon dioxide and 2. diesel exhaust".

29 On January 25, 2016, the Complainant emailed Sgt. Young. The Complainant and Sgt. Young have a mutual friend, who suggested the Complainant contact Sgt. Young about her work situation. In her email to Sgt. Young, the Complainant explained her situation and sought his assistance in reaching an arrangement with TSML that would allow her to return to work. Sgt. Young replied that he would discuss the issue with the Executive Board and would respond to her expeditiously.

30 On January 27, 2016, Sgt. Young told the Complainant that Sgt. Graham was handling the issue and would be in touch with her. On February 1, 2016, Sgt. Graham emailed the Complainant, stating, in part:

I'll start off by asking that you choose just one TPPA representative to be your advocate for this issue. I take no issue and have no problems if you would rather have Dan Young work on your behalf. The only issue I take is this. When you go to someone else to have them advocate for you and don't inform me of anything the following happens:

Both Dan and myself end up doing the same work and speaking with the same people. This becomes confusing... The bigger issue to myself is simply if both Dan and myself are doing the same thing then one of us is wasting our time. A lot of this work involves me making phone call[s] and meeting with people on my [own] time sometimes having to drive to work on an off day, taking time away from my family. It upsets me when this time is wasted. ...

I would suggest that you follow up with EI ... You should also follow up with WCB... I would also expect the health nurse would have to go through HR to get you back to work. Sending them to me will just cause a delay in the process, causing more stress and financial hardship on yourself...

As far as the TPPA goes we are in [a] holding pattern as we have to give management time to conduct an investigation into the matter... Have you met or spoke with HR about a return to work?...

31 In response, the Complainant emailed Sgt. Graham on February 2, 2016, raising some concerns and stating, in part:

The company can take however long it wants to "conduct their investigation", whatever that is. The issue is that I am not being paid, and am able to return to work. It appears to me that I am either being constructively dismissed, or medically discharged. The Employer and the OHN nurse are aware of my diagnosis... They have had my diagnosis since December 10, 2015. My doctor wrote a revised duty to accommodate yesterday, and it was rejected again by Glassford. The note said that I could return to work, unprotected, for full 12 hour shifts so long as I didn't spend more than one hour a day at either [Bridgeport] or [Sapperton], to be reviewed in 60 days.

32 As referenced in the Complainant's February 2, 2016 email quoted above, on February 1, 2016, the Complainant obtained a medical certificate from her physician stating that the Complainant had been diagnosed with environmental sensitivities, and that she could return to work immediately to "full duty activities" given reasonable accommodation. The physician recommended that:

1. the Complainant spend no more than four hours per work week at either of the two buildings that triggered her allergic reactions (i.e., Sapperton or Bridgeport);
2. the Complainant utilize the sub-offices for report writing that do not trigger her environmental allergies; and
3. these conditions be reviewed in 60 days.

33 The Complainant did not provide a copy of this medical certificate to the TPPA at the time though, as noted in the email quote above, she referred to it and its contents in her email to Sgt. Graham.

34 On February 5, 2016, Sgt. Graham sent a detailed letter to the Complainant in response to the concerns raised in her email of February 2, 2016. In his letter, Sgt. Graham expressed his views on the accommodation issue and an employee's obligation to be flexible. He also asserted the Complainant had not provided all of the medical documentation to the TPPA, stating:

You have not shared all correspondence between your doctor and the Employer so we are not in any position to determine if their response is reasonable or not. This puts your union at a significant disadvantage to provide effective representation because we simply can't address those issues. ... Early in this process you have insisted on absolute discretion with the information that has been provided to the union. That request has been respected so far

but we need greater latitude to discuss FACTS with the Employer so that we can take a strong advocacy position of your behalf...

Please cease attempting to school me on the role of the union in the duty to accommodate. I am well aware of our role as a union but our role currently has limitations based on the absence of the access to information that you have imposed. ...

In your email yesterday you advised me that the Employer was changing filters and replacing contaminated ceiling tiles and Bridgeport and further alleging that they are destroying evidence for your case. I have checked with the Employer and have confirmed that this is routine work... Another reason the TPPA is declining to pursue your request is that the request to have this "evidence" collected to discover the source of your reaction is somewhat illogical. ... It is an extreme leap of faith to assume that what is found in the filters or on ceiling tiles is causing your health issues.

* * *

In speaking with the Employer today about your return to work, their position is that you will not be allowed to return to work at Bridgeport until they are satisfied that the air quality is within acceptable parameters AND you will not be allowed to return to work at any location until the OHN and your doctor reach resolution on your general prognosis going forward in the workplace. ... (emphasis in original)

35 Sgt. Graham followed up with Ginogino requesting further information on the time frame that the air filters at Bridgeport had been changed.

36 The Complainant and her physician continued to communicate with TSML and the OHN, and some possible triggers were investigated. The Complainant returned to work on February 15, 2016 at Sapperton, while air quality testing at Bridgeport was being conducted. In an email to the TPPA dated February 17, 2016, she asked that Sgt. Young replace Sgt. Graham as her representative, as Sgt. Graham was away on annual leave.

37 The Complainant was scheduled to work on March 10 and 11, 2016, at Sapperton. She experienced symptoms as a result and booked off sick.

38 The Complainant has not returned to work with TSML in any capacity since March 11, 2016.

39 The OHN asked the Complainant to obtain another medical form from her physician. On March 21, 2016, the Complainant's physician completed the form and, among other things, listed the following limitations:

She continues to be unable to work in either Sapperton or Bridgeport worksites likely due to VOCs [volatile organic

compounds] in those environments as confirmed by Worksafe. Could RTW [return to work] if in full body coverage incl. hands, face, eyes, neck, to limit exposure to toxins. May need to wear goggles and carbon filter mask at all times when in buildings.

40 On April 4, 2016, the Complainant emailed Sgt. Young and raised several questions, including: whether the TPPA had forwarded any of her suggestions for accommodation options to TSML; whether TSML would install activated carbon filters at Bridgeport; and whether the TPPA had obtained air quality investigation results.

41 Sgt. Young's evidence was that, at this time, the Complainant's situation was being discussed with some regularity at Executive Board meetings. On April 4, 2016, he forwarded the Complainant's email to the Executive Board members, stating: "For discussion. I will need some guidance".

THE APRIL 19 MEETING AND THE IME

42 The evidence was that at this point, Sgt. Hermann became directly involved in the Complainant's case. Sgt. Hermann's evidence was that he acted as the liaison with TSML's Human Resources, and primarily Glassford, "making sure there was a connection between what was going on on the TPPA's side, to management moving things along and understanding their approach". Sgt. Hermann testified that, because he worked similar shifts to Glassford, it was convenient for Glassford to speak with him about the Complainant's situation, and they spoke about it regularly.

43 On April 4, 2016, Sgt. Hermann responded to Sgt. Young's request for assistance, and sent an email to Sgt. Young and the other members of the Executive Board, as follows:

Hi Dan,

We have discussed this issue with the Employer extensively. Their position is that there are currently no "secondments" available for consideration. They are also taking the position that they do not have managerial control over external secondments. I spoke to Clark [Glassford] this morning and he agrees that they will "attempt" to find a permanent accommodation for her somewhere in the enterprise. Here is what I think we need to communicate to Joanne at this stage even if [it] is repeated information to her". (emphasis added)

44 Sgt. Hermann then set out an extensive draft response to the Complainant's questions. Among other things, Sgt. Hermann reiterated the need for the Complainant to provide full medical documentation to the TPPA. He also stated that TSML was not going to install activated carbon filters at Bridgeport, in part due to cost and lack of control over the building. Further, he stated that WorkSafeBC had declared Headquarters "safe for workers so that matter is no longer being pursued".

45 In cross-examination, Sgt. Hermann acknowledged he had not had any contact with the Complainant about her medical situation at that point. He was also asked where he was getting the information to prepare a lengthy email response when he had not had any contact with the Complainant. His evidence was that Sgt. Graham had kept the Executive Board informed of the Complainant's situation, and Sgt. Hermann had also had conversations with Glassford.

46 Sgt. Young subsequently forwarded Sgt. Hermann's email to the Complainant. The Complainant responded positively to the news that accommodation was now being discussed. On April 4, 2016, she emailed several documents to the TPPA, including medical reports and certificates not previously sent to the TPPA. In this respect, she stated as follows in her email (emphasis added):

I have attached all the medical information that I have, including medical notes from 2014, symptoms, prescription for medication, specialists report, and return to work forms. All correspondence between my doctor and the OHN had to be sent on a separate email... Please confirm receipt of this information ASAP.

As of today, my doctor has stated I am capable of returning to full duties. My limitations are that I cannot be inside [Sapperton] or [Bridgeport] without protective gear, which I am fully willing to wear.

...

47 In a separate email to Sgts. Hermann and Young on April 4, 2016, the Complainant asked them to "advise exactly what, if anything you may require at this point to assist your efforts". In addition, she explained she did not experience any of her symptoms outside of the Transit Police buildings, and recovers when she is not in them. In this respect, she identified six stations or sub offices where she had not had a reaction.

48 The Complainant wrote back to Sgt. Hermann three times on April 5, 2016 to confirm the TPPA had all the medical information that it required, and stated she provided the medical information as soon as she understood the TPPA wanted copies of the actual medical documents.

49 On April 5, 2016, Sgt. Hermann met with Glassford to discuss the Complainant's return to work and accommodation. Sgt. Hermann emailed the Complainant later that day, outlining some concerns which he indicated came from TSML. Among other things, Sgt. Hermann stated:

There are some logistical questions and hurdles that need to be overcome. For instance the Employer is asking questions like... Where do you get changed into what amounts to a haz-mat suit when you arrive at [Sapperton] or [Bridgeport] for briefings and other duties. Is it stored in one of these buildings or in the trunk of your car? When you come back to a building mid-shift to lodge an exhibit or are required [to] attend one building or another how does that work if your safety gear is stored at the other building?

How/Where does your firearm get stored when you wear the protective gear if you are getting changed at the trunk of your car? In order to be accommodated they are looking for you to be reasonably functional as a police officer. The requirement to dawn [sic] and remove safety gear really means that full duties are not practically an option without significant time delay getting changed. This also decreases your ability to respond in a timely manner to emergencies.

50 The Complainant responded to these concerns by email to Sgt. Hermann on April 5, 2016. Among other things, she stated:

The doctor has not recommended a Hazmat suit. I am required to wear a mask, protective eye wear, and to cover my skin only if I have to be inside of [Sapperton] or [Bridgeport]. Other than my face, hands and ears, my uniform covers my skin. We have phones that could be used on speaker function so that I don't have to be inside [Bridgeport] for briefing. This is not a big hurdle to overcome. I could arrive at [Bridgeport] in full uniform, with a dedicated radio that I charge each night at my home. The protective gear would not need to be worn unless and until I had to go into [Bridgeport] office. It could easily be stored in a locker at YVR sub. Any exhibits could be placed into a locker at YVR sub as well. These are all simple, inexpensive solutions. I am totally functional as a Police Officer... There is no negative effect on my ability to respond to any emergency, because I would not have to wear the protective gear. What I am asking for is to be allowed to wear protective gear inside of [Bridgeport] if and when it is absolutely necessary for me to be inside the building. ... Perhaps the shift in perception away from "hazmat suit" which has never been brought up until today, will assist in seeing how simple and inexpensive the return to work could be. ..." (emphasis added)

51 In his evidence, Sgt. Hermann acknowledged it was an error to have referred to the protective coverage required by the Complainant's physician as a "Hazmat suit", but it was "something like it without the positive pressure in it".

52 In a separate email to Sgts. Young and Hermann dated April 5, 2016, the Complainant requested the TPPA to file a grievance regarding the recovery of her sick time.

53 On April 10, 2016, the Complainant's remaining sick pay ran out. On the same date, she sent an email to the TPPA expressing concern that the TPPA had not filed a grievance for back pay for her, which she stated she had asked for "multiple times" and over "several months". She also suggested the easiest way to get her back to work would be to allow her to start and finish work out of a sub office, and the closest one to Bridgeport that she did not get sick in was the YVR sub office.

54 Via email on April 15, 2016, Sgt. Hermann confirmed the TPPA and TSML had
agreed to waive grievance timelines until such time as the parties had a better
understanding of how she may be accommodated.

55 In this respect, Sgt. Hermann's evidence was that, rather than create "an
atmosphere of filing a grievance", it would be best to continue the dialogue with TSML.
In cross-examination, he was asked to expand on what he meant by an "atmosphere of
filing a grievance". Sgt. Hermann's was that the TPPA had a history of resolving most
matters with TSML through dialogue, meetings, and cooperative effort, and that filing a
grievance created "process formality" that was unnecessary with the Employer, as it
was the first formal step in an "adversarial process". He stated that "if we absolutely
have to file a grievance, we will".

56 On April 19, 2016, the Complainant, the TPPA and TSML (along with the OHN)
met in-person, for the first time, to discuss accommodation. Sgts. Young and Hermann
attended for the TPPA (the "April 19 Meeting").

57 The Complainant provided some suggestions for how she could be
accommodated, which Glassford said he would take away for discussion. The OHN
indicated there were two challenges to returning the Complainant to work:
accommodating her physician's recommendations, and being unable to identify the
trigger of her symptoms. Glassford and the OHN indicated TSML required additional
medical information.

58 Subsequently, TSML directed the Complainant to attend an independent medical
examination ("IME") by a physician of its choice. The TPPA supported this direction.
While the Complainant initially objected to the physician selected, she ultimately agreed
to attend the IME. An IME was scheduled for June 14, 2016.

59 On May 27, 2016, the Complainant emailed Glassford seeking certain air quality
testing and HVAC information. On May 30, 2016, Glassford forwarded her email to Sgt.
Young, copied to Sgt. Hermann, and stated, in part:

I am not responding to these types of e-mails. I have made her
aware that she is not to communicate via e-mail and if she has
questions or concerns she is to call me directly or we can set up a
meeting.

* * *

Joanne does not have her facts straight when she sends e-mails
like this and it makes it very difficult to respond to. We have been
very diligent in ensuring that our work environments are safe.
Unfortunately she is not accepting of that and continues to look for
other workplace issues rather than a treatment plan or long term
prognosis.

The purpose of the IME is to understand her disability and the factors contributing to it. Hopefully we will get some meaningful information from the doctor that will then help Joanne further understand her disability and assist us in developing a plan for her.

...

60 Sgt. Hermann's evidence was that he did not convey the contents of Glassford's email to the Complainant.

EVENTS AFTER THE IME REPORT WAS RECEIVED

61 On June 14, 2016, the Complainant attended the IME. The IME report was provided to the OHN, with a date stamp of July 26, 2016 (the "IME Report"). Among other things, the IME Report concluded that the Complainant presented with a number of symptoms, but the cause of those symptoms was "elusive at this time", and there was "no diagnosis that unifies this clinical picture of her condition currently". The IME Report stated that, as a result, a diagnosis of the Complainant's symptoms should be clarified, and recommended a number of investigations, including referral to certain specified medical specialists, and investigation of possible underlying respiratory conditions. The IME Report also recommended that, while these diagnostic investigations were occurring, the Complainant's exposure to Sapperton and Bridgeport, as well as sub-offices where she had experienced symptoms, should be limited. The OHN provided a summary of the findings to TSML via email on July 27, 2016.

62 The Complainant obtained a copy of the IME Report from her physician on August 5, 2016. At the time, the Complainant did not provide the TPPA with a copy of the IME Report, nor did the TPPA request it. Sgt. Hermann's evidence was that he "received verbally the results of the IME" and TSML's position from Glassford.

63 Following the IME, neither TSML nor the TPPA directed or requested any additional medical or workplace investigations or assessments relating to the Complainant.

64 Sgt. Hermann's evidence was that after the IME was completed and the results were "in", TSML no longer had an issue with the Complainant's medical condition and accepted that she needed accommodation. According to Sgt. Hermann, the message from TSML at that point was to move to the accommodation stage.

65 Sgt. Hermann gave evidence that, at that time, they considered whether the Complainant could be accommodated and, in that regard, considered various protective equipment provided by TSML. Sgt. Hermann indicated he had discussions with Glassford on these topics. In addition, Sgt. Hermann testified that after the IME results were received, Inspector Barry Hicks from TSML ("Insp. Hicks") became involved in conducting a functional assessment of the accommodation of the Complainant in the police constable position. Sgt. Hermann's evidence was that Insp. Hicks is employed by TSML as the Manager of Operational Support and had previously worked as a Transit Police officer. In cross-examination, Sgt. Hermann acknowledged that, prior to giving

testimony at the hearing, he had not told the Complainant either about Insp. Hicks' involvement in the accommodation process, or that this functional assessment was occurring.

66 Sgt. Hermann's evidence was that they considered a standard surgical mask, a dust protection or N95 mask, as well as a smaller version of a carbon filter mask. He brought each of these items to the hearing to demonstrate. Sgt. Hermann's evidence was that he considered the surgical mask with Insp. Hicks earlier on, and they concluded it would not provide adequate coverage for the Complainant. Subsequently, Sgt. Hermann reviewed the N95 dust mask and came to the same conclusion. He also stated the carbon filter mask issued by TSML was the piece of Employer-provided equipment that provided maximum facial coverage, but it did not cover the ears. Sgt. Hermann brought to the hearing a larger carbon filter mask which the TPPA purchased for the purposes of the hearing. Sgt. Hermann tried on the mask at the hearing to demonstrate. The mask covered the entire face, and his voice, though muffled, was audible and understandable.

67 Sgt. Hermann testified that the Complainant's ability to communicate while wearing such equipment was a concern. He gave evidence regarding the importance of communication in a police constable's duties, such as with colleagues, the public, suspects or witnesses, and that anything that obstructed a constable's ability to communicate would be a challenge.

68 In addition to the protective gear, Sgt. Hermann's evidence was the TPPA and TSML considered various workplace locations in assessing the Complainant's request for accommodation, and several logistical challenges arose.

69 I will outline some of the challenges he raised. For example, he said they started with the Sapperton and Bridgeport locations, and realized there were "many challenges" associated with having personal protective equipment being made available to the Complainant outside of these buildings. His evidence was they then considered sub-offices. However, the primary challenge with sub-offices was their small size and lack of supplies, interview rooms, and facilities for firearms or exhibit storage. Sgt. Hermann's evidence was that sub-offices are also in high-traffic locations proximate to diesel buses and diesel trains that could pose potential health issues for the Complainant. In addition, he identified the lack of video facilities outside of Sapperton and Bridgeport as a challenge to the Complainant's ability to participate in various required training that took place at Sapperton.

70 Sgt. Hermann also gave evidence that there was a concern about the delay associated with having the Complainant's protective equipment stored in one location, and the time it would take for her to access it if an emergency arose elsewhere in the transit line.

71 In short, Sgt. Hermann's evidence was there "was nothing simple about this accommodation, and with a lack of simplicity comes cost". In cross-examination, he acknowledged that he did not have specific discussions with TSML about

accommodation costs, and that TSML did not provide him with information on the costs related to specific accommodation proposals. Instead, Sgt. Hermann's evidence was that "what I gleaned from the Employer's perspective was that cost was a significant consideration for them".

72 In cross-examination, Sgt. Hermann acknowledged he did not ask the Complainant to participate in the above-mentioned process. Sgt. Hermann stated that Sgt. Young was the Complainant's primary contact, though he was not sure if Sgt. Young told her about the process. Sgt. Hermann testified that he did not consider whether the Complainant would be a "viable participant" in that process.

73 Returning to the chronological review, on August 5, 2016, Glassford advised Sgts. Young and Graham that the Complainant's short-term disability claim had been approved, and the Complainant was owed approximately \$4600 by the TPPA. The Complainant did not receive those monies from the TPPA until approximately one month later. In addition, her claim for long-term disability benefits was denied.

74 On August 17, 2016, the Complainant emailed Sgt. Young asking why she had not been contacted with any accommodation update. She stated that her priority was to return to her current position, but in the meantime she was willing to return to work in another position within the TransLink enterprise. She identified five temporary positions she would be willing to consider. In addition, on September 3, 2016, the Complainant sent an email to Sgt. Young and Glassford requesting a meeting to discuss her return to work.

75 Sgt. Young responded via email on September 6, 2016, indicating TSML was doing an accommodation review and a meeting would be arranged "very shortly". Sgt. Young also stated that the TPPA "will do everything legally possibl[e] in order to get you accommodated with the aim to satisfy you".

76 In an email dated September 16, 2016, Sgt. Young advised the Complainant that he had spoken with Glassford and was informed as follows:

[Y]our accommodation review is ongoing and currently in the hands of Inspector SEMPLE. After Inspector SEMPLE reviews this accommodation submission, it will eventually go to the Chief for his review and comments and wind up back in the hands of [Glassford]". (emphasis in original)

77 The Complainant replied with several concerns, including: the OHN no longer appeared to be involved in the process; an unreasonable length of time had elapsed since the IME Report had been received; whether TSML was reviewing any other documentation of which she was not aware; and whether her suggestions for accommodation had been forwarded to TSML. In response, Sgt. Young stated he had it on "GOOD authority that at the very least, the employer is willing to ensure you get to the top of the list and will assist in your success being a SkyTrain Attendant and possibly a Supervisor..." (emphasis in original).

78 On September 19, 2016, Sgt. Young sent the Complainant an email advising that the accommodation meeting would be taking place "by next week" and that, "if the Employer does not offer anything reasonable, the TPPA will submit a grievance with appropriate action to be initiated as it deems fit and proceed to arbitration if necessary". On September 22, 2016, Sgt. Young emailed the Complainant stating "the TPPA has had initial discussions with our Labour Lawyer concerning your case", and the TPPA had "received advice from our Labour Lawyer as to what to do at this stage". In addition, Sgt. Young stated "sufficient medical evidence" had already been submitted regarding the Complainant's condition.

79 The Complainant continued to send emails to the TPPA inquiring about when the accommodation review would be concluded and when she could return to work. Sgt. Young pressed Glassford on the status of TSML's accommodation review. The Complainant sent an email to Sgt. Young on October 4, 2016, stating as follows:

I am glad that the TPPA is finally starting to understand the urgency of my situation.

However, both the TPPA and the Employer have been apprised of my limitations and restrictions since very early this year, and in fact, were both represented at the April 19th, 2016 "accommodation" meeting where those same limitations and restrictions were discussed.

It is difficult to understand why this is taking so long since presumably all parties came prepared to discuss how to accommodate my disability and get me back to work.

The half year delay since that meeting has significantly and adversely impacted me and is not justified, especially in light of the fact that the IME's recommendations contain the same restrictions/limitations. ..."

80 On October 4, 2016, Sgt. Young advised that a meeting had been scheduled between TSML, the TPPA and the Complainant for October 13, 2016 (the "October 13 Meeting").

THE COMPLAINANT'S TERMINATION

81 The October 13 Meeting occurred as scheduled, and was the second meeting between all three parties. It was attended by Sgts. Hermann and Young, the Complainant and her husband, Glassford, and another individual for TSML.

82 In the October 13 Meeting, TSML provided the Complainant with a letter in relation to her accommodation request ("the Accommodation Letter"). In the Accommodation Letter, TSML advised it could not accommodate the Complainant, either in her position as a police constable or in other available positions. TSML's stated reasons for this conclusion included, among other things, its assertions that: the

requirement for protective clothing significantly impaired her ability to function as a police constable and could pose a safety risk; the sub-offices were not equipped with video surveillance equipment, interview rooms, exhibit rooms, or storage of firearms; and she could not attend in person at Bridgeport or Sapperton for daily briefings or training.

83 The Accommodation Letter stated that, as a result, her employment with TSML would be terminated. During the October 13 Meeting, TSML verbally advised that the termination date would be October 31, 2016. Sgt. Hermann requested TSML to maintain the Complainant's benefits until November 30, 2016. Ultimately, TSML did not approve that request. In cross-examination, Sgt. Young confirmed the TPPA did not challenge TSML's decision in this regard.

84 In addition, in the October 13 Meeting, TSML offered to assist the Complainant if she was interested in obtaining employment with other TransLink subsidiaries.

85 Sgt. Hermann testified that, after delivering the Accommodation Letter, TSML's representatives left the meeting room. Sgt. Hermann told the Complainant the TPPA would be seeking legal advice regarding the Accommodation Letter, and asked her to prepare a point-by-point rebuttal to the claims made in the Accommodation Letter.

86 In cross-examination, Sgt. Hermann was asked when he first became aware that the Complainant's employment was going to be terminated. His evidence was that he had a conversation with Glassford the day prior to the October 13 Meeting, in which Glassford said "it's not looking good". Sgt. Hermann surmised from that statement that TSML either was not going to accommodate the Complainant, or would offer something that was not suitable for her. Sgt. Hermann did not advise the Complainant of this.

87 On October 14, 2016, the Complainant provided the TPPA with a detailed email response to each paragraph of the Accommodation Letter, disputing many of TSML's claims. Among other things, she stated: there had been no meaningful attempt by TSML to find out about the protective gear she required, and that TSML was operating under assumptions and stereotypes in that regard; none of the recommendations in the IME Report had been implemented; TSML wrongly concluded, without any consultation with her or her physician, that wearing protective equipment would significantly impair her ability to function as a police officer; and no trial of the protective equipment had occurred. She also asked to meet with the TPPA's legal counsel in person, prior to October 31, 2016.

88 In cross-examination, Sgt. Young confirmed he did not read the Complainant's email in detail, and that he had no further discussions with TSML about it.

89 The Complainant had several email exchanges with Sgts. Hermann and Young at this time about next steps, and they told her the TPPA was in the process of obtaining a legal opinion. Among other things, the Complainant asked whether the TPPA would file a grievance regardless of the conclusions in the legal opinion.

90 In addition, the Complainant asked to be copied on what had been sent to the
TPPA's legal counsel. Sgt. Hermann responded that she had the information that was
sent to legal counsel.

91 At the hearing, Sgt. Hermann's evidence was that he put together information for
the TPPA's legal counsel for the purposes of assisting in the preparation of the legal
opinion. This information included a document purporting to summarize TSML's
concerns regarding the Complainant's accommodation. There was no dispute that the
TPPA did not provide this document to the Complainant at the time, and the
Complainant was not aware of its existence until the hearing. There was also no
dispute that this document had not been disclosed to the Complainant's counsel in the
pre-hearing process.

92 On October 17, 2016, the Complainant emailed Sgt. Hermann and stated, in part:

I am very disappointed that I was not involved in any meaningful
discussions with the Employer regarding the points they raised in
the [Accommodation] letter that have been used to form the basis
of the medical discharge. I made it clear that I wanted to participate
and made every attempt to fulfill each request by the Employer,
even when that meant spending hundreds of dollars on doctor's
notes, forms for GWL, tests and expert opinion. ...

93 In a letter dated October 20, 2016, TSML confirmed the Complainant's
employment would be terminated as of October 31, 2016, for frustration of contract. In
addition, TSML made a without prejudice offer, consisting of eight weeks' pay and
continuation of benefits until December 31, 2016, in exchange for a release. TSML
requested a response to its offer by October 31, 2016 (the "Without Prejudice Offer").

94 In an email dated October 20, 2016, Sgt. Hermann advised the Complainant not
to accept the Without Prejudice Offer until the TPPA's legal counsel had reviewed her
case. The Complainant stated she would follow the advice given.

95 On October 24, 2016, the Complainant emailed the TPPA's counsel, reminding
him that her termination would occur in one week, and asked again to meet with him.
On October 26, 2016, the TPPA's counsel advised that they were still finalizing the legal
opinion, after which they would meet with the TPPA. The Complainant requested
direction on how to respond to the Without Prejudice Offer. In an email dated October
27, 2016, the TPPA's counsel stated they would let her know by October 31, 2016. This
was the last communication the Complainant received from the TPPA's counsel.

96 On October 31, 2016, Sgt. Young told the Complainant her employment would
be terminated that day, and that the TPPA's counsel was still working on the legal
opinion.

97 The TPPA filed a grievance with TSML on November 1, 2016, alleging that TSML
"had a duty to accommodate and did not reasonably do so" (the "Grievance"). The
Grievance was filed at Step 2 of the grievance procedure. At the TPPA's request,

TSML held the Grievance in abeyance pending the TPPA's receipt of a legal opinion. The TPPA did not advise the Complainant that the Grievance had been filed.

98 On November 2, 2016, TSML advised Sgt. Young that CMBC had an opening for a casual position as a customer information clerk, which the Complainant could apply for, subject to required testing in the recruitment process. The Complainant was out of town during the time period that the testing was to occur, and requested alternate arrangements be made. She was advised the testing had to occur during the time she was away, and that she would be placed back in the queue if any further opportunities arose. However, the Complainant did not receive any further communications from TSML.

THE LEGAL OPINION

99 The TPPA's counsel provided Sgt. Hermann with a written legal opinion dated November 4, 2016 (the "Legal Opinion"), which was disclosed in the pre-hearing process. In brief, the Legal Opinion concludes it would not be reasonable or safe for the Complainant to return to work, even with her duties and responsibilities being modified as requested. However, the Legal Opinion also notes that TSML had stated it would assist the Complainant with obtaining a position with TransLink, but "has not fulfilled that promise". In this respect, the Legal Opinion identifies an option for accommodating the Complainant, as follows:

...[T]he whole of the circumstances indicates that the only viable option for accommodating Brandon would be a placement with TransLink... In light of the Employer's offer of assistance and its corporate link with TransLink, there is an argument to be made that it would be reasonable to require TSML to fulfill its offer to attempt to secure a position for Brandon within TransLink. Consequently, the TPPA could argue that the Employer has failed to accommodate Brandon to the point of undue hardship, because it has ended her employment with the Employer before fulfilling its offer to assist her with securing continued employment in an appropriate accommodation with TransLink. In fact, its failure to do so could be argued as a breach of its duty to accommodate Brandon's disability up to the point of undue hardship. (emphasis added)

100 The Legal Opinion was emailed to Sgt. Hermann on November 4, 2016, which was a Friday. Sgt. Hermann's evidence was that he read the Legal Opinion several times over the weekend. His evidence was that, on Monday, November 7, 2016, he brief the Executive Board members and emailed the Legal Opinion to them, stating:

This is the legal opinion on Joanne. Short version is that the Employer has the right to terminate her as her requested accommodation is unreasonable (constituting undue hardship).

Dan,

Can we chat because we need to tell Joanne asap.

101 Sgt. Hermann's evidence was that he had telephone calls with each of the members of the Executive Board, and asked their opinions on next steps. The outcome was that everyone, except Sgt. Young, agreed the TPPA should not proceed to arbitration.

102 Sgt. Hermann asked Sgt. Young to set up a time to meet with the Complainant in order to review the Legal Opinion and discuss the matter in person. Sgt. Young's evidence was that he attempted to do so via email. He testified, and I accept, that he erroneously sent some emails in this regard to an email address that the Complainant no longer used and had asked him not to use. In addition, the Agreed Statement of Facts indicates the Complainant was going to be out of town during this period in any event.

103 On November 9, 2016, Sgt. Young and the Complainant spoke by telephone. He told her that the Legal Opinion indicated TSML had a strong case to claim undue hardship, and that the Executive Board needed to make a decision regarding the legal advice. In his testimony, Sgt. Young indicated this was a very difficult phone call for him personally.

104 The Complainant received a copy of the Legal Opinion on November 9, 2016. In an email to the Complainant of the same date, Sgt. Young stated:

I've spoken with the TPPA Executive members and the board decision is that based on the Legal Opinion from the TPPA Labour Lawyer, the TPPA is electing not to proceed with a grievance and will not proceed to an arbitration as it's believed there will not be a successful outcome. Thus, the TPPA is not initiating any further action with respect to having the employer accommodate you. The TPPA will continue to assist you with your WCB appeal and will cover all costs associated using Barry Shaw until the matter concludes.

I've also received communication that you have until the end of this week to sign off on the severance that the employer is offering you as a condition of severing employment. The TPPA executive has stated that the employer may withdrawal [sic] their severance offer if they don't receive a signed document of you agreeing.

I'm very sorry that this is not a favourable outcome for you.
(emphasis added)

105 The Complainant notes that November 9, 2016 was a Wednesday and November 11, 2016, a statutory holiday, was on a Friday. Thus, when Sgt. Young stated that the Complainant had "until the end of this week" to accept the Without Prejudice Offer, there was, in reality, one business day for the Complainant to process the TPPA's determination and respond to the Without Prejudice Offer.

106 Sgt. Young testified that he felt "livid", "displeased", "sad", and "angry" at both TSML and the TPPA and disagreed with the TPPA's decision to not proceed to arbitration. His evidence was that he expressed his disagreement to the Executive Board, but they did not change their position. In cross-examination, Sgt. Young was asked whether, in his view, there was anything the Complainant could have done to change the Executive Board's decision, and his response was "in my view, no".

107 Sgt. Young testified that, in his view, in hindsight, the TPPA should have been more aggressive with TSML, to facilitate another position in the TransLink enterprise. He also described the Without Prejudice Offer as a "pittance", and that the TPPA should have done more in that regard.

108 The Complainant and the TPPA did not have any further communications after November 9, 2016.

109 In cross-examination, Sgt. Hermann confirmed that, other than the April 19 October 13 Meetings, he did not meet with the Complainant, and all of his communications with her were by email. His evidence was that he did not telephone the Complainant, meet with her, or advise her of specific developments, because Sgt. Young was her primary contact within the TPPA. At the same time, Sgt. Hermann also confirmed he was the primary liaison with TSML (and Glassford in particular), on the TPPA's behalf regarding the Complainant's case.

110 Sgt. Hermann also confirmed that, outside of the April 19 Meeting, he did not discuss the recommendations made by the Complainant's physician with the OHN, and he did not discuss the recommendations with the Complainant's physician at any time.

111 The Complaint was filed with the Board on November 16, 2016. Due to various adjournments, the hearing in the matter did not take place until the dates indicated above.

THE EXECUTIVE BOARD

112 Sgt. Hermann gave evidence regarding the workings of the Executive Board. At the relevant time, the Executive Board met, at a minimum, once every two weeks, while at other times it met weekly or daily if needed, via telephone or web conferencing. An Executive Board member could also poll the other members, by calling them and seeking their opinions on a matter.

113 Sgt. Hermann testified that decisions of the Executive Board are reported to the membership in attendance at the next TPPA annual general meeting. His evidence was that if a member disagreed with a decision of the Executive Board, the member could attend the meeting and introduce a motion to have the decision changed. He explained that the membership has a right to overturn the Executive Board on a variety of matters, including a decision regarding a grievance or not proceeding with a grievance, though the latter has never occurred.

114 In cross-examination, Sgt. Hermann confirmed that, in the Complainant's case, the Executive Board was effectively the grievance committee, and that the Executive Board's decision to not advance her case to arbitration was the decision of the grievance committee.

III. THE POSITIONS OF THE PARTIES

THE COMPLAINANT

115 The Complainant submits the TPPA's decision to not proceed with the Grievance, or provide any further assistance to her with respect to TSML's alleged failure to accommodate her, constitutes arbitrary representation under Section 12 of the Code. In this respect, she says the TPPA: did not ensure that it was aware of the relevant information; did not make a reasoned decision; and carried out its representation of her with blatant and reckless disregard for her interests.

116 In particular, the Complainant asserts the TPPA breached its duty of fair representation through the following:

- the TPPA's refusal to initiate any further action with respect to the accommodation of the Complainant, including: proceeding with the steps of the grievance procedure; grieving anything else she had asked the TPPA to grieve; conveying her response to TSML's reasons for termination to TSML; and not engaging in settlement negotiations on her behalf; and
- the TPPA based that refusal on the Legal Opinion and, in doing so, the TPPA: accepted TSML's assertions without assessing them critically or giving the Complainant an opportunity to respond; failed to consider TSML's refusal to implement the recommendations in the IME Report; and failed to pursue the advice in the Legal Opinion that there was a viable argument that the TPPA could advance on the Complainant's behalf.

117 The Complainant asserts a higher standard of representation is required of a union when a disability is involved, and relies upon *Bingley*, 2004 CIRB 291, [2004] C.I.R.B.D. No. 32 (QL), a decision of the Canada Industrial Relations Board ("*Bingley*").

118 The Complainant takes issue with the flow of information between and among the parties. For example, she says that from the time of the IME in June 2016 to her termination in October 2016, she repeatedly asked for information, updates, meetings, and to be a participant in the process so she could return to work, but got little from the TPPA in return. The Complainant also says the undisputed evidence is that she was not given the opportunity to raise her concerns regarding the stated reasons for her termination directly with TSML, and that TPPA did not raise her concerns with TSML.

119 Further, the Complainant notes it is undisputed that she was not given the opportunity to either review or respond to the document created by Sgt. Hermann that

purported to outline TSML's concerns, and which was given to the TPPA's legal counsel for the purposes of the Legal Opinion. The Complainant submits that, accordingly, the Legal Opinion relies to a significant extent on concerns that were never raised with her and to which she was never given the opportunity to respond.

120 The Complainant asserts the TPPA's decision to abandon the Grievance without any further action was based on the Legal Opinion. She says she was not permitted to meet with the TPPA's legal counsel despite her requests to do so.

121 The Complainant also refers to the fact that she made repeated requests for a meeting to be held after the IME was completed, to no avail. She says that, instead, the TPPA told her it was waiting for the results of the IME to initiate an accommodation agreement, but then failed to turn its mind to the fact that TSML failed to follow the recommendations in the IME Report. When she met with TSML on October 13, 2016, she was terminated and was not permitted to engage in dialogue with TSML about its reasons for termination.

122 In sum, the Complainant asserts the TPPA was frustrated with the Complainant, had its own strong opinions about her condition, and took a deferential approach to the Employer's positions. She points to a lengthy delay in conducting an accommodation review, after which no accommodation offer was made and her employment was terminated. The Complainant says the TPPA essentially "washed its hands of her" by abandoning the Grievance, not undertaking any negotiations on her behalf, and allowing TSML's October 31, 2016 deadline to lapse without responding to her.

THE TPPA

123 The TPPA acknowledges that, given the termination of the Complainant's employment, a higher standard of representation applies in this case. However, it says the Complainant has failed to establish that the TPPA breached Section 12 of the Code by acting in an arbitrary manner.

124 Specifically, the TPPA says it took reasonable steps to ensure it was aware of the relevant information. It says it was in continuous contact with the Complainant and TSML for more than 10 months. Among other things, the TPPA says its Executive Board members regularly discussed the developments in the Complainant's case, and were aware of both the Complainant's and Employer's views on the Complainant's accommodation.

125 With respect to the information provided by the TPPA to its legal counsel to prepare the Legal Opinion, the TPPA says it specifically requested the Complainant to provide her response to the Accommodation Letter and the majority, if not all, of the TPPA's input in this regard was previously communicated to the Complainant in April 2016. For example, the TPPA had already advised her that TSML had concerns about the type of protective equipment required and its impact on her ability to perform her job.

126 Further, the TPPA says it made reasoned decisions in all aspects of the Complainant's case, including the decision to not pursue the Grievance. It says it based its decisions on relevant workplace considerations, as well as the Legal Opinion. Among other things, the TPPA says it extensively outlined its position on why the Complainant's proposed accommodations were not acceptable. The TPPA refers to Sgt. Hermann's evidence as to the factors he considered in assessing TSML's position on the possibility of accommodation. The TPPA says that, after his discussions with Inspector Hicks and Glassford, Sgt. Hermann concluded TSML's position was reasonable. Specifically, he agreed with TSML's position that while it was possible to work around each specific problem identified with respect to accommodating the Complainant's restrictions, the totality of the solutions was "insurmountable". With respect to the Legal Opinion, the TPPA says the Legal Opinion should be not be reviewed for its contents but only for the fact that the TPPA sought one in the course of representing the Complainant's interests.

127 Further, the TPPA says it did not act with blatant and reckless disregard. In the TPPA's submission, it acted in an attentive matter, and kept the Complainant apprised of all the developments in her case. The TPPA says that, in any event, there was no need to have the Complainant respond to or be involved in TSML's job function analysis as there was nothing she could add to the process. In this respect, the TPPA says TSML's expertise is policing and carrying out police duties, while the Complainant had a limited understanding of her position's functional duties, and she oversimplified and minimized the efforts that would be required to accommodate her restrictions.

128 In its argument, the TPPA points to the Complainant as the cause of delay and for failing to ask for help. For example, the TPPA makes repeated references to the Complainant's alleged refusal to provide the relevant medical information, contributing to delay and impeding the TPPA's ability to engage in accommodation discussions with TSML. With respect to the Without Prejudice Offer, the TPPA says the Complainant did not ask for the TPPA's assistance in negotiating a better settlement offer. With respect to the Complainant's lack of knowledge of the Grievance, the TPPA says the Complainant refused to meet with the TPPA after receiving the Legal Opinion.

129 In sum, the TPPA submits that, considering its conduct as a whole, the TPPA did not act in an arbitrary manner, and the Complaint should be dismissed.

THE EMPLOYER

130 In its final argument, TSML reiterated that the Board should not address human rights matters in this case and, among other things, should not apply the analysis in *Bingley*.

THE COMPLAINANT'S REPLY

131 The Complainant says Sgt. Hermann concluded the issues associated with the Complainant's accommodation were insurmountable, yet he was supposed to be liaising

with TSML on her behalf. The Complainant says Sgt. Hermann did not communicate these conclusions to her prior to the hearing, and the inference should be drawn that he did not have an open mind. The Complainant reiterates the TPPA did not keep her apprised of the developments in her case and denied her an opportunity to respond.

IV. ANALYSIS AND DECISION

SECTION 12 OF THE CODE

132 Section 12 of the Code prohibits a union from acting in an arbitrary, discriminatory, or bad faith manner in representing any of the employees in its bargaining unit.

133 In *James W.D. Judd*, BCLRB No. B63/2003, 91 C.L.R.B.R. (2d) 33 ("*Judd*"), the Board set out several general principles regarding the scope and application of Section 12. For example, the Board explained that Section 12 contains a narrow right and protection, and is not an avenue for appeal of the merits of the union's decisions: paras. 26 and 44. It is not the Board's role to decide if a union was right or wrong, as long as the union did not act in arbitrary, discriminatory, or bad faith manner: para. 30.

134 As the exclusive bargaining agent of employees, any decisions regarding the negotiation and administration of the collective agreement are for the union to make. This includes the decision as to whether to file a grievance, to abandon it, or to try to negotiate a settlement: *Judd*, para. 34. In this respect, the Board held as follows at paragraphs 42 and 43:

When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- *it is doing its job of representing the employees*. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of Section 12.

The situation is different if a union's decision is not based on these kinds of relevant considerations. A union would breach Section 12 if it misused its exclusive bargaining agency by making decisions based on improper factors, or by making random or unreasoned decisions. ... (emphasis in original)

135 In assessing a union's conduct in representing an employee, the Board will consider the union's conduct as a whole: *Judd*, para. 45. Further, each case must be assessed on its own facts. For example, the more serious the matter is for the employee, the more closely the Board will review the union's conduct. Thus, the union will be expected to treat matters involving critically important employee interests, such as termination, with more care and concern: *Judd*, para. 59.

136 Section 12 relates to the union's conduct: it is not a forum for complaints against the employer: *Judd*, para. 46.

137 The Board in *Judd* also provided guidance for determining whether a union carried out its representation in an arbitrary manner, as alleged in the present case. Arbitrariness encompasses three requirements; the union must (i) ensure it is aware of the relevant information; (ii) make a reasoned decision; and (iii) not carry out representation with blatant or reckless disregard for the employee's interests: para. 61.

138 To ensure it is aware of the relevant information, the union must make sure it is aware of the circumstances and possible merits of the grievance: *Judd*, para. 62. This typically requires conducting an adequate investigation, which may include learning the grievor's point of view, and offering the grievor a chance to respond: *Judd*, para. 63. In this respect, the Board stated as follows:

The key is that the union must take reasonable measures to ensure it is aware of the relevant information. What is "reasonable" will depend on the particular circumstances – including the significance of the issue for the employee. (*Judd*, para. 64)

139 The union must then put its mind to the case and come to a reasoned decision as to whether to proceed. A reasoned judgment will have a reasonable and rational connection between relevant considerations and the decision made. In this respect, a legal opinion is not required, but, if obtained, may be considered as some evidence that the union took a reasoned view of the matter: *Judd*, para. 65.

140 Last, the union must not act with blatant or reckless disregard. This does not mean that a union will breach Section 12 if it makes a mistake or handles a matter poorly. It is only when the alleged carelessness of the union reaches the level of blatant or reckless disregard for the employee's interests that the union will have misused its exclusive bargaining agency and acted arbitrarily: *Judd*, paras. 69-70.

THE PRESENT CASE

141 Turning to the present case, I reiterate the parties' agreement that I am not to decide matters such as whether the Complainant has a disability under the Human Rights Code, and whether the TPPA or TSML met their respective accommodation obligations. Under Section 12 of the Code, however, I can, and must, consider whether the TPPA's representation in the context of the facts of this case was arbitrary as

alleged, without needing to decide the issues agreed upon by the parties as being outside my purview.

142 As a preliminary matter, I note the TPPA initially took the position that the Complaint was premature because the Complainant did not exhaust internal appeal remedies. The TPPA did not pursue this argument in its final submissions. In any event, the evidence was that the decision of the Executive Board to not proceed with the Grievance was, in effect, the decision of the grievance committee. Accordingly, in my view, an internal appeal to the same group of individuals would have been impractical and unnecessary.

143 There is no doubt that the facts of this case presented a complex situation to be navigated by the parties. As noted in *Judd*, the issue is not whether the TPPA made a mistake, or was right or wrong in its decisions. The issue is whether the TPPA carried out its representation of the Complainant in an arbitrary manner.

144 For the reasons set out below, and considering the TPPA's conduct as a whole, I find the Complainant has established that the TPPA acted in an arbitrary manner in its representation of her, contrary to Section 12 of the Code. My decision in this regard is based on the well-established framework and approach set out in *Judd*; I do not find it necessary to comment on the case law from other jurisdictions cited by the Complainant, and make no findings regarding their applicability.

THE TPPA DID NOT TAKE REASONABLE MEASURES TO ENSURE IT WAS AWARE OF THE RELEVANT INFORMATION

145 I accept that there was a significant amount of information to be handled and digested by all parties over the course of events. However, for the reasons below, and in the circumstances of this case, I find the TPPA did not take reasonable measures to ensure it was aware of the relevant information.

146 Specifically, while the TPPA says it had continuous contact with the Complainant for more than 10 months, I find the TPPA had a troubling lack of communication with the Complainant during critical periods when accommodation options were being assessed or discussed with TSML, purportedly on her behalf. As a result of this lack of communication, I find the TPPA was not, or could not have been, reasonably aware of the relevant information.

147 For example, Sgt. Hermann repeatedly testified that Sgt. Young was the Complainant's primary contact, implicitly leaving the responsibility of communication with the Complainant to him. However, the evidence was that after April 4, 2016, Sgt. Hermann was the primary liaison on behalf of the TPPA with TSML for the Complainant's case. While Sgt. Young discussed the Complainant's case with the Executive Board, the evidence was that Sgt. Hermann did not ask Sgt. Young for copies of his extensive email correspondence with the Complainant until November 2016, after the accommodation review and functional job analysis were complete, after the

Complainant's employment was terminated, and well after Sgt. Hermann commenced acting as the primary liaison with TSML.

148 Further, Sgt. Hermann's evidence was that, after the IME results were received, there was a significant shift in TSML's position and TSML accepted that accommodation was required. Despite this, Sgt. Hermann met with the Complainant in person on only two occasions (the April 19 and October 13 Meetings), and never spoke with her physician or the OHN to clarify the Complainant's restrictions. Sgt. Hermann did not ask her to participate in his discussions with Insp. Hicks regarding the functional job assessment of her position, and in fact did not inform her that process was occurring at all.

149 Sgt. Hermann gave evidence that the Complainant's accommodation was "not simple", and that he appreciated the increasing complexities of the matter as time went on. At the same time, his evidence was that he was "very clear" on the restrictions recommended for the Complainant. However, the evidence shows that the TPPA continued to misconstrue the Complainant's restrictions, despite her repeated efforts to identify options that may potentially have enabled her to return to work with accommodation. The most blatant example is the continued and erroneous reference to the protective gear required by the Complainant as a "hazmat suit" when in fact, the evidence was that a hazmat suit was not what her physician recommended and that the Complainant went to some lengths to dispel that assumption. In his evidence, Sgt. Hermann accepted the reference to a hazmat suit was in error, but the evidence shows the reference to it persisted, even up to and including the Legal Opinion.

150 Similarly, the TPPA did not discuss with the Complainant her responses to TSML's assertions in the Accommodation Letter. I find her detailed responses would reasonably have been material considerations for the TPPA to review and understand in order to be aware of the relevant information and to assess next steps from an informed perspective. Sgt. Hermann's evidence was that he discussed the Accommodation Letter with the Complainant immediately after it was delivered. However, the Complainant would understandably and foreseeably be in a shocked state at that time. When she provided her detailed email response the next day, the TPPA did not discuss it with her. Further the TPPA did not accede to her request to meet with legal counsel so she could discuss her response.

151 The evidence also establishes that the TPPA did not review key information. For example, Sgt. Young's evidence was that he did not read the Complainant's detailed email response to the Accommodation Letter and did not convey the information contained in it to TSML. Similarly, Sgt. Hermann's evidence was that he did not review the IME Report, and was informed of the results verbally by Glassford. I acknowledge the Complainant could have provided a copy of the IME Report to the TPPA; however, based on the evidence, I find Sgt. Hermann accepted TSML's assertions regarding the IME results at face value, without asking for the IME Report from TSML or from the Complainant.

152 The TPPA says the Complainant failed to provide it with her medical information in a timely way. However, the evidence was that, by April 4, 2016, the Complainant had provided all of the medical information she had at the time. She repeatedly asked the TPPA whether it had all the information it needed from her. With respect to the IME Report which was issued after that, I have found the Complainant could have provided a copy to the TPPA. However, the TPPA also did not ask for a copy of the IME Report from the Complainant or from TSML, and instead chose to rely on TSML's summary of it.

153 As noted in *Judd*, the union must take reasonable measures to ensure it is aware of the relevant information, and what is "reasonable" will depend on the particular circumstances, including the significance of the issue for the employee. The Complainant's ability to return to work and, ultimately, her continued employment, were at stake. In addition, there is no dispute that the matter was complex. In my view, in the circumstances of this case, the lack of communication with and involvement of the Complainant, and the other factors described above are materially important considerations in assessing whether the TPPA was reasonably aware of the relevant information. Considering the TPPA's conduct as a whole, I find the TPPA did not take reasonable measures to ensure it was aware of the relevant information in this case.

THE TPPA DID NOT COME TO A REASONED DECISION

154 I accept that the TPPA considered some relevant factors in its decisions regarding the Complainant's situation. However, on the whole of the evidence, I find the TPPA did not come to a reasoned decision with respect to the Grievance or in handling other critical aspects of the Complainant's situation. I reach this conclusion for the following reasons.

155 First, there can be no dispute that the IME was a significant event in the process of dealing with the Complainant's situation. The evidence was that the IME occurred at TSML's insistence, and TSML's stated purpose in seeking the IME was to understand the Complainant's disability and the factors contributing to it. Sgt. Hermann's evidence was that the IME marked a significant shift in TSML's position, in that TSML no longer questioned that accommodation was needed. The IME Report made a number of recommendations, including referral to an ear/nose/throat specialist, specific investigations, and a worksite assessment by a clinician and an occupational hygienist. However, the undisputed evidence is that TSML did not direct any medical or workplace investigations or assessments in relation to the Complainant, nor did the TPPA request anything of the sort. Instead, Sgt. Hermann embarked upon an assessment of the Complainant's job functions with Insp. Hicks, without the Complainant's knowledge or involvement. Given that the IME was conducted at TSML's insistence, and given TSML's stated purpose for the IME, I find it was not a reasoned decision for the TPPA to leave the total lack of follow-up by TSML unchallenged. There was no evidence that the TPPA turned its mind at all to consider or assess the impact of TSML's failure to follow through with any of the recommendations in the IME Report.

156 Second, I find the TPPA's reluctance to file a grievance regarding back pay and sick time, despite the Complainant's multiple requests, and its failure to at least pursue the Grievance through the grievance procedure, does not reflect a reasoned judgment. While a union holds ultimate control over whether a grievance will be filed, pursued or settled, the union's actions must be based on relevant workplace considerations, and must be assessed in the circumstances of each case. As noted in *Judd*, a reasoned judgment will have a reasonable and rational connection between relevant considerations and the decision made.

157 I accept the Complainant's assertion that Sgt. Hermann had a clear preference for avoiding the grievance process. Sgt. Hermann's evidence was that filing a grievance would have been premature, but also that the TPPA did not want to create an "atmosphere of a grievance" with "process formality", describing a grievance as the first step in an "adversarial process". After the Accommodation Letter was received, the TPPA was still not prepared to file a grievance, and wanted to first obtain a legal opinion. When the Grievance was ultimately filed, the evidence was that the TPPA decided to not pursue it, based on the Legal Opinion.

158 As submitted by the TPPA, it is not necessary to comment upon the quality of the Legal Opinion. However, what is clear is that the Legal Opinion expressly identified a legal argument that could be pursued with respect to the accommodation of the Complainant and the termination of her employment, and described that argument as "viable".

159 I find the Legal Opinion was an important and significant factor in the TPPA's decision to not pursue the Grievance. In short, the TPPA sought a Legal Opinion, decided not to pursue the Grievance on the basis of the Legal Opinion, yet ignored a viable argument identified in the Legal Opinion for pursuing the Grievance. Importantly, I find there was no meaningful evidence or explanation as to why the TPPA chose to ignore the argument identified in the Legal Opinion. What is clear on the evidence is that after receiving the Legal Opinion, the TPPA took no further action on the Grievance, the accommodation of the Complainant, or the termination of her employment, *at all*.

160 As noted in *Judd*, a union is not required to obtain a legal opinion but, if obtained, it may be considered as some evidence that the union took a reasoned view of the matter. However, in the circumstances of this case, I find the TPPA did not make a reasoned decision to rely on the Legal Opinion as a basis for deciding to not take any further action in relation to the termination of the Complainant's employment whatsoever, when the Legal Opinion itself identified an argument for doing so. In such circumstances, it was incumbent on the TPPA to have provided some meaningful explanation in this regard, and it did not do so.

THE TPPA SHOWED BLATANT AND RECKLESS DISREGARD

161 I am also satisfied on the evidence that, in the circumstances of this case, the
TPPA showed blatant and reckless disregard for the Complainant's interests with
respect to its conduct in relation to the termination of the Complainant's employment.

162 Specifically, there can be no dispute that matters reached a critical stage when,
in the October 13 Meeting, TSML advised the Complainant and the TPPA that the
Complainant's employment would be terminated on October 31, 2016. The TPPA was
also aware that TSML imposed a deadline of the same date for the Complainant to
respond to the Without Prejudice Offer. The evidence was that Sgt. Hermann expressly
advised the Complainant not to accept the Without Prejudice Offer until the TPPA's
legal counsel had reviewed her case. The Complainant told him she would follow his
advice. In addition, the evidence was the TPPA did not discuss her termination with her
at that time, because it was seeking the Legal Opinion.

163 As her termination date neared, the Complainant again sought direction on how
to respond to the Without Prejudice Offer. The TPPA's counsel stated they would let
her know by October 31, 2016. However, this was the last communication the
Complainant received from the TPPA's counsel. More relevant, the TPPA itself did not
have any further meaningful discussions with her regarding the Without Prejudice Offer.
In addition, it asked her to prepare a detailed response to the Accommodation Letter,
but then did not discuss her response with her or with TSML, and did not accede to her
request to discuss her response with the TPPA's legal counsel. In sum, I find the TPPA
did not discuss her pending termination with her in any meaningful way.

164 Thus, after expressly counseling the Complainant to not accept the Without
Prejudice Offer until legal counsel had reviewed her case, and knowing the Complainant
was relying on this advice, the TPPA then allowed the deadline for responding to the
Without Prejudice Offer to lapse, without providing the Complainant any further direction
or advice in this regard. In addition, the TPPA did not discuss her termination with her
at all, because it was waiting for the Legal Opinion, yet it allowed the termination date to
come and go without having any meaningful discussion with the Complainant. This was
at a time when the Complainant had been without regular income for 10 months.

165 Sgt. Young later advised the Complainant that TSML had extended the date for
her to consider the Without Prejudice Offer. However, as noted above, the Complainant
in effect had one business day to process the TPPA's decision to not proceed with her
Grievance, and to respond to the Without Prejudice Offer.

166 Thereafter, knowing the Complainant's employment was terminated and that it
was not going to take any further steps to assist her with respect to accommodation, the
TPPA then took no further steps to discuss the Without Prejudice Offer with the
Complainant or to assist her in negotiating severance with TSML. In the Agreed
Statement of Facts, the parties agree the TPPA and the Complainant did not have any
further communications after November 9, 2016. While the TPPA says the Complainant
refused to meet, there is no evidence the TPPA attempted to contact her after

November 9, 2016. In all of these circumstances, and given that the TPPA was aware that the Complainant had not received wages since March 11, 2016, her sick leave pay had expired, her LTD claim had been denied, and her WorkSafeBC appeal was yet to be determined, I find the TPPA demonstrated blatant and reckless disregard for the Complainant's interests.

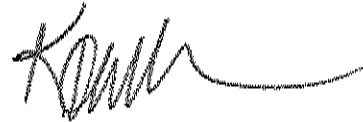
V. ORDERS AND CONCLUSION

167 For the reasons set out above, I find the TPPA breached Section 12 of the Code and engaged in arbitrary representation of the Complainant.

168 The Complainant has asked for an extensive remedial order. Given the existence of other proceedings involving these parties, I find it is most appropriate to remit the issue of remedy to the parties. The parties are encouraged to seek the assistance of a special investigating officer from the Board in this regard.

169 The parties have 30 days from the date of this decision to come to an agreement upon remedy. Should the parties fail to do so, I retain jurisdiction to deal with the issue of remedy.

LABOUR RELATIONS BOARD



KOML KANDOLA
VICE-CHAIR