

Date: 20070118

File: 166-02-35109

Citation: 2007 PSLRB 10



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

DANIEL O'LEARY

Grievor

and

**TREASURY BOARD
(Department of Indian Affairs and Northern Development)**

Employer

Indexed as

O'Leary v. Treasury Board (Department of Indian Affairs and Northern Development)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: [Georges Nadeau, adjudicator](#)

For the Grievor: [Dougald E. Brown](#)

For the Employer: [Karl G. Chems, counsel](#)

Heard at Ottawa, Ontario,
October 13 to 14, 2005 and March 7 to 10, 2006.

REASONS FOR DECISION

Grievance referred to adjudication

[1] Daniel O'Leary, the grievor, was employed by the Department of Indian Affairs and Northern Development (DIAND) in Iqaluit as a Human Resources (HR) advisor. On June 28, 2004, he grieved his demotion effective June 21, 2004. The demotion had been communicated to him in a letter dated June 10, 2004. The letter of demotion (Exhibit E-38) reads as follows:

...

This decision has been made after numerous attempts to have you correct problems of performance and behaviour. You have been counselled on numerous occasions. Consequently, I have concluded that you are unable to meet the requirements of this position and I am demoting you to the position of Administrative Officer in the Operations Directorate.

You have received a letter dated April 6, 2004, from your supervisor, Janet Hodder, Manager Human Resources, outlining the problems with your work performance and behaviour since the commencement of your employment in the Nunavut Regional Office on August 11, 2003. Your poor work performance has caused the Department serious concern and has resulted in significant and extraordinary efforts to provide additional training and coaching to assist you in meeting performance expectations.

...

I regret that this action is necessary, but your failure to correct your performance deficiencies have left me no other choice.

...

[2] On April 1, 2005, the *Public Service Labour Relations Act (PSLRA)*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

Summary of the evidence

For the employer

[3] The first witness called by the employer was Janet Hodder, Manager, Human Resources, DIAND, Iqaluit. She started in this position on August 1, 2003.

[4] Ms. Hodder testified that she had some 14 years of experience in the public service. Prior to her work with the DIAND, she held the position of Director of Staffing with the Nunavut Territorial Government, and she has held a number of positions in human resource management and staffing with that territorial government.

[5] In her position at the DIAND, Ms. Hodder indicated that she provided human resources functions to the region. She had five subordinate staff members to carry out these functions in the area of compensation and benefits, staffing, labour relations and training and development.

[6] Ms. Hodder reported to Eric Kan, who was Director of Corporate Services. Each year a work plan would be prepared for her section establishing goals and objectives. She would meet with each employee to explain the performance review process, letting staff know that performance would be reviewed and goals established.

[7] Ms. Hodder testified that she met Mr. O'Leary on July 29, 2003, prior to her reporting for duty at the DIAND. The grievor had come up to Iqaluit to get acquainted with the community to which he was to move. He was to report for duty on August 11, 2003. The previous supervisor had invited Ms. Hodder to come and meet the grievor. The meeting was brief, as the grievor was leaving to return home.

[8] After their meeting, the previous manager advised Ms. Hodder that Mr. O'Leary had a visual impairment and that he had provided the Department with a workplace assessment. She was informed that they were in the process of ensuring that all the tools were in place for the grievor's arrival.

[9] Asked to describe the work of an HR advisor, Ms. Hodder testified that the grievor's position in the regional office was responsible for the staffing function in the region. The main duties of the position were to counsel, support and provide advice to managers in accordance with relevant legislation, policies and directives that govern staffing in the federal Public Service.

[10] Ms. Hodder testified that the position required an incumbent who had experience in providing advice to senior managers and clients, someone familiar with the legislative framework, policies and practices related to human resources. It required someone who was able to organize the work to meet client demands, someone who possessed good analytical skills to provide options and recommendations to managers and someone who was client-focused. The position also required an incumbent with good interpersonal skills and initiative. There was only one such position at the time.

[11] The first meeting between Ms. Hodder and Mr. O'Leary with regard to work took place on September 3, 2003. This meeting was held to explain the process of performance review, the setting of goals and objectives and the identification of training needs. Ms. Hodder indicated that she told the grievor at the time that his performance assessment would be based on the goals and objectives established. After Ms. Hodder had listed some of the goals and objectives for the position, the grievor was given two weeks to establish goals and objectives he thought were reasonable and to develop a training plan. The training plan would identify training that he might be required to take to meet the goals and objectives that had been established. Ms. Hodder indicated that the grievor provided this document (Exhibit E-6) on October 31, 2003, outlining the objectives and goals he had set for himself. She found these objectives to be reasonable. The grievor also submitted his learning plan (Exhibit E-7), which included French-language training two mornings a week, as well as taking part in an appeal workshop and a staffing-for-managers training session. Ms. Hodder indicated that the grievor did not attend the appeal workshop prior to his departure.

[12] Ms. Hodder testified that the workload was constant and heavy within the unit and particularly in staffing. In the region, the turnover was quite high and the vacancy rate was usually in the 20-percent range. The Department had many managers that were new to the Public Service and required assistance in the area of staffing. Many did not understand the process or the values, let alone the administrative requirements.

[13] Asked what her assessment was of Mr. O'Leary in September and October, Ms. Hodder replied that she always had an open-door policy and any time that the grievor experienced a high volume of work or difficulties in handling his tasks he could come and see her. She added that, during that period, there were some concerns

being raised by the Public Service Commission (PSC) and hiring managers about the level of expertise the grievor had in his position. Ms. Hodder's understanding was that the questions put to the PSC by the grievor were very basic and that on many occasions he would call and ask the same question over and over.

[14] Ms. Hodder testified that she had a discussion with Mr. O'Leary with regard to the appropriate time to post notices of appeal. Relating her experience at the territorial government, Ms. Hodder indicated that she believed the appropriate time was prior to the appointment of the successful candidate. The grievor replied that things were done differently at the federal level. Ms. Hodder researched the issue and wrote an email to the grievor (Exhibit E-8) saying she could not find specific information on the subject. Ms. Hodder added in her testimony that she later determined that notices are to be posted before rather than after appointments.

[15] Ms. Hodder recalled communications (Exhibit E-9) with regard to a letter of offer for a contaminated-site project officer position. On October 28, 2003, she received an email from a hiring manager enquiring about the status of the letter of offer to a person that was to report to work on November 17, 2003. She enquired of Mr. O'Leary and was told that the letter was being prepared. This was rather troublesome, as a relocation was required and was to take place in two and a half weeks. Ms. Hodder testified that the grievor had had the request for four weeks and had been part of the staffing process since the start. She also testified that she had indicated to him the importance of timelines.

[16] It also became apparent that Mr. O'Leary had proceeded with the staffing without having a copy of the statement of qualifications. The statement of qualifications should have been prepared up front, as this was a prerequisite to initiating a competition. The last email in these communications (Exhibit E-9) shows that the grievor requested the statement of qualifications from the hiring manager on November 3, 2003.

[17] Ms. Hodder testified that she frequently met with Mr. O'Leary to discuss issues, which came to her attention on an ongoing basis. She would notice that some basic tasks were not done. She would speak to the grievor about those and encouraged him to come and see her.

[18] In November 2003, Ms. Hodder relayed her concern to Mr. Kan and they agreed that they would meet with Mr. O’Leary to address concerns of performance and behaviour up to that date. It would be an opportunity for the grievor to respond to the issues brought forward and to once again identify any training he required or any issues he may have in completing the tasks he was hired to do.

[19] Ms. Hodder testified that the meeting took place on November 7, 2003. A summary of the discussion that took place during the meeting was put in writing at Mr. O’Leary’s request (Exhibit E-11). The witness indicated that the meeting began with a review of the expectations of the position and the discussion that had taken place on September 3, 2003, with regard to the learning plan, the goals and the objectives. Ms. Hodder said that during the meeting, she highlighted the tools provided by the Department with regard to accommodation. The grievor thanked Mr. Kan and Ms. Hodder for their efforts in that regard. Ms. Hodder also reminded the grievor during the meeting of the responsibilities of a PE-2 HR advisor.

[20] Ms. Hodder proceeded in her testimony to describe the causes that led her to conclude that Mr. O’Leary, who had been in his position for two months, was unable to do the basic tasks involved in his job.

[21] Ms. Hodder testified that Mr. O’Leary had sent, in response to a question, a policy document to a manager without providing the advice sought. Ms. Hodder added that, on another occasion, she had had to complete answers to a set of questions sent by a potential candidate, as the grievor could not do it. She related an incident when the HR assistant came to her feeling uncomfortable that the grievor had relayed an alleged error on her part to a hiring manager. The grievor also had difficulties using software such as PeopleSoft and Microsoft Word, as well as templates developed for job offers. Ms. Hodder indicated that the grievor had advertised two positions without having the proper paperwork done and that she had raised with him the necessity of having complete competition files. Issues with regard to the grievor falling asleep at work and unprofessional communications as described under the heading “client service” (Exhibit E-11), were also raised with the grievor.

[22] Ms. Hodder indicated that a lot of the issues addressed had been discussed with Mr. O’Leary prior to the meeting. The employer believed that it was important to tell the grievor that the situation was serious, given the basic requirements of the position.

She added that there were some behavior concerns and that she had wanted the grievor to take the necessary action to improve his performance.

[23] Ms. Hodder testified that she believed the consequences to be serious, as the management team looked to the unit to provide professional services. She added that it was the unit's responsibility to see that the Department abided by the legislations and regulations governing staffing and adhered to the staffing values.

[24] Ms. Hodder indicated that, following a conversation with Mr. O'Leary on October 30, 2006, she had been informed that although the grievor had taken three courses in staffing, he had no real experience in staffing and it was all new to him.

[25] In September, in order to assist Mr. O'Leary with his workload, Ms. Hodder had assigned a human resource assistant to work strictly with the grievor.

[26] With regard to Mr. O'Leary's health, Ms. Hodder stated that, at the time of the November meeting, the employer was not aware of the grievor having any medical condition. It was on November 10, 2003, that the grievor presented a medical certificate from Dr. Jason A. Shack (Exhibit E-12) of the Iqaluit Regional Hospital. The letter stated that the grievor had a significant eye problem that required follow-up with an ophthalmologist on a regular basis, a service not available at the regional hospital. The doctor supported the grievor's request for a southern placement. The employer decided to have the grievor assessed by Health Canada. This decision was communicated to the grievor on November 24, 2003 (Exhibit E-13). This first assessment came back on February 25, 2004, (Exhibit E-16) indicating that he was fit to work in his position in Iqaluit. It was discussed with the grievor the following day.

[27] Ms. Hodder indicated that she advised Mr. O'Leary during the November 7, 2003 meeting, that it was important to communicate with her about what he was doing and that she would be conducting a follow-up review of all his files to ensure that all documentation was in the files. She also provided the grievor with a checklist of all the different staffing actions to be included in these files, to help him ensure that all necessary documentation was there.

[28] It was also decided by management that it would be beneficial for Mr. O'Leary to get some coaching from a senior staffing officer from headquarters, Mr. Millican, who

would be brought to spend a couple of days with the grievor. It would be left up to the grievor and this person to determine the areas with which the grievor needed help.

[29] Mr. Millican came to Iqaluit on November 18, 2003, and worked with Mr. O'Leary for a couple of days. Following this session, Mr. Millican reported to Ms. Hodder that he thought the grievor would be able to get the job done and that he needed on-the-job training. The senior staffing officer was also concerned that the grievor was thinking defensively, and not focusing enough on the job to be done.

[30] Ms. Hodder added that Ann Leal, an HR consultant from the PSC in Edmonton, provided services to the Iqaluit DIAND office. In doing so, she was in regular daily contact with Mr. O'Leary. Ms. Leal visited the Iqaluit office on November 20, 2003, and both the grievor and the witness met with her. It was the witness' understanding that the grievor was to spend a full day together with Ms. Leal to go through the files. Ms. Leal would take this opportunity to explain the importance of documentation for audit purposes. The meeting never occurred as the grievor called in sick on the day in question.

[31] Ms. Hodder indicated that Ms. Leal had raised concerns with her about the level of expertise the grievor had about staffing, as he would call five to six times a day to ask questions related to staffing.

[32] Ms. Hodder was asked what her assessment of Mr. O'Leary was after November 7, 2003. She responded by saying that the grievor had difficulty completing basic tasks related to staffing. She started a file review to ensure that the appropriate documentation was there and that assessment tools were implemented appropriately. She added that she would highlight anything she found in the file and note what was missing. She observed that there was a significant amount of documents missing from the competition files.

[33] On December 11, 2003, Ms. Hodder sent an email (Exhibit E-18) to Mr. O'Leary summarizing the problems she had found during her review of the documentation in two competition files.

[34] With regard to a land operations clerk competition, Ms. Hodder indicated in her email that there were numerous amounts of pertinent information missing. She added in testimony that she found that, while the eligibility list indicated a certain person

was ranked first, the rating board report mentioned another person had placed first on the eligibility list. Ms. Hodder also found as noted in the competition documentation (Exhibit E-20-2), that the person ranked fourth had failed to achieve the 60-percent pass mark for the rated requirements. If she had failed to achieve the required pass mark, her name should not be on the eligibility list. The witness also indicated that the names of candidates that did pass the assessment did not appear on the eligibility list. She added that when such a list is forwarded to the PSC it cannot be altered.

[35] Ms. Hodder indicated that, in May 2004, Douglas Nelson, Director of Operations at the PSC, had requested a telephone conference with Mr. Kan and herself regarding staffing and problems with the land operations clerk competition file. Mr. Nelson advised them that the department could not remove or add names from an eligibility list. He also noted other problems with the documentation on file and expressed concerns about the level of knowledge the grievor had about staffing. Mr. Nelson raised concerns that the situation might lead to the staffing delegation being questioned.

[36] Ms. Hodder also recalled an incident involving the preparation of a letter of offer that should have contained a notice that a pre-employment medical certification was a requirement for a position. The witness presented the email exchange that occurred (Exhibit E-19). She indicated that it was Mr. O'Leary who had sought her assistance in preparing the appropriate wording for the letter. The witness said that she had sent him the wording to be used, along with information on which part of the form should be completed by the hiring department and which part should be completed by the candidate. The letter of offer prepared by the grievor was totally different. She sent the letter back to the grievor, who finally prepared the document as directed. She also became aware that the grievor had sent the candidate a form with missing departmental information, contrary to the instructions Ms. Hodder had provided him.

[37] Ms. Hodder reported an incident where the grievor sent a letter of regret (Exhibit E-22) to the second-highest-ranking candidate before receiving acceptance of the offer from the highest-ranking candidate. The highest-ranking candidate declined and, as a result, the department was in the embarrassing situation of issuing a letter of offer after issuing a letter of regret.

[38] Ms. Hodder stated that, with regards to a competition for a computer support specialist position, she had noticed upon reviewing the file that the candidate who had placed first according to the rating board report did not meet the education requirement of the position. He did not possess the two-year education mentioned in the statement of qualifications (Exhibit E-23), and there was no indication on file as to why he was considered to have an equivalency. Ms. Hodder further commented on what she believed were deviations from standard practices in establishing the rating guide for the position.

[39] Ms. Hodder also reported on the staffing of a position by way of a name referral without receiving the proper authorization from the PSC. The situation only came to light when Mr. O'Leary sought authorization to extend the appointment after the initial appointment period of six months had expired. Ms. Leal had informed the witness of the situation by email. Asked to explain why he had not obtained clearance as required of the initial appointment in September, the grievor offered as an explanation that, at the time, he was running back and forth on interview panels and was not really sure why it had not happened. The grievor apologized for the mistake. The situation was embarrassing because the employee in question did not meet the basic qualifications for the position and the PSC was not prepared to grant the clearance required to extend the appointment. The Department was placed in the position of having to tell an employee who had been performing the job for six months that she could not be extended in the job because she did not meet the basic education requirement. As a result of these events and because the witness was dissatisfied with the explanation provided by the grievor for the incident, the witness issued a letter to the grievor, dated April 6, 2004 (Exhibit E-26), stating that the training and coaching had failed and that a meeting would occur on April 30, 2004, to review the grievor's performance.

[40] Ms. Hodder was asked to review the meetings she had had with Mr. O'Leary with respect to his work performance. Ms. Hodder replied that following the meeting of November 7, 2003, the grievor had raised issues with regard to his health. These issues resulted in an assessment by Health Canada. A meeting was held on February 26, 2004, to discuss the results of this assessment. During the course of this meeting, the grievor was advised that the employer would continue to monitor his performance and that an action plan would be developed to identify deficiencies. Ms. Hodder committed to meet with the grievor every morning at 08:30 to provide the grievor with an opportunity to discuss with her any areas where he needed assistance in performing the duties of his

position. The witness testified that she and the grievor developed the action plan that was signed on March 1, 2004 (Exhibit E-27). It was based on the goals and objectives established in September 2003.

[41] The first point mentioned in the action plan reiterated the requirement to properly document staffing files. Ms. Hodder testified that this problem existed with Mr. O'Leary from the beginning; competition files did not contain required documentation, or the documentation contained mistakes. Her reviews of the files indicated that the required documents were still not on file. Ms. Hodder indicated that she gave the grievor until March 31, 2004, to complete the files. It was important that he complete the files as he had given indications that he would be looking for another position.

[42] Ms. Hodder testified that when Mr. O'Leary would take action on a file, it was at times evident that he was not sure what he was doing. She added that she became aware of this when there was an issue brought forward by a third party. Ms. Hodder said that she, therefore, asked the grievor to make her aware of all conversations by telephone and of all emails he received and sent on the same day they occurred. She felt this was necessary to improve lines of his communications, as representatives of the PSC had raised concerns that when they requested information on how to proceed the grievor would not provide all the facts needed to get the correct answers.

[43] Ms. Hodder also testified that, in the action plan, she had asked Mr. O'Leary to develop written procedures for the staffing process. This request was also the result of the grievor having told her he was seeking other employment.

[44] Ms. Hodder testified that she had had concerns that, at times, Mr. O'Leary would be away from his desk making personal calls from the boardroom. She, therefore, directed the grievor, in the action plan, to limit his use of personal telephone calls at work.

[45] Asked when Mr. O'Leary had mentioned for the first time that he was looking for another position, Ms. Hodder replied she was not sure but that this had occurred in fall 2003, after their first meeting. He subsequently mentioned on several occasions that he was looking for southern employment. Asked if she had taken any action in relation to this, Ms. Hodder replied that she had contacted headquarters and spoken to Chief of Staffing, Betty Mitchell, to see if there were any opportunities for the grievor

at the PE level in Ms. Mitchell's office. At the time, there were no such opportunities but Ms. Mitchell told the witness she would ask around. Ms. Hodder indicated that she had advised Ms. Mitchell that there were some performance concerns. On April 7, 2004, during the course of a meeting, the grievor asked Ms. Hodder and Mr. Kan if they could help him find a deployment opportunity in the South. At the time, they both informed him that it would be difficult to market him at the PE-2 group and level, since he was not performing at that level.

[46] Ms. Hodder testified that, following the April 7, 2004 meeting, she was copied on a letter Mr. O'Leary wrote to Stephen Traynor, Acting Regional Director, requesting a meeting to discuss a solution to the situation he was facing (Exhibit E-28).

[47] Ms. Hodder testified that at the time she contacted a number of people to see if there were deployment opportunities available for Mr. O'Leary. She also advised the grievor that he should be seeking a deployment at a lower level, given his performance issues.

[48] Unfortunately, there was a salary cap in force during that period and no such opportunities were available. Ms. Hodder added that, at that time, Health Canada considered Mr. O'Leary fit to work in Iqaluit and there was no reason for the DIAND regional office to look formally for a position for him.

[49] On April 15, 2004, Mr. O'Leary provided Ms. Hodder with letters from his specialist in Toronto, as well as from an Iqaluit doctor, indicating he would be better suited for a position in the South. As a result of these letters, and with the consent of the grievor, Ms. Hodder requested a second fitness-to-work evaluation from Health Canada. The Health Canada assessment came back on May 14, 2004, indicating that the grievor's health could be monitored in Iqaluit and that he could be sent to Toronto for consultation with his specialist on an "as needs basis" (Exhibit E-30). The cost of travel for these consultations would be assumed by the Department.

[50] Ms. Hodder testified that, at the end of May 2004, Mr. O'Leary requested a leave of absence for 11½ months for medical reasons. The medical certificates of absence (Exhibits E-36 and E-37) provided that he would be absent until June 8, 2006. The grievor had been advised on several occasions that any leave request for medical reasons required supporting medical certificates.

[51] Ms. Hodder testified that Mr. Traynor had been made aware of the concerns about Mr. O'Leary's performance and had been updated on a regular basis around April 2004, when the grievor sent an email to Mr. Traynor requesting his assistance in obtaining another job. Ms. Hodder added that she and Mr. Kan explained to Mr. Traynor the efforts they had made, starting on November 7, 2003, to indicate to the grievor his deficiencies. She said they updated Mr. Traynor on the concerns raised by the grievor with regard to his medical condition and of the efforts in referring the grievor to Health Canada. Mr. Traynor was also advised of the one-on-one meetings held daily between the grievor and Ms. Hodder, and of the action plan that had been developed to address the situation. Ms. Hodder testified that she advised Mr. Traynor that the grievor was aware of the expectations and the consequences if he did not get up to par. Ms. Hodder testified that she advised Mr. Traynor of the concerns raised by the PSC about the delegated staffing authority. She said that she discussed with Mr. Traynor the alternatives of either terminating employment or demoting the grievor to a lower-level position. The letter demoting the grievor was submitted in evidence (Exhibit E-38).

[52] In cross-examination, Ms. Hodder confirmed that Mr. O'Leary was absent on sick leave when he was advised on June 10, 2004, of his demotion to an AS-01 position effective June 21, 2004. The grievor remains still an employee in the Public Service.

[53] Counsel for Mr. O'Leary proceeded to question the witness about a third fitness-to-work assessment conducted by Health Canada after the demotion. Counsel for the employer objected, arguing that this information was not relevant, as the task of the adjudicator was to determine if the employer was justified in demoting the grievor at the time the decision was made. Counsel for the grievor responded by saying that it was relevant to determine the appropriate remedy, that it was relevant with regard to the employer's motivation and that it shed some light on how the employer dealt with the grievor. He argued that the evidence would show that the grievor was declared unfit to work in Iqaluit and has since been 15 months without work. Counsel for the employer responded by saying the grievor should not be allowed to use this grievance to resolve all his outstanding issues with the employer. Should I admit this evidence, he urged me to consider its relevancy and probative value. I indicated that I would accept this evidence subject to final argument on its relevancy and probative value.

[54] Ms. Hodder confirmed that following a third assessment conducted by Health Canada, she was advised by letter on December 21, 2004, that Mr. O'Leary should be considered unfit for posting to isolated areas at this time and in the foreseeable future (Exhibit G-1). Ms. Hodder indicated that no position had been identified at the AS-01 group and level within the department for the grievor since this letter had been received.

[55] Ms. Hodder confirmed that 10 days after giving Mr. O'Leary the action plan to improve his performance on March 1, 2004, she undertook a staffing action to fill his position. She explained that this was an anticipatory staffing action started on the recommendation of the grievor himself, who was seeking employment in a southern position. Ms. Hodder also confirmed that Renée Hall was appointed to an indeterminate position as an HR advisor on May 27, 2004 (Exhibit G-5). Ms. Hall had worked with Ms. Hodder at the time the latter was employed with the Nunavut Territorial Government. Ms. Hodder added that Ms. Hall started on June 14, 2004 and specified that she was not the grievor's replacement although she was hired to do staffing. Ms. Hodder also confirmed that a second HR advisor was hired in November 2005.

[56] Ms. Hodder did not ask for any input from the operation managers with regard to the grievor's performance. Mr. O'Leary's role was to educate and advise managers. While he handled over 40 staffing actions, it was the quality of his work that was an issue.

[57] Counsel for Mr. O'Leary introduced six reference letters from managers (Exhibit G-6) and proceeded to question Ms. Hodder about the content of these letters. Counsel for the employer objected to the admissibility of this evidence in light of the direction counsel for the grievor was taking in questioning the witness. Counsel argued that, if the content of the letters was going to be debated, then the authors should be here to be cross-examined. Counsel for the grievor argued that the letters had been written on departmental letter head and, as such, are part of the business records. They should be accepted as an admission against interest. Counsel for the employer responded by saying it was a fundamental issue of fairness to be able to cross-examine the authors of these documents. I allowed the evidence to be introduced subject to the arguments the parties would make as to the weight I should give to the content of these letters in the event the authors would not be brought in to testify.

[58] In response to questions in relation to a letter of reference dated June 14, 2004, signed by Mr. Jason Sharp (Exhibit G-6) one of the six managers, Ms. Hodder confirmed that Mr. O'Leary provided advice with regard to the development of the statement of qualifications as it pertained to the education requirement. He would also discuss the competitive and staffing process with the managers and would be involved in the screening of applicants. Up until November 2003, he was also involved in the actual interviewing of applicants. Ms. Hodder confirmed that the workload for the grievor was heavy and that he was in charge of handling the staffing program in the region. She said she did not know that he was referred to as "Super Dan" by managers.

[59] Ms. Hodder indicated that this was the first time she had seen these references but she conceded that she had never solicited the opinion of the managers to whom Mr. O'Leary was providing services. She pointed out that managers are not aware of the issues that may exist with regard to the grievor's work and cannot really judge if they have received the proper advice.

[60] Ms. Hodder confirmed that Mr. O'Leary had been involved in 44 staffing processes during his employment. She also confirmed, while reviewing the HR plan, that the region had a high turnover rate and that during the fiscal year the grievor worked, 59 competitions were completed in the region. The whole DIAND held 300 competitions. Ms. Hodder also recognized that most regions had more than one HR officer and that, by himself, the grievor had worked on more than 15 percent of all staffing in the Department.

[61] Ms. Hodder confirmed that, in addition to Ms. Hall, a second HR officer was hired. This officer, Ms. Kyle, had experience in staffing with the DIAND in Manitoba. Both she and Ms. Hall were hired to do staffing and staff relations. Staff relations was a new responsibility for these positions. Ms. Kyle was hired into Mr. O'Leary's old position.

[62] Ms. Hodder was then questioned about the competition for the land operation clerk position. She reiterated that applicant B should not have been on the eligibility list because her marks had been below the 60-percent pass mark required. Asked if she had reviewed the entire file, Ms. Hodder replied that she went through the file. Faced with documents (Exhibit G-10) signed by competition board members, Ms. Hodder acknowledged that it appeared that applicant B had scored higher than the required pass marks. Ms. Hodder then indicated that it had not been properly noted on the file

that all scores had been increased. She said that the file was in a confused state and she had not noticed that the scores of all candidates had been increased.

[63] Ms. Hodder was also questioned about the PSC clearance certificate for the land operations clerk position. She reiterated that a certificate had not been obtained before staffing the position. Asked if she was aware that the staffing process had begun in June 2003, before the grievor's arrival, Ms. Hodder acknowledged that the process was underway before his arrival.

[64] Asked if appeals or complaints had been filed by candidates with regard to the 44 staffing competitions handled by the grievor, Ms. Hodder acknowledged that they had not.

[65] Ms. Hodder was then questioned about a problem she encountered with Mr. O'Leary with regard to the drafting of a letter of offer that included a requirement for the candidate to get a medical clearance. She testified that the grievor had requested from her the appropriate wording to include in the letter. She provided the grievor with the proposed wording only to find that the draft he submitted to her did not include the proposed language. She brought it to his attention and he amended the letter. Ms. Hodder was then questioned about the fact that the grievor had not been asked to get a medical clearance before being offered a position in Iqaluit. She acknowledged that anyone can make mistakes.

[66] Ms. Hodder was questioned about the competition to staff a water management specialist's position. Asked if there had been any delays in the staffing of this position, she replied that she did not think so. As for the fact that a letter of regret was sent before a job offer was accepted, she acknowledged that the letter of regret was signed by the HR assistant, not Mr. O'Leary, but said that it was the grievor who assigned work to the assistant.

[67] Ms. Hodder was also questioned with regard to her complaint in relation to an email Mr. O'Leary sent to a candidate (Exhibit E-21). She indicated that it showed that the grievor had sent this candidate incomplete forms, since he was providing information that should have already been on the form. Asked if any delays or prejudice had been caused by this oversight, she replied that none had and added that it showed that procedures had not been followed. Asked if the grievor had done it again, Ms. Hodder replied "No". Asked if the grievor corrected his mistakes,

Ms. Hodder replied that he did. Asked if the grievor was capable of learning from his mistakes, Ms. Hodder replied in the affirmative.

[68] Ms. Hodder confirmed the department offered training in Zoom Text (magnification and reading software for the vision-impaired) to Mr. O'Leary only after Ms. Hodder had threatened the grievor with termination. The training occurred in December 2003. Ms. Hodder also indicated that managers did not see the staffing administration files and that the errors therein resulted in serious consequences for the Department that managers were not aware of. She also indicated that, at the time of the meeting on November 7, 2003, while the employer was aware that Mr. O'Leary had a disability, it was not aware that he had a medical concern. It was after the grievor provided a letter from a doctor later during the month that the Department asked for a fitness-to-work assessment by Health Canada.

[69] When asked if Mr. O'Leary had advised Ms. Hodder and Mr. Kan during the course of the meeting of November 7, 2003, that he had difficulties with his vision, Ms. Hodder replied that he had said he was not sure, given the demands of the job and his disability, if he would be able to fill the expectations of the position. Asked if she had not observed that he could not do things at the same speed as a person with normal vision, Ms. Hodder replied “. . . I guess probably reading would take him longer. . . .”

[70] Ms. Hodder indicated that there was no issue with the quantity of the work performed by Mr. O'Leary; she said it was more the quality. She confirmed that he worked on 15 percent of all departmental staffing, had a large workload and tried hard. Asked if she had noticed that the grievor was becoming depressed, Ms. Hodder indicated she had not. She was aware that he was seeking employment in the South. When asked if the grievor would have known that she was critical of his work, Ms. Hodder replied that she did not hesitate to bring issues up with him.

[71] Ms. Hodder confirmed that she was aware that her former employee, Ms. Hall was interested in applying for the position of HR advisor. Ms. Hodder had been her direct supervisor and had a good knowledge of her capabilities. Ms. Hodder indicated that she found out that Ms. Hall had applied for the position when Ms. Hodder went through the screening process in early May 2004.

[72] Ms. Hodder testified that soon after Mr. O'Leary's arrival it became apparent that he was having difficulties meeting the expectations of his position. Ms. Hodder was nonetheless surprised when she asked him what experience he had in staffing and the grievor replied that staffing was new to him.

[73] Ms. Hodder testified that in April 2004, Mr Kan offered the grievor the opportunity to ask for personal leave without pay for a year, along with relocation to Sarnia, Ontario. Ms. Hodder confirmed that, if the grievor had made this request, the Department could have backfilled his position. She also testified that, in order to obtain leave for medical reasons, the grievor would have had to present medical certificates for the duration of the period requested. During May 2004, the grievor submitted more medical certificates, which prompted further correspondence from Health Canada indicating that the grievor could be sent to Toronto on an "as needs basis." Asked if she had noted that the grievor was obviously depressed at that time, Ms. Hodder replied that, for the most part, the grievor expressed his concern that the Department had an obligation to find him a job. She said that his demeanour had not changed.

[74] Ms. Hodder was also questioned about the position to which Mr. O'Leary was demoted. She indicated that the position had considerable support and was not a position with a lot of pressure. She indicated that these factors were taken into account when Mr. Traynor decided to look at AS-01 positions in Iqaluit for Mr. O'Leary. Ms. Hodder also confirmed that no other position, to her knowledge, had been identified for the grievor anywhere within the Department.

[75] Ms. Hodder confirmed that Mr. O'Leary had received in error a letter dated June 14, 2004, referring to an offer of deployment. This letter was rescinded, as no such letter is required in the circumstance of a demotion. She indicated this was an error on her part and that no job offer was required in the case of demotion. Ms. Hodder, commenting on her performance evaluation of the grievor (Exhibit G-28), indicated that, in the evaluation, she had only presented five of the competition files the grievor handled.

[76] In re-examination, Ms. Hodder confirmed that Mr. O'Leary had provided the Department with his accommodation requirements including the use of Zoom Text. A new version of the Zoom Text program was purchased and training for this new

version was scheduled in December 2003. A month or two later, Ms. Hodder asked the grievor if he was using the program. The grievor replied that he was not.

[77] Ms. Hodder indicated that it was an expectation of his position that Mr. O'Leary would sit on all selection committees. However, following discussions in early November 2003, and because of the fact the grievor was getting behind in his work, the grievor was advised that this was not a requirement anymore and that he could sit on selection committees at his discretion. Ms. Hodder also confirmed that it was in early fall 2003, when the grievor was a couple of months into the job, that she questioned his experience after some of the concerns had come to her attention. Mr. O'Leary responded by saying, sometime in late October or early November, that staffing was brand new to him. Ms. Hodder indicated that she had reviewed his resume early in the fall, and as a result of this review, had initially concluded that he had experience in staffing.

[78] With regard to the competition for the land operations clerk position, Ms. Hodder testified that she was not aware that the scores of the candidates had been increased. She maintained that the rating board report, along with the eligibility list, contained errors and discrepancies and said again that once an eligibility list is sent to the PSC it cannot be changed.

[79] Ms. Hodder testified that the decision to proceed with an anticipatory staffing of an HR advisor position in 2004 resulted from a discussion with Mr. O'Leary. It was the grievor who suggested this course of action, as he was anticipating leaving his position. She indicated that she consulted the grievor on selection criteria for the competition.

[80] Ms. Hodder indicated that she had never seen the letters of reference submitted in evidence. Asked if Mr. O'Leary had agreed with the action plan of March 1, 2004 (Exhibit E-27), Ms. Hodder replied that the grievor had and that he had not indicated or made reference to the good service he was providing to the managers. She further explained that managers are not necessarily aware of the legal requirements that govern staffing. It is the role of the HR advisor to ensure that staffing is done in accordance with the legislative and policy requirements. Managers are not aware of the interaction between the Department and the PSC.

[81] Asked to explain the circumstances of the creation of a second HR advisor position in 2005, Ms. Hodder explained that the Department had been given responsibility to engage in the devolution of responsibilities to the Nunavut government. This devolution would result in extra workload for the HR Branch in finding alternate employment for its employees. The HR advisor position description was used to staff the position, as it is a generic position description used by the Department.

[82] Ms. Hodder testified that she started to review files in November 2003, and would pull a file at random and provide feedback to Mr. O'Leary in areas the file needed improvement. Ms. Hodder indicated that, as noted in Exhibit E-18, she would ask the grievor to bring her a specific file for review. She noted that in the land operations clerk position mistakes had been identified but had never been corrected.

[83] The employer's second witness was Ms. Leal. Since June 2005 she has been the priority administration advisor with the PSC. She started with the PSC in 1990, holding positions as an employment equity advisor for three years and then an HR consultant. Starting in 1993, her role was to assist departments with staffing. The PSC has an automated system entitling certain people to priority consideration for appointments. Ms. Leal would review the essential qualifications of such candidates in order to determine if they met the qualifications of the position. When no candidates could be so identified, a priority clearance would be issued allowing the department to proceed with the staffing.

[84] As requests for staffing came to her attention, Ms. Leal would discuss them with the HR advisor from the relevant department and would monitor compliance with the *Public Service Employment Act (PSEA)* regulations and policies. She would also provide advice and direction to departments on most staffing matters. As an HR consultant, she was assigned a certain number of departments, amongst which were the Edmonton and Nunavut regions of the DIAND.

[85] Ms. Leal testified that she began working with Mr. O'Leary in August 2003, when he started in the HR advisor position. Her communications with him were essentially with regard to priority clearances and external recruitment. Once a request would be made by the grievor on the automated system to staff a position, Ms. Leal would review this information and discuss with the grievor anything that did not fit into the *PSEA* or its regulations, Treasury Board directives or PSC policies. Eventually, when all

was correct, she, with the grievor, would move on to the recruitment stage, at which point she would prepare a draft poster and forward it to the grievor for approval.

[86] Ms. Leal indicated that she would receive four to five calls a day from Mr. O'Leary in his first three months in his position. In the beginning, she would assist him in inputting the correct information into the automated system. With most new HR advisors, the person would, after a month or two, start to understand how the system worked and what information was required. However, this did not happen with the grievor. Ms. Leal testified that it became apparent that the grievor had not done this type of work before. He still needed guidance and she became concerned since it was causing extra work for herself and her assistant. At times, advertisements would have to be cancelled and re-issued. Processes used to staff a position were incorrect and had to be cancelled. She testified that this occurred four to five times. She asked the grievor to contact her prior to putting a request in the system. She indicated that this resulted in other problems surfacing and the same information had to be repeated. She tried to direct the grievor to the PSC website, where he could consult references and she suggested he bookmark the information there for future use. Ms. Leal indicated that the repetitive questions occurred throughout the time she had dealings with the grievor, between August 2003 and April 2004. She also found out, during weekly meetings, that the grievor was contacting other individuals in the same office with the same types of questions. It became apparent that the grievor had not done this type of work before. In order to ease the workload, she decided she would take the initiative to contact the grievor to verify the information on his requests to confirm any information regarding recruitment posters.

[87] Ms. Leal testified that for every staffing action there has to be a priority clearance number. In most cases in the North, there were not a lot of priorities. The Iqaluit office of the DIAND would automatically obtain clearance. However, the PSC would monitor requests for compliance. If departments were not following the rules or regulations, the PSC would request a cancellation and provide the correct way of doing a request. She added that when a new HR advisor was be hired by a department, the person would have a basic understanding of how to go about their work, what was expected and what preparation is done with a manager before the request comes to the PSC. Ms. Leal indicated that it was clear from the requests presented by the grievor that there was no preparation done by the grievor. This was apparent to her because

the grievor could not directly answer any questions she asked him. He would have to go back to the manager staffing the position to find out the answer.

[88] Ms. Leal recalled receiving a phone call from Mr. O'Leary in early 2004, asking if clearances were required for closed competitions. She advised that this was the case. The grievor then indicated to Ms. Leal that he had not been aware of this and that appointments had been made without a clearance number. Ms. Leal testified that she advised the grievor to go back through the files and submit requests for clearances, and to call her if he was not given a clearance number. She indicated that she was worried about this and mentioned the situation to her director, Mr. Nelson. She also advised the grievor to document his files to explain the reasons for the delay in obtaining clearances.

[89] On another occasion, Ms. Leal indicated that she received a request to extend the appointment of a name referral. Whenever such a request came in, she would indicate that she wanted the information to refer back to the original appointment. The original appointment had taken place in September 2003, and no request had gone to the PSC at the time. Authorization from the PSC was required in order to appoint without competition on a name-referral basis. Mr. O'Leary communicated with Ms. Leal in March 2004. She suggested he cancel the request to extend the name referral, present the situation as a new request and submit the justification to her. The grievor did so. Upon reviewing the information, Ms. Leal realized that the employee the department wanted to appoint did not meet the education or experience requirements as set out in the statement of qualifications. She brought the situation to the attention of Mr. Nelson, who contacted Ms. Hodder, the manager of HR for the department.

[90] Ms. Leal indicated that there were other incidents regarding eligibility lists where Mr. O'Leary wanted advice on whether one individual could be appointed over another who was ranked higher on the list. Ms. Leal commented that an HR advisor should be familiar with the response to that question.

[91] Ms. Leal testified that one common occurrence was with regard to forwarding competition documentation to the PSC. Ms. Leal indicated that, as soon as a competition has been completed, results must be sent to the PSC, including the screening board report and the list of candidates indicating if they had qualified or not. This is a tool used by the PSC to ensure that the right procedures have been followed and to see if the DIAND is attracting Nunavut land claim beneficiaries.

Ms. Leal indicated that she sent a list to the HR Branch in Iqaluit requesting these documents in January, as they had not been sent and that she had only received some of them.

[92] Ms. Leal testified that she made a trip to Nunavut for the week starting November 17, 2003. The purpose of the trip was, amongst others things, to meet with the HR shop at the DIAND. Prior to the meeting, she spoke to Mr. O'Leary to set a meeting with him to assist him with his work in order to improve the work flow between the PSC and the DIAND. According to Ms. Leal, the meeting was set for Friday, November 21, 2003. She met with the grievor when she arrived on November 17, and then met with the entire unit. The meeting with the entire unit lasted all morning and included discussion on the issue of recruitment strategies. It was this week that Robert Millican, a senior staffing officer from the DIAND's office in Ottawa, was in Nunavut to assist the grievor. Ms. Leal returned to the office on the Friday to meet with the grievor. The grievor was not at work. She was disappointed and decided that she had done all she could. From that time on, she indicated that she monitored the grievor's work and made sure her director was aware of what was happening regarding the North. At the time, she was dealing with 7 departments and 15 HR advisors.

[93] Ms. Leal indicated that, in addition to the information she provided to all new HR advisors, when she noticed that Mr. O'Leary had not done staffing prior to being appointed to his position, she suggested to him that he discuss his training needs with his manager. She gave him the name of a person in the Edmonton office of the DIAND who did similar work and suggested he also attempt to find a contact in Ottawa. She also spoke to Ms. Hodder to ask about additional hands-on work experience for the grievor.

[94] In cross-examination, Ms. Leal indicated that she had suggested that Mr. O'Leary spend a week with or in close liaison with an experienced staffing officer and indicated that Mr. Millican had been in Iqaluit for that purpose. She also indicated that prior to her trip to Iqaluit in November she had not been aware that the grievor had a visual impairment.

[95] Asked if she could have provided training to Mr. O'Leary, Ms. Leal indicated that it was not her role to provide training and that she did not believe her director would have allowed her to be available for such.

[96] Ms. Leal testified that, in her experience, the majority of employees promoted from PE-01 to PE-02 would already have worked in the area of staffing. She also indicated that she was not aware of the training opportunities in Iqaluit. She also indicated that she was not aware of the staffing backlog at the time the grievor arrived in his position. She was, however, aware of the high turnover of personnel and that subject was discussed at the meeting in Iqaluit on Monday, November 17, 2003.

[97] Ms. Leal indicated that, through her regular weekly meetings with colleagues, she had noticed that Mr. O'Leary was being provided the same type of information over and over again. When the grievor would come with a request, she would ask if he had done his research. Her role was not to provide answers. This was the role of the HR advisor. She would basically direct him to the PSC website for HR advisors.

[98] Ms. Leal acknowledged receiving a fax (Exhibit G-33) dated October 31, 2003, which indicated that Mr. O'Leary was forwarding screening board reports for two competitions. In that document, the grievor stated “. . . I have a feeling that there may be a couple of others that I might have to get for you. Please accept my apologies. . . .”

[99] Ms. Leal indicated that she never had an opportunity to review the staffing files under Mr. O'Leary's responsibility. She confirmed that a staffing action starts with a request from a manager and that Exhibit G-34 was a priority clearance generated automatically as a result of a request from the grievor to staff a computer specialist position. Ms. Leal was shown a draft poster for the position and recognized that she had prepared it (Exhibit G-35). Ms. Leal indicated that the grievor would have reviewed this poster, with the hiring manager, and would eventually have sent the document back to her with his approval. This must have occurred as a poster was published (Exhibit G-37). Asked if she had any specific examples where additional costs were incurred by the DIAND as a result of changes to competition posters, Ms. Leal indicated that she did not have her records with her at the hearing and had not been monitoring this specifically. Asked if, in the case of the computer specialist position, procedures had been followed correctly, Ms. Leal replied in the affirmative and said that working closely together “. . . we would get the required result.” Ms. Leal was asked if she had told the grievor in February 2004, not to ask questions anymore. She replied that she had told him to do research.

[100] Ms. Leal was questioned on employment equity and was asked if there existed special programs. She replied no but said that accommodation measures were available

through the departments and Treasury Board. This would be a departmental responsibility and departments could ask the PSC if there were other positions available.

[101] In re-examination, Ms. Leal reviewed the staffing process for the computer specialist position in Iqaluit. With regard to the cancellation of posters for ongoing competitions, she recalled that she brought to the attention of her director three cases of competitions that had been put on hold.

[102] Ms. Leal indicated that she was pleased to see that the DIAND had acted on her suggestion and that Mr. Millican had been brought to Iqaluit to spend a week with Mr. O'Leary.

[103] The third witness called on behalf of the employer was Mr. Kan. He has held the same position since January 2000. He reports directly to the regional director general based in Iqaluit. At the time of the decision affecting Mr. O'Leary, Mr. Traynor was the acting regional director general.

[104] As Regional Director of Corporate Services, Mr. Kan directly supervises 4 employees: the manager of Finance and Administration, the manager of Human Resources, the chief of Informatics and the Administration officer. The directorate had 23 employees: 11 in Finance and Administration, 6 in Human Resources and 3 in Informatics. Mr. O'Leary was one of these employees.

[105] Mr. Kan indicated that he met Mr. O'Leary for the first time in July 2003, when the grievor came to visit prior to commencing work. He testified that he wanted to make sure the grievor visited the community and made sure he was comfortable. Mr. Kan indicated that the visit was good. He had a chance to talk to the grievor and to learn his background. They spoke about the challenges and conditions of working in the North. Mr. Kan testified that he realized the grievor had a visual impairment.

[106] Mr. Kan testified that Mr. O'Leary did not report directly to him. He had contact with the grievor in order to sign documentation in relation to staffing, such as letters of offer. He indicated that he became aware that the grievor was experiencing problems when, in late October or early November 2003, Ms. Hodder came to him to discuss the files the grievor was working on. A decision was then made to have a meeting with the grievor to discuss the concerns Ms. Hodder had with him. The

meeting was set for November 7, 2003. Mr. Kan indicated that, at the meeting, he asked Ms. Hodder to describe the areas of concern with regard to how the grievor handled files. Every time she raised a concern, Mr. Kan asked the grievor to give his response, in order to confirm he was aware of the issue and to give him a chance to respond.

[107] Mr. Kan testified that he was uncomfortable hearing the majority of Mr. O'Leary's answers. The grievor was either saying he did not know about things or that they had happened and he would not do them again. During the course of the meeting, the grievor made both Mr. Kan and Ms. Hodder aware that he had a medical concern about which they subsequently sought advice from Health Canada.

[108] Mr. Kan indicated that, at the conclusion of the meeting, the employer decided to bring Mr. Millican in to provide training to the grievor. It was also decided to follow up with the grievor with respect to Zoom Text training, in order to assist the grievor in navigating the computer. Arrangements were made with a consultant to take Mr. O'Leary through the new version of the program. Action items resulting from the November meeting also included, according to Mr. Kan, a direction to the grievor that he follow the staffing process and that it was expected that all documents that needed signatures should have zero errors in them and should be provided in a timely manner.

[109] Mr. Kan testified that Mr. Millican was brought to Iqaluit to spend a week in the office with Mr. O'Leary. Mr. Kan was told that the grievor had received Zoom Text training. Mr. Kan added that, because the grievor had indicated he had medical concerns, Ms. Hodder and Mr. Kan decided that they would ask Health Canada to do an assessment of fitness to work, as there might be more accommodations to meet.

[110] Mr. Kan testified that, since the grievor indicated that he spent considerable time on selection panels and, as a result, was not able to complete the tasks associated with staffing as expected, it was agreed that he would not be required to participate in every panel. This was how the employer addressed the grievor's concern with the workload.

[111] Mr. Kan testified that he met with Mr. O'Leary again on February 26, 2004, accompanied by Ms. Hodder. The purpose of the meeting was to have a discussion with the grievor about the result of the fitness-to-work evaluation conducted by Health Canada. Health Canada had confirmed the grievor's fitness to work in Iqaluit,

indicating that the grievor would need to be seen twice a year by a specialist in Toronto. The grievor was advised that if he needed to be seen by a specialist, his travel expenses would be paid by the DIAND in accordance with the housing directive, as long as he provided a medical certificate. In the case of an emergency, the Baffin Regional Hospital would be handling the arrangements. Mr. Kan indicated that during this meeting the grievor was reminded that the employer was still concerned about his performance and, since he had been found fit to work, it would continue to assist him. He was also told that if he needed assistance Ms. Hodder would be available to assist him. Mr. Kan also indicated that an agreement was reached that the grievor and Ms. Hodder would jointly develop an action plan in an effort to help the grievor improve his performance.

[112] Mr. Kan testified that he believed the action plan was developed by Mr. O'Leary and signed off on by both the grievor and Ms. Hodder. The next time Mr. Kan met with the grievor was on April 6, 2004. He indicated in his testimony that the Department was quite concerned with the performance of the grievor. The grievor was about to take his vacation and Mr. Kan wanted to speak to him about a couple of options given his performance to date. Mr. Kan indicated that the PSC had raised concerns informally, through Ms. Hodder about the quality of the work submitted by the grievor.

[113] Mr. Kan testified that he participated in a conference call in May with Mr. Nelson, Director of Operations, the PSC, Edmonton. Mr. Nelson raised a number of concerns about an eligibility list he had received and pointed out to Mr. Kan that candidates who were not qualified should not be on the list. Mr. Kan also said that he was told by Mr. Nelson that the first successful candidate's name did not appear on the list. Mr. Kan indicated he was told that once he signed off on an eligibility list the DIAND could no longer modify the list. Mr. Kan testified that he was told by Mr. Nelson that, as the person holding the delegation of authority, he could be liable, along with the DIAND, if the list was not prepared correctly or if there was a mistake. Mr. Kan then testified that he did not review the staffing files and that he had relied on the HR advisor to ensure that the documents were prepared correctly. Because of the workload, it would not be possible for Mr. Kan to review the files. Furthermore, he expected the HR advisor to keep good records.

[114] Mr. Kan testified that he was away on duty travel when the decision was made to demote Mr. O'Leary. Brenda MacDonald replaced him during his absence.

[115] In cross-examination, Mr. Kan confirmed that Mr. Nelson had never put in writing to him the concerns he had expressed with regard to the work performed by Mr. O'Leary, nor was Mr Kan aware of those concerns being expressed in writing to anybody else. As for the date of the telephone call from Mr. Nelson, Mr. Kan indicated it was around the beginning of May but he did not have a record of the call and did not take notes during the conversation.

[116] Mr. Kan indicated that he later had become aware that Mr. O'Leary had been assessed as not fit to work in Iqaluit. Asked if he had made any efforts to locate a position for the grievor in the South, Mr. Kan replied that he had not been involved directly in such efforts.

[117] The employer's fourth witness was Mr. Traynor, who has been Senior Advisor to the Assistant Deputy Minister assigned to language training since October 2005. Prior to that, he was Acting Regional Director General (ARDG) for the DIAND position in Iqaluit, a position he held between May 2003 and September 2005.

[118] Mr. Traynor testified that his role as the ARDG was to undertake the departmentally mandated responsibilities in Nunavut. Those responsibilities included intergovernmental affairs, economic development, resource management and ensuring that the corporate activities were in line with the departmental plans and priorities. Until September 2004, he reported directly to the deputy minister. After that, following a departmental reorganization, he reported to an assistant deputy minister.

[119] Mr. Traynor indicated that reporting directly to him were the senior advisor, the executive assistant, the manager of communications, the director of corporate services, the director of intergovernmental affairs, the director of operations and the manager of policy. As the ARDG, Mr. Traynor had signed the letter of demotion.

[120] Mr. Traynor recounted how he became involved in Mr. O'Leary's demotion. He indicated that he was initially contacted by Ms. Hodder in early November 2003, to discuss the grievor. The discussion revolved around two issues: the grievor's performance and the comments Ms. Hodder had received from the PSC. Mr. Traynor believed Ms. Hodder should be talking to her immediate supervisor, Mr. Kan, about the performance issues. As for the comments from the PSC, Mr. Traynor indicated he understood from Ms. Hodder that the region might be at risk of losing its delegated staffing authority. As the region was conducting a considerable number of staffing

actions, Mr. Traynor, as ARDG, felt that it would be a serious matter to lose staffing delegation.

[121] Mr. Traynor indicated that it was very important to maintain the ability to staff, as the Department had a high turnover rate of more than 20 percent. He added that if the region lost delegated staffing authority, they would have to rely on the Yellowknife office. That office had clearly indicated that it would be unable to fulfill this responsibility due to their workload. Mr. Traynor testified that the DIAND headquarters indicated that they would no longer help in classification and other staffing matters due to their workload. In Mr. Traynor's mind, this was a high-risk situation.

[122] Asked what it meant concretely to lose delegated staffing authority, Mr. Traynor testified that he did not know the full ramifications but that ultimately, he would either have to rely on another region or have the deputy minister sign off on all the staffing actions. He was not aware of another region having lost delegated staffing authority in his 13-year career with the DIAND.

[123] Asked whether he had been aware of Mr. O'Leary's specific situation, Mr. Traynor indicated that he had been aware that the grievor had problems with his sight. He said that during the initial discussion with Ms. Hodder he asked her to ensure that the grievor had the right equipment he needed to do the job. Mr. Traynor was also aware that the grievor had been given Crown housing that was within one block of the office in order to facilitate his ability to get there daily.

[124] Mr. Traynor testified that he understood that the purpose of the email he received from Mr. O'Leary dated April 14, 2004 (Exhibit E-28), was to inform him that things were not working out in his job. The grievor was seeking assistance to get out of Iqaluit. Mr. Traynor indicated that the email seemed to him a fairly honest assessment and that the grievor was clearly trying to reach out to him and sort out the current situation. The grievor also indicated that he would need mentoring. This caught Mr. Traynor's attention. Mr. Traynor indicated that he worked in the North and knew the difficulties of recruiting people. He felt it was important to make sure that the best support mechanisms were there to help employees do the job. Mr. Traynor indicated that the region provided a fair amount of training dollars. In Mr. Traynor's mind, the training was there and available, but it appeared that the grievor needed something extra. Mr. Traynor indicated that he was not sure what the grievor really wanted. Often, there was confusion about the North versus the South. Deployment out of Iqaluit does

not necessarily mean to Toronto or Ottawa. Deployment could occur to Thunder Bay, for example.

[125] Mr. Traynor indicated that at the time of the email in April 2004, he was aware that Health Canada considered Mr. O'Leary fit to work in Iqaluit. It was Mr. Traynor's understanding that any medical issues related to the grievor's disability could be accommodated, as the Treasury Board guidelines allowed for medical travel should the need arise.

[126] Mr. Traynor testified that he responded to Mr. O'Leary's request for assistance by referring him back to his supervisors, Ms. Hodder and Mr. Kan. They could best assist him in sorting out how best to go about being deployed, what was available and what his options were. From Mr. Traynor's perspective, the grievor was fit to work in Iqaluit and the manager responsible, Ms. Hodder, was working with the grievor in trying to lay out a plan to help him be successful in his position. Mr. Traynor indicated that in his role, he had responsibilities for issues in Nunavut only. He could talk to colleagues in Nunavut but he clearly felt that, given the situation with regard to the grievor's ability to do the work, he did not have a role to play.

[127] Asked what facts he took into account when issuing the letter demoting Mr. O'Leary (Exhibit E-38), Mr. Traynor testified that, in determining the course of action, he reviewed the file and had been briefed three to four times on the situation. Initially, there were three options to consider: deployment to another position, demotion and termination. It was not within Mr. Traynor's authority to deploy the grievor to the South, nor was there any other suitable position in the region. The decision was made to demote the grievor from a PE-01 to an AS-01 group and level position. Termination was considered, but Mr. Traynor considered that the grievor was still someone who was willing to work, although he was in the wrong job. There was no PE-01 position available, and Mr. Traynor could not create a new position. Two positions at the AS-01 group and level were vacant. After assessing which position would be more suited to the grievor, it was decided to demote him to the administrative officer position, in the Operations Directorate, where the pressures would be somewhat less and the support mechanisms easier to put in place. Mr. Traynor also indicated that the AS category is fairly mobile and that there are more opportunities to find such a position in another location.

[128] Mr. Traynor, asked to comment on why he had come to the conclusion that Mr. O'Leary was in the wrong job, indicated that, in reviewing all the information available, he was of the view that Ms. Hodder had made every effort to assist the grievor in doing the job by establishing objectives and expectations and having monthly and daily meetings with the grievor. Ms. Leal was brought in to assist and the grievor was assessed by Health Canada as being fit to work in Iqaluit. Mr. Traynor indicated that the grievor, in his April 14, 2004 email (Exhibit E-28) recognized that, despite his best efforts, his lack of formal training and experience hindered his performance. It was clear to Mr. Traynor that the grievor could not perform at the PE-02 group and level.

[129] Asked why Mr. O'Leary was not given more training, Mr. Traynor indicated that the grievor had been around since August 2003. By June 2004, the grievor had been provided with training, including one-on-one training and there had not been a marked improvement. The grievor himself was seeking to be deployed. Mr. Traynor added that the position of HR advisor was important to the organization. There were a lot of staffing actions. It seemed that enough time had been given to discussion and training and to correct the situation and that it was now time to reassess and try to give the grievor a position and support that were commensurate with his abilities and to try to move forward from there.

[130] In cross-examination, Mr. Traynor indicated that, with the exception of one staffing procedure, he had little contact with Mr. O'Leary other than at general staff events. He acknowledged that this one staffing action was conducted to his satisfaction and that he had no complaints about how the grievor handled the staffing or about any of his interactions or behaviour. Mr. Traynor added that there were indications on the file that the grievor was not at his desk because of personal business and that he showed up for work late. Mr. Traynor said that this would have been documented by the supervisor.

[131] Mr. Traynor confirmed that he did not speak to anyone at the PSC or receive correspondence from them with regard to the work done by Mr. O'Leary. Other than through discussions with Ms. Hodder and Mr. Kan, the only other reference he found to the PSC in relation to the grievor's performance was in the email the grievor sent to him on April 14, 2004 (Exhibit E-28).

[132] Mr. Traynor testified that, following the demotion, he became Mr. O'Leary's direct supervisor. However, the grievor was on sick leave and was eventually found by Health Canada, in December 2004, not fit to work in Iqaluit.

[133] Since Mr. O'Leary was now incapable of working in an isolated post position, counsel for the grievor asked Mr. Traynor whose responsibility it was to locate a position for the grievor. Counsel for the employer objected to this question, on the grounds that this was not relevant to the issue at hand. The grievance did not deal with the placement of the grievor in another position for the employee but with the demotion that occurred on June 10, 2004. Counsel also noted that a human rights complaint had been filed dealing with that issue. Counsel for the grievor replied that if the grievor's demotion is rescinded he will require accommodation. I allowed the question.

[134] Mr. Traynor testified that he understood Mr. O'Leary to be the responsibility of the Nunavut region. Mr. Traynor indicated that he had briefed his successor and that the Nunavut region was prepared to assume half of the grievor's salary for a period of six to nine months, as an incentive in order to facilitate his employment in another region. Mr. Traynor was not aware of opportunities that may have come about so far, and assumed attempts were still being made. Mr. Traynor indicated that headquarters was still trying to find a position and had advised the region to create an incentive with regard to salary.

[135] Mr. O'Leary testified on his own behalf. He is 45 years old, single and living with his mother in Toronto. He has been in Toronto since June 2004. He obtained a Bachelor of Arts from the University of Western Ontario in 1985. He took 4½ years to complete his degree because of his visual impairment. He also completed a certificate in HR management from the Ryerson Polytechnical University through evening courses.

[136] Mr. O'Leary testified that from 1988 to 2000, he was employed by the City of Toronto where he worked in accounts payable and receivable and in payroll. In 2000, as a result of a municipal amalgamation, his position became surplus and his employment came to an end. He joined the federal Public Service in June 2000, hired by the Department of Fisheries and Oceans (DFO) in the Central and Arctic Region, located in Sarnia. He was classified as a PE-01 and was in a development assignment program for persons with disabilities. During his first year of employment, he was hired to focus on recruitment and retention of persons with disabilities. As this

assignment related to employment equity, his role was to encourage hiring managers to give serious consideration to qualified persons with disabilities. The grievor indicated that this was not work in the staffing operations unit but it was part of HR planning and development. He would interact with staffing officers as the situation related to employment equity when they would staff vacant positions. He also indicated that he had involvement in official languages.

[137] The HR group employed between 25 to 30 persons while the DFO's Central Arctic region accounted for 2000 employees. Mr. O'Leary, prior to joining DFO, indicated that he had never been exposed to staffing. During his stay at DFO, he received training in staffing by taking modules 1 and 2 of the course entitled Staffing for Specialists. Asked if there were any exams at the end of the training sessions, the grievor indicated that there was no examination or test at the end of either module.

[138] Mr. O'Leary testified that he also took a Train the Trainer course for a harassment-free and zero-tolerance workplace initiative, an orientation to official languages course, an orientation on employment equity course, a session on staffing delegation for sub-delegated managers and a series of computer courses.

[139] Mr. O'Leary testified he started to look for a promotion late in 2002. This was purely voluntary as he was not required to leave Sarnia.

[140] Mr. O'Leary indicated that he has had a visual impairment since birth, identified as congenital cataracts. He has had numerous eye surgeries and he was diagnosed, in 1988, with glaucoma. At the present time, he has 10-percent vision in his left eye and 5-percent vision in his right eye. He also has a narrowed field of vision. He lacks muscle control in his pupils which results in his moving his head to focus as he reads. He is at risk of losing his sight because of the high pressure in his eyes related to glaucoma. Since childhood, he has been under the care of Dr. R.C. Pashdy, an ophthalmologist, located in Toronto. The grievor indicated that there was no prospect of his vision improving.

[141] Asked how his visual impairment restricts his ability to work, Mr. O'Leary responded by saying it has a significant effect because it takes him considerably longer to do visually-oriented tasks, such as reading and writing and sometimes identifying objects in an office. It has an impact on his mobility because, at times, contrast and

colours are a problem. Stairs are a problem, as are roadways. Traffic control is important to his mobility.

[142] Mr. O'Leary testified that he learned about the DIAND position when he saw a poster for a closed competition on the PSC website. He submitted his application to the DIAND in June 2003. An interview was conducted by phone in early July 2003. The interview was conducted by Geri Lukes, Manager, HR and Renée Lamontagne, the HR advisor. During the interview, the grievor was asked to name 10 pieces of legislation that an HR advisor would use. He was also asked behaviour-based types of questions, for instance how he would handle a specific situation. He was asked to provide references.

[143] Mr. O'Leary testified that he had not told the people conducting the interview that he had a visual impairment because he did not want to prejudice their viewpoints, as they may have perceptions of what legally blind or visually impaired is.

[144] Mr. O'Leary had indicated that he was later informed that he was the successful candidate and received a letter of offer. When Ms. Lukes phoned him to advise him he was the successful candidate, the grievor informed her of his impairment. This was before the letter of offer was sent. Ms. Lukes indicated that she would look into a few things and would get back to him. She phoned back and informed the grievor that she did not think this would be a problem and indicated that the employer would look for housing to facilitate his reporting to the office and getting to a grocery store. The grievor was not asked to obtain a medical clearance before reporting to Iqaluit, nor did he seek an opinion from his specialist as to the advisability of moving to Iqaluit.

[145] Ms. Lukes invited Mr. O'Leary to come to Iqaluit the second or third week of July 2003. When he got to Iqaluit, Ms. Lukes picked the grievor up at the airport and took him for a brief drive around Iqaluit, which was followed by a visit to the DIAND office, where the grievor met a few members of the staff. He was also introduced to Wendy Dorion, who took photo identification and was then taken to Capital Suites, where he would reside when he moved to Iqaluit. The whole visit lasted 1½ to 2 days. The grievor was to report to work on August 11, 2003.

[146] Mr. O'Leary testified that, in July 2003, he provided his employer with a copy of a letter (Exhibit E-5), dated in July 2001, providing an assessment of the accommodations the grievor required in the workplace. One of the accommodations

required was Zoom Text software. The HR advisor position required that he use a computer on a significant basis. Zoom Text magnifies the screen and has speech recognition capabilities. It allows the computer to read and listen. The software was installed on Mr. O'Leary's computer four to six weeks after his arrival. However, the grievor indicated that he was not able to use the software, despite his attempts to do so. He learned that training was available for this software late in October or early November 2003. He received the training by phone which lasted slightly more than an hour. This was somewhat a difficult training session to hold over the phone. After the training session he could get the software program to start but it did not always change lines properly when reading. He never received the headset that would have allowed him to use the software without disturbing colleagues with whom he shared an open-concept office.

[147] As for the other accommodations, Mr. O'Leary testified that he received the 21-inch computer monitor about four to six weeks after he started work. Until that time, he had a regular monitor. The bigger monitor is quite valuable to him, as it makes it easier to see and recognize material. He indicated that the large-print keycaps were not provided. As for the computer workstation, the grievor indicated it was fine. He does not recall being provided with optical character-recognition software. He also indicated that he did not have, at all times, a local printer.

[148] Mr. O'Leary testified that he experienced difficulties in Iqaluit. In the beginning the lack of traffic control presented a problem. There were not always formed roadways as we know them in the South. People drive where they want. This posed a challenge for the grievor, who was never sure from which side vehicles would come. He recalls having close calls with snowmobiles and almost being hit by one.

[149] At the time Mr. O'Leary reported to work on August 11, 2003, Ms. Lamontagne had left and Ms. Lukes was there for three to four days. Ms. Lukes showed him where the staffing files were kept but this was the extent of his initial orientation. No one reviewed the status of ongoing staffing actions with him. As for the HR assistant Noolee Iou, she had started work in early July 2003, and was not really able to provide guidance. It was the compensation and benefit advisor who pointed out to the grievor the file cabinet drawer, where the competitions files were located. The files were in a state of disarray.

[150] Mr. O'Leary testified that he received a 15-minute training session from another colleague on the computer system. The session essentially consisted of instruction with regard to the various system drives. He does not recall seeing any office manual.

[151] Mr. O'Leary testified that one of the first instructions he received from Ms. Hodder, was to sit on all selection boards when hiring managers were staffing vacant positions.

[152] With regard to the "Objectives and Expectations" document (Exhibit E-6), Mr. O'Leary indicated that Ms. Hodder had told him what she wanted and that he had then put it together. With regard to the comment from Ms. Hodder that he had been slow to put it together, the grievor indicated that he had been very busy. It was a hectic period, particularly since he had to sit on all staffing boards; the backlog kept growing.

[153] Mr. O'Leary reported directly to Ms. Hodder and found her aggressive and, in many instances, intimidating. As for Ms. Leal, he did not know her until he requested a first-priority clearance. He thought he had a reasonably good rapport with her, although, at times, Ms. Leal seemed somewhat frustrated with him or with something else. He understood her to be the HR consultant at the PSC in Edmonton. He first started communicating with her in late August or early September.

[154] Asked if, in August or September 2003, he had anybody else to turn to for assistance, Mr. O'Leary indicated that the HR assistant was not experienced.

[155] With regard to the land operations clerk competition, Mr. O'Leary indicated it was already underway when he started work in August 2003. He did not recall how the handwritten changes were made to the eligibility list (Exhibit E-20.1) or to the score sheets produce by Anna North who was presiding the rating board (Exhibits G-10 and G-11).

[156] Mr. O'Leary testified that the first competition number appearing in the email marked Exhibit E-18, does not appear on the list of competitions he worked on Exhibit G-7.

[157] The grievor testified that he found the tone of the November 7, 2003 meeting, very heavy-handed. He found that Ms. Hodder was trying to intimidate him and he was intimidated. He confirmed that he had requested that the meeting topics be put in writing. He confirmed that this document (Exhibit E-11) generally sets out the matters

discussed with Mr. Kan and Ms. Hodder. The grievor noted that in the last paragraph of the second-last page, a more accurate reflection of his comment would have been that he was not sure if he could meet the demands set by the manager for the position, given the nature of his disability.

[158] Mr. O'Leary recalled indicating to Ms. Hodder that he was trying to adjust and to cope and that he felt intimidated by her aggressive approach. He recorded these comments in his notes shortly after the November 7, 2003, meeting. However, he scratched out these comments in his notes (Exhibit G-38), as he did not want to appear unreasonable and did not want the employer to feel that he was not conscious of the concerns they may have had. The grievor indicated that he kept the notes in his file, as he feared for his situation. He wanted an accurate account for himself in case the situation developed into a full-blown confrontation.

[159] Mr. O'Leary testified that Ms. Hodder, during a conversation, expressed concern about not having received an HR officer who could "hit the ground running." This was one of the attributes that precipitated the November 7, 2003, meeting. Ms. Hodder had indicated to the grievor that she had accepted the position on the belief that she was getting an HR advisor who had worked in staffing and could "hit the ground running." She told the grievor that, obviously, the people who had hired him did not have vested interest in the matter.

[160] Mr. O'Leary indicated that, following the November 7, 2003, meeting, he had provided a letter from Dr. Jason A. Shack (Exhibit E-12) to Ms. Hodder, indicating the doctor's support for a southern placement for the grievor. Ms. Hodder came to Mr. O'Leary on November 12, 2003, to ask if he had undergone a medical clearance through Health Canada prior to arriving in the North. The grievor replied in the negative, and indicated that he had not realized he would have to. In early November, he had sought medical attention from the Baffin Regional Hospital, as he was experiencing nausea, vomiting and pressure in his eyes. The hospital had difficulty getting an accurate reading of the pressure in his eyes. The grievor indicated that, following the letter from Dr. Shack to Ms. Hodder, he was asked to consent to a medical assessment, which eventually took place in the Toronto area during the Christmas holidays.

[161] Mr. O'Leary testified that he understood that Mr. Millican was going to spend time with him to work on issues related to staffing. He may have gotten 1½ to 2 days

of Mr. Millican's time. This allowed them time to review a couple of files and they developed a handwritten action plan to address some of the issues raised by Ms. Hodder. Mr. O'Leary showed Mr. Millican the letter dated November 12, 2003 (Exhibit E-11). Mr. Millican had some suggestions. A final version of the action plan was sent to her via email. Ms. Hodder replied that it was not what she was looking for.

[162] Mr. O'Leary recalled when Ms. Leal was in Iqaluit. He was told after the fact by Ms. Hodder that Ms. Leal had set some time aside to meet with him on the Friday. The grievor was ill on that day and he apologized to Ms. Leal for not having been there. He indicated that he had participated earlier in the week in the first meeting with Ms. Leal. Generalities were discussed as they related to HR. Inuit employment and the Inuit Summer Student Employment Plan were discussed. Mr. Millican also took some of Ms. Leal's time to discuss issues between the PSC and the DIAND.

[163] Mr. O'Leary indicated that he spent Christmas 2003 in Toronto with family. His initial appointment with Dr. Eric Jeffries was cancelled and he was referred to see an ophthalmologist, Dr. Blair Fearon. This took place on January 5, 2004, and delayed Mr. O'Leary's return to Iqaluit. The grievor testified that he continued to have medical concerns with regard to his eyes. He expressed those concerns to Ms. Hodder in an email dated February 27, 2004 (Exhibit G-13).

[164] Mr. O'Leary testified that he did sign the action plan dated March 1, 2004. Asked what input he had in the plan, the grievor indicated that he was called to a meeting with Ms. Hodder that morning where she presented the document (Exhibit E-27). Her tone was aggressive and the grievor continued to feel intimidated. She asked the grievor to review the document. She stated that it contained the measures that she had developed in the form of an action plan to address the concerns she had with his performance. The grievor did not know what to say. He felt that no matter what he said or did, he would not be able to meet her expectations and testified that he was living in fear.

[165] Mr. O'Leary indicated that after March 1, 2004, he had daily meetings with Ms. Hodder. These meetings addressed daily functions. At times, the grievor would prioritize items and Ms. Hodder would respond by asking ". . . who told you to make that a priority? . . ." The meetings dealt with day-to-day things the grievor did as part of staffing.

[166] Mr. O'Leary testified that he continued to have difficulties with the pressure in his eyes. He had headaches and nausea, was vomiting and had poor sleep. He started to notice that he was losing weight, feeling tightness in his chest and knots in his stomach. The grievor indicated that it was very stressful time for him.

[167] Mr. O'Leary testified that he had begun to think about leaving Iqaluit. He was having physical difficulties and everything he did at work was not good enough. He told Ms. Hodder that he would try to look for a deployment. He was aware of the anticipatory staffing for an HR advisor. It was an anticipatory option in the event that he would be deployed elsewhere.

[168] Mr. O'Leary recognized the email he sent to Mr. Traynor on April 14, 2004. He indicated that he had had a discussion with Mr. Kan and Ms. Hodder about their concerns. He felt it was necessary to bring his request to a higher senior level in the organization. Mr. Traynor replied that he was not in a position to intervene (Exhibit G-15) and the grievor did not have any further communications with Mr. Traynor.

[169] Mr. O'Leary introduced the letters he had from Drs. Stern and Pashby, indicating that he should be employed in a large southern centre (Exhibits E-32 and G-39). He also recognized the two medical certificates for absences in May 2004 (Exhibits E-36 and E-37), indicating that he would be absent from work because of depression.

[170] Mr. O'Leary testified that on June 1, 2004, he applied for leave without pay for medical reasons (Exhibit E-35). He needed to return home to hopefully address his concerns with respect to his medical condition and the difficulties he was encountering. In a discussion with Mr. Kan and Ms. Hodder, he was continually told that his leave of absence could be approved but that it would have to be for a minimum of one year. The grievor believed that the reason behind this was that the employer could staff the position on an indeterminate basis if the leave period was for more than one year. Otherwise, the employer would have had to protect his substantive position.

[171] Mr. O'Leary received his letter of demotion (Exhibit E-38) by fax on June 10, 2004, and then by registered mail. His health was poor at the time. He had lost a lot of weight and had been off work for a significant period of time. He had seen a psychiatric nurse at the Baffin Hospital, who recommended that he return south. He

did so and provided medical certificates in support of his absence. He was treated for depression and saw a psychiatrist between July 2004 and November 2004. On November 2, 2004, he was found to be able to return to work. The grievor also consented to another medical assessment from Health Canada, which confirmed on December 21, 2004, that he should be considered unfit for postings to isolated areas at that time and for the foreseeable future.

[172] Mr. O'Leary indicated that he has been willing to work in a large centre in Canada where he would have access to the ophthalmologic care he required. He is willing to work at the AS-01 group and level. He has only managed to obtain temporary work stocking shelves at an IBM warehouse (for a few days) and as a security guard (8 to 10 weeks). His current financial circumstances are difficult, as he has no income. His mother is 69 years old and unable to support him and he and she have been forced to sell their home.

[173] In cross-examination, Mr. O'Leary confirmed that he had a chance to visit Iqaluit before commencing his employment. He had been in Iqaluit once before, in March 2002, for business purposes when he was working for the DFO. He looked at the vacancy and saw it as a promotional opportunity. He knew it was in the Arctic but did not fully know the ramifications of working in the North. He asked before going what it was like, and where he would shop and get his hair cut. Ms. Lukes provided him with this information. Mr. O'Leary did not inquire if there was an association that could support disabled persons. He was driven around town by a colleague. There were no direct flights from Toronto; he had to go through Montreal or Ottawa.

[174] Mr. O'Leary confirmed that he had not mentioned his visual impairment in his application and had not realized he had to. When he spoke to Ms. Lukes after being told he was the successful candidate, he indicated to her that he had a visual impairment and was considered legally blind. He also indicated to her that he might need accommodation in the workplace and asked her about the possibility of living in Iqaluit without being able to drive. He told Ms. Lukes that the DFO had had a workplace accommodation assessment done for him. Ms. Lukes said she would look into these matters and get back to him.

[175] Mr. O'Leary indicated that he had gone to Iqaluit with the knowledge of what he had seen in the limited time he had spent there. When he was there in 2002, there were

a couple of days when the weather was so bad that he was instructed to stay in his hotel room.

[176] Mr. O'Leary testified that he had read the poster when he applied for the position and that he asked questions at the time of the interview. He was told at the time that the position was focused on staffing and that the region had a high turnover rate, as people often go and work in the Arctic for two to three years. Mr. O'Leary also recalled asking questions about the position's duties and receiving answers to these questions. He indicated that there was dialogue about the position itself in somewhat of a general fashion but not one that could be qualified as an in depth discussion. Asked what connection he had made between workload and turnover, the grievor replied that at the time of the interview he did not make a connection between workload and turnover, but that after having been there and having seen what it was like, he would say that there was a connection.

[177] Asked if he remembered the questions asked during his selection interview, Mr. O'Leary replied that he recalled being asked to state 10 pieces of legislation or regulations that an HR advisor would use. He had no specific recollection of the other questions, although other questions were asked. He did not recall exactly if he told the members of the selection committee he had no experience in staffing. The grievor indicated that his background was diversified and that, although he did not work in staffing operations, he had worked in HR, in planning and development, as communicated in his resume.

[178] Mr. O'Leary explained that the provision of advice on staffing and staff relations mentioned in his resume was done in consultation with staffing and staff relations officers. He would receive the advice and communicate it to others. The grievor indicated that when he was hired at the DFO, it was intended that his major focus would be to promote the recruitment and retention of persons with disabilities. It was a matter of educating hiring managers on the merits of employing persons in the designated groups. This would involve pointing out that persons with disabilities often work hard, if not harder than employees who do not have to face a barrier to succeed. He would also point out that they also tend to stay longer in their positions and that there are many ways to accommodate employees that can allow them to do certain work that others may think they can't do. The grievor confirmed that part of his work was to educate on accommodation when it was necessary. When he was not familiar

with a specific problem, he would refer the manager to resources such as a job accommodation network. The grievor confirmed that part of his role was also to educate managers on the importance of accommodation.

[179] Mr. O'Leary confirmed that he had taken training on staffing modules 1 and 2, on staffing delegation for sub-delegated managers and on employment equity and an orientation on official languages. He also took a Train the Trainer course in mentoring. The grievor explained that DFO has a mentoring program. His manager was responsible for overseeing the program. He was encouraged by this manager to take the Train the Trainer program on mentoring in order that he deliver a workshop in his region to encourage employees to participate in the mentoring program. He became the trainer and coordinator of the program for the region. In order to become the subject matter expert, he had to develop his competencies in mentoring. The grievor was also asked to play a support role with regard to harassment and completed a Train the Trainer course for harassment. The course was to train people to deliver workshops on identifying harassment and trying to prevent it. Mr. O'Leary was never asked to prepare such a workshop. The course centred on presentation and communication skills, as well as on the subject matter.

[180] Mr. O'Leary testified that he had tried to use the Zoom Text software on certain occasions while at the DFO but had never received the formal training on its use while there. He indicated that it would have been helpful to have it when he first started at the DIAND. He did not raise the concern, however, as he knew the DIAND had taken steps to get it. When it was installed, he tried to use it but with not much success.

[181] Asked whether it was fair to say that he had been accommodated with regard to his visual impairment while he was working in Iqaluit, Mr. O'Leary responded by saying he had been accommodated to a degree. He indicated that accommodation takes many forms. There needs to be a reasonable expectation and allowance for someone like himself to read and write. The grievor indicated that people may need to consider that he may perform certain tasks in a different manner than a fully sighted person.

[182] Mr. O'Leary acknowledged that accommodation is a shared responsibility. He also recognized that he had received accommodation and had expressed the view that he was appreciative of what he had received. However, the grievor testified that, in certain respects, he was not satisfied and had expressed that view verbally on many occasions to Ms. Hodder. He related how Ms. Hodder directed him to use websites to

obtain information rather than verbal communications or the telephone, thereby not allowing him to work differently. Asked why he stated his satisfaction with accommodation in the email dated February 27, 2004 (Exhibit G-13), the grievor replied that he had not wanted to appear ungrateful or as not appreciating the things that he had been provided. He added that to accommodate a person such as himself, an employer may have to allow him to do things in a different manner.

[183] Mr. O'Leary testified that he was worried, leading up to the November 7, 2003, meeting. He was constantly feeling that he was being dealt with in an aggressive manner. He felt intimidated and continued to feel this way during and after the meeting. His feelings were recorded in his handwritten note (Exhibit G-38). Asked why he had not dated the note, the grievor replied that he had kept it with the letter dated November 12, 2003 (Exhibit G-38).

[184] Mr. O'Leary acknowledged receiving the November 12, 2003, letter from Ms. Hodder, and that this letter had been written at his request. He had not expected the letter to contain a threat of termination. In his email dated February 27, 2004 (Exhibit G-13), the grievor expressed the view that he was not sure he could meet Ms. Hodder's expectations. He wanted to set the record straight and felt it necessary to correct what had been written.

[185] Mr. O'Leary acknowledged that Mr. Kan had not been aggressive towards him but was supportive of his manager, Ms. Hodder. The grievor also acknowledged that Mr. Traynor had not been aggressive towards him. As for Ms. Leal, the grievor indicated that she had been impatient with him at times and that she had seemed frustrated. They had a reasonably good relationship and she was helpful when he was able to reach her. He did not tell her he had a disability. The grievor never felt it necessary to tell people he was working with that he had a disability. When Ms. Leal would refer him to a website, he did not feel it relevant to tell her of his difficulties in accessing it. The grievor does not recall but does not think that they had set an appointment for the Friday when Ms. Leal was in Iqaluit. He only became aware of the meeting after the fact.

[186] Mr. O'Leary indicated that he got along with Ms. Iou, the HR assistant, although at times it was difficult. She did not report to him but as of some time in October she worked only with him.

[187] Questioned as to when he had started to feel depressed, Mr. O'Leary indicated that he had been living in fear since November 2003, and that by March 2004, the situation had gotten worse.

[188] Asked if he had contacted anyone with regard to his feeling intimidated, bullied and fearful, Mr. O'Leary testified that he had contacted the Employee Assistance Program. He had also shown Mr. Millican the letter he had received from Ms. Hodder, dated November 12, 2003, and had talked to his union representative, Ms. Dorion. The grievor indicated that he felt he really had nobody to whom he could turn. He was very busy at the time.

[189] Mr. O'Leary confirmed he was taking French language training, half a day, twice a week. He indicated that when he arrived in Iqaluit, Ms. Lukes told him that French language training was available and that everybody was taking it. It was not mandatory for Mr. O'Leary's position.

[190] Mr. O'Leary confirmed that he had signed his Personal Learning Plan (Exhibit E-7). The Plan included French training, an appeal workshop and the Staffing for Managers course. The grievor had wanted to take the Staffing for Specialists (Modules 1 and 2) course. He had taken the course before but his reference material had been lost in transport. He had talked about the possibility of taking the course again with Ms. Lukes and she saw no problem. However, when he raised the possibility with Ms. Hodder, she did not see fit to allow him to take it again.

[191] Mr. O'Leary confirmed that he had signed the action plan to improve performance on March 1, 2004 (Exhibit E-27). He indicated that he had no other choice but to sign it, as it had been prepared by Ms. Hodder. He indicated that he had been living in fear but acknowledged that he did not raise the matter with anyone. He had requested a meeting with Mr. Traynor but never had a chance to speak to him (Exhibits E-28 and G-15). The grievor acknowledged meeting with Ms. Hodder and Mr. Kan on February 16, 2004, and being told he could lose his job. Asked why he did not file a harassment complaint, the grievor replied that he was not a member of the bargaining unit.

[192] Mr. O'Leary testified that he received a phone call from Mr. Traynor with respect to the letter of demotion.

[193] Mr. O'Leary confirmed that it was his signature that appeared on the "Screening Board Report" (Exhibit E-23) for the position of computer specialist. He indicated that the handwritten notes on the report look like his. The grievor was also asked to confirm that the handwritten notes on the "Screening Board Report" for the position of land operations clerk were his. The grievor replied that it was possible but that he was not sure.

[194] Mr. O'Leary participated in a cultural orientation day in May 2004. In February 2004, he also took a training session on respecting differences and another on understanding the collective agreement. In January 2004, he attended a course on occupational health and safety. In October 2003, he attended an orientation on financial authority.

[195] Mr. O'Leary testified that he recognized the importance of applying the merit principle in a meticulous fashion.

Summary of the arguments

For the employer

[196] According to counsel for the employer, the case concerns the demotion of Mr. O'Leary effective June 21, 2004, as communicated to him in a letter dated June 10, 2004. Counsel submitted that the right to demote is derived the *Financial Administration Act (FAA)*. Although the grievance alleges disciplinary action, counsel argued that, because demotion is expressly provided for in the *FAA*, it has always been interpreted as a demotion for non-disciplinary reasons. Counsel for the employer pointed out that a disciplinary demotion does not exist in the federal Public Service.

[197] Counsel for the employer argued that the test to be applied is not whether the demotion was disguised discipline but whether the demotion was arbitrary, discriminatory, unreasonable or made in bad faith.

[198] Counsel for the employer submitted that, according to D.J.M. Brown and D.M. Beattie, *Canadian Labour Arbitration*, 4th Edition (Aurora: Canada Law Book, 2006), para. 7:4260, it was: ". . . incumbent upon the employer to have advised the employee of the consequences of continued substandard performance, to have taken some positive steps to assist the employee in overcoming the deficiency in the work and to have seen those efforts fail. . . ."

[199] Counsel for the employer recognized that the burden of proof was on the employer to demonstrate that it had established expectations and objectives, and had provided supervision to enable the employee to meet the standards. The employer has to demonstrate that it had warned the employee that the consequence of the substandard performance would be jeopardizing his position. The employer also has to demonstrate that, even after the warnings, the employee was still incapable of doing the job.

[200] Counsel indicated that, once the employer has established the above, it is the burden of the grievor to establish that the employer's action was taken in bad faith, was arbitrary or was discriminatory. Counsel referred me to the last paragraph at 7:4260 of the *Canadian Labour Arbitration* supporting this view.

[201] Counsel also referred me to the *Canadian Labour Arbitration* at 7:3510, which indicates what an employer has to do to justify a non-disciplinary action: “. . . Generally . . . an employer must have established a reasonable measure of job performance and communicated it to the employee, given suitable instruction and supervision to enable the employee to meet the standard, warned of the consequences if substandard performance continued, and shown that the employee was still incapable of doing the job. Where an employee suffers a physical or mental disability, the employer will have to satisfy statutory duties of accommodation as well. . . .”

[202] Counsel pointed out that the *Canadian Labour Arbitration* recognizes that there are circumstances where the employer can discharge an employee with a disability (see para. 7:6100) and that “Arbitrators have insisted that the rights of employees who are incapable of discharging their employment responsibilities in a consistent and adequate manner cannot be settled without considering the legitimate interests of their employers.”

[203] Counsel argued that the jurisprudence also recognized, in the case of non-disciplinary demotion, that an adjudicator cannot substitute his judgement for that of the employer (*Steel Co. of Canada Ltd. v. United Steel Workers, Local 1005* (1976), 7 L.A.C. (2d) 132. The question is whether or not the action of the employer is arbitrary or in bad faith.

[204] Counsel for the employer argued that there were reasonable measures of job performance and that those measures were communicated to the employee in three

documents: the “employee performance review/objectives and expectations” document (Exhibit E-6), the letter to Mr. O’Leary dated November 12, 2003 (Exhibit E-11), and the Action Plan to Improve Performance (Exhibit E-27).

[205] Counsel for the employer submitted that Ms. Hodder met with Mr. O’Leary on September 3, 2003, to discuss expectations and objectives and asked the grievor to come back with a written document. This document was signed on October 31, 2003. Counsel argues, as shown in the letter dated November 12, 2003 (Exhibit E-11), that it was the grievor’s responsibility to write those objectives by September 20, 2003. Counsel for the employer argued that the uncontradicted evidence showed that Ms. Hodder and the grievor sat together on September 3, 2003, and discussed the objectives. Counsel added that the letter dated November 12, 2003 (Exhibit E-11), is uncontradicted evidence that the objectives were reiterated two months later. Expectations were communicated to the grievor during the course of his meeting with Ms. Hodder and Mr. Kan on November 7, 2003, and in the letter that followed on November 12, 2003. At that point, the grievor knew without any doubt what the employer expected of him.

[206] Counsel for the employer argued that the action plan to improve performance (Exhibit E-27) is evidence that the employer again outlined what it expected of the grievor. The grievor signed the document on March 1, 2004.

[207] Counsel for the employer argued that the employer had discharged its burden of demonstrating that the first element of the test (i.e. informing the employee of the expectations) had been met. The next question to be dealt with was whether Mr. O’Leary was given proper supervision to meet the standards or expectations.

[208] Counsel for the employer argued that the evidence revealed that Ms. Hodder and Mr. Kan met with Mr. O’Leary on February 26, 2004, and during that meeting again raised concerns about the grievor’s performance. They decided at the meeting that Ms. Hodder would meet with the grievor at 08:30 every morning. Well before the demotion, the grievor was clearly supervised, his files were reviewed and he regularly received feedback. Counsel pointed to the email dated December 11, 2003, as an example of the feedback given to the grievor with respect to the competition files.

[209] Counsel for the employer argued that it was Mr. O’Leary’s responsibility to update his manager if he faced any difficulties in his job. The supervisor, Ms. Hodder,

was available at 08:30 every morning but it was the grievor's responsibility to tell his supervisor if there were any problems.

[210] Counsel for the employer argued that the third element of the test, regarding whether Mr. O'Leary had been advised of the consequences, had also been met. The grievor was warned of the consequences if his substandard performance continued. Counsel for the employer pointed to what he believed was compelling evidence that the grievor received several warnings. Counsel pointed to the meeting of November 7, 2003, to the letter dated November 12, 2003 (Exhibit E-11), the meeting of February 26, 2004, the meeting of March 30, 2004, and the letter dated April 6, 2004 (Exhibit E-26).

[211] Counsel for the employer argued that on at least four occasions the employer warned Mr. O'Leary that he should improve his work performance and that the consequence of not doing so could be termination. Counsel views the March 1, 2004, action plan to improve performance as the last chance given to the grievor to improve. Despite the warnings and actions by the employer, the grievor was still incapable of performing to a satisfactory level.

[212] Counsel for the employer argued that the grievor continued to perform at a substandard level to the point that the PSC threatened the employer with the removal of its staffing delegation authority. Although this threat was never put in writing, three witnesses have confirmed that the PSC had concerns from the beginning and that they had called Mr. Kan to warn him of the problem.

[213] Counsel for the employer submitted that as a PE-02 Mr. O'Leary was supposed to work as an HR advisor with the basic competencies and knowledge of the field. Upon review of the description of the experience found in the grievor's resume (Exhibit E-17), counsel argued that it appeared he had experience in staffing. However, it was obvious through cross-examination that the grievor had no prior experience in staffing. In looking at the resume, there was no way for the employer to know he lacked the experience necessary to perform in the position.

[214] Counsel for the employer indicated that he was not claiming that Mr. O'Leary lied in his resume. However, the grievor was supposed to have a basic knowledge of staffing. The grievor now justifies his performance problems by saying he had no experience in staffing. Counsel for the employer added that a person does not need the

best experience, but does need a minimum knowledge of the field. The grievor now claims he knew nothing about staffing and he was not provided advice. What the grievor is doing is blaming the employer for not being able to do the work on staffing files.

[215] Counsel for the employer relied on the testimony of Ms. Leal. She was a person outside the DIAND with no interest in the outcome of this case. She testified about her impression of Mr. O'Leary's competence. She provided examples of the facts that lead her to form her own opinion of what was going on in the HR department. She was a highly credible witness. Counsel pointed out that Ms. Leal had started having dealings with the grievor in early September. Ms. Leal conceded that, when there is a new HR advisor, the section she works in recognizes the situation and takes it upon itself to provide help. Ms. Leal soon realized that the grievor was not familiar with the field. She provided a lot of assistance to the grievor. She realized that the grievor did not have basic knowledge of the staffing field. He was calling her many times with the same questions. She also noted his lack of preparation. Ms. Leal was disturbed by the fact that, even though she provided advice and assistance and answered the same questions several times, the grievor was contacting other people in her office with the same questions. Counsel noted that this occurred throughout the period from August 2003 to April 2004. Ms. Leal had several concerns about the quality of the HR advisor's work. Not only did this create extra work for the PSC, it also had concrete effects on the files. Ms. Leal gave examples of cancellations that occurred after the work had been done. Counsel for the employer added that Ms. Leal testified that the PSC would issue a priority clearance number prior to proceeding with staffing. According to counsel, Ms. Leal testified that this was a continuous problem with the grievor. Counsel noted that Ms. Leal came to the conclusion that there was no foundation on which to build.

[216] Counsel for the employer noted that Ms. Leal decided to inform her director, who, in turn, called the DIAND, to discuss the problem and warn them of the possibility that staffing delegation could be withdrawn.

[217] Counsel for the employer pursued with the evidence provided by the DIAND with regard to Mr. O'Leary's performance. He referred me to the letter dated November 12, 2003 (Exhibit E-11). He indicated that Ms. Hodder had testified about the document and the context in which it had been prepared. He argued that the letter was

uncontradicted evidence as to what was said at the November 7, 2003, meeting. Counsel for the employer noted that Mr. O'Leary only disputed the last paragraph on page 17 in the letter dated November 12, 2003 (Exhibit E-11). The grievor's requested change to this letter can be found in an email dated February 27, 2004 (Exhibit G-13). Counsel for the employer noted that the grievor never grieved the letter of November 12, 2003, and that it was issued at the grievor's request. Counsel also noted that the comments regarding the grievor's handwritten notes (Exhibit G-38) were never discussed with the employer.

[218] Counsel for the employer reviewed the competition files, which were filed in evidence. In relation to the land operations clerk competition (Exhibit E-20-1), counsel pointed out that the name of the candidate who placed first did not appear on the eligibility list. The candidate who placed fourth should not have been on the list at all. Names of candidates on the eligibility list were crossed out and the list was submitted to the PSC with those changes, despite the fact that the DIAND does not have the authority to make such changes to an eligibility list. Counsel for the employer argued that this is basic knowledge for an HR advisor.

[219] Counsel for the employer pointed to an email prepared by Mr. O'Leary with regard to the water management specialist position (Exhibit E-21). Upon review of that email, counsel noted that it was evident that Part A should have been filled out by the grievor prior to the form being sent to the candidate. Counsel noted that Ms. Hodder had testified that she had given the grievor specific instructions on how to proceed (Exhibit E-19) and that the grievor failed to follow her instructions. She had given him wording for a letter and the grievor came back with a totally different version from what she had instructed. Referencing the eligibility list relative to the water management specialist position, counsel pointed out that the evidence revealed that the grievor had sent a letter of regret to the second-ranking candidate before assuring himself that the first-ranking candidate had accepted the position, creating an embarrassing situation when the first candidate refused the position. Counsel also noted that the third paragraph of the rating board report, for the same position (Exhibit E-22) contained inconsistencies that should not appear in such a document.

[220] Counsel for the employer reviewed the competition file for the computer support specialist position (Exhibit E-23). He submitted that the screening board report was only signed by Mr. O'Leary and that the document was sent to the PSC without the

other required signatures. Counsel also noted that the successful candidate did not meet the educational requirements of the position, that the rating guide did not follow a standard followed by the DIAND and that there was no rationale for the weight given to the rating questions. Counsel was of the view that the main problem with this file was that the successful candidate who was offered the position did not meet the qualifications for the position.

[221] Counsel for the employer reviewed the staffing actions with regard to the contaminant coordination position. He noted that authorization was not sought in September 2003 to obtain a priority clearance. A priority clearance was only sought in March 2004, at the point when management was seeking an extension of the term appointment. It then came to light that the candidate did not meet the education requirement for the position and should not have been appointed in the first place. Mr. O'Leary had not verified whether the candidate met the education requirement of the position.

[222] With respect to Mr. O'Leary's poor performance, counsel for the employer argued that the document sent to the grievor on November 12, 2003 (Exhibit E-11), had not been contradicted. He also argued that the grievor's supervisor had testified on her review of the files and that she should not be expected to bring the 50 files the grievor worked on. Counsel added that the only attempt to contradict Ms. Hodder had been in relation to the land operations clerk position appointment. He added that the screening board report sent to the PSC by the grievor for this position contained notes to the effect that the successful candidate had failed (Exhibit E-20-3).

[223] Counsel for the employer submitted that Mr. O'Leary's sole argument against the validity of the demotion based on his poor performance was that there was an issue with his disability that had not been properly taken into account and that he had not been provided with accommodation. Counsel for the employer argued that it was necessary to distinguish between the grievor's disability and his health condition.

[224] With respect to Mr. O'Leary's visual impairment, counsel for the employer noted that the grievor admitted that he had been accommodated as noted in his email to Ms. Hodder dated February 27, 2004, (Exhibit G-13). Counsel noted that the grievor, who had been provided with the tools he had requested, in accordance with Exhibit E-5, had claimed during his testimony that the tools had not been provided in a timely fashion. Counsel argued that the duty of accommodation is a shared responsibility and

that the grievor had admitted that he never raised concerns with his employer about the delays in obtaining a larger monitor or about having problems with the software provided. Counsel added that the grievor had worked on equity programs and should be well aware of accommodation issues and the responsibility of the person seeking accommodation to make his or her issues known.

[225] Counsel for the employer reviewed the measures that were discussed in the meeting of November 7, 2003. He noted that the employer decided to bring Mr. Millican in to provide assistance to the grievor. He also indicated that the task of sitting on every selection board had been removed from the grievor's duties. He pointed to the fact that the grievor, on cross-examination, had admitted that the DIAND, Iqaluit HR assistant had been assigned exclusively to him. Counsel noted that, as soon as the grievor mentioned his health problems and not being able to attain expectations, the employer sent him to Health Canada for an assessment. The supervisor communicated to Health Canada the concerns raised by the grievor. The response received from Health Canada (Exhibit E-16) stated that the grievor was fit for his job, with the aids that had been provided.

[226] Counsel for the employer pointed out that during Mr. O'Leary's testimony the grievor indicated that his depression started in March 2004, while in his complaint to the Canadian Human Rights Commission (CHRC) (Exhibit G-42) he mentioned that it started in November 2003. When cross-examined on this matter, the grievor could not indicate when his depression started. In any event, this situation should have been captured by Health Canada.

[227] In April 2004, the employer received further information from Mr. O'Leary's doctors (Exhibits E-32 and G-39). The two documents do not address the issue of Mr. O'Leary's duties, but rather, express concerns with regard to the monitoring of his medical condition. This information was forwarded to Health Canada, which responded by maintaining its previous assessment. In essence, counsel for the employer argued that there were three assessments done by Health Canada that say that, if the grievor needed to consult a specialist in the South, he could do so on an as-needs basis. The employer was prepared to pay for the cost of this travel.

[228] With respect to workload, counsel for the employer argued that Mr. O'Leary was aware of the workload before he started to work in Iqaluit. Counsel for the employer noted that the grievor had acknowledged in cross-examination that one of the

questions in the interview for the position referred to the high rate of turnover of employees, which is not an uncommon situation in a region such as Nunavut. The grievor has the ability to manage his time. It was the grievor's own decision to book two mornings a week to undertake French training, which was neither a requirement nor a priority for his position. The grievor had control over the timelines in relation to staffing and dealing with managers' expectations.

[229] With regard to the allegations that his manager was aggressive, intimidating and bullying and that he was fearful of her and had been forced to sign the action plan, counsel for the employer argued that Mr. O'Leary was not credible. The grievor never raised the issue with anyone. The grievor was aware of the complaint mechanism that existed to deal with harassment situations. The grievor had taken a course on harassment and was familiar with this subject. There is no doubt that his supervisor was critical of the grievor's work performance and had brought it to his attention, indicating that there might be consequences. Counsel added that Mr. Kan was involved with the situation and would not have tolerated anyone taking an aggressive tone with other employees.

[230] Counsel for the employer argued that the claim that Mr. O'Leary had been forced to sign the action plan was not credible. The concerns with regard to his performance had been discussed for many months and the action plan did not refer to discipline or threats of termination. Counsel noted that in his email to Mr. Traynor (Exhibit E-28) the grievor acknowledged the support given to him by Ms. Hodder and Mr. Kan. In the email, the grievor recognized the performance problems he had encountered and corroborated that the PSC had concerns with respect to staffing delegation authority.

[231] As for the letters of reference submitted by Mr. O'Leary, counsel for the employer argued that they constituted post-demotion evidence. The managers who signed those letters may not be aware of the technical side of the HR advisor position and its requirements with regard to staffing. Since the authors of the letters have not testified, their opinions should be given little weight.

[232] Counsel for the employer noted that the burden was on the grievor to demonstrate that there was bad faith. Several post-demotion documents were submitted to show ulterior motives. The Health Canada letter dated December 21, 2004, is based on new information received after the demotion and does

not rescind the three previous assessments. This evidence is not relevant to determining whether the employer acted in bad faith. Counsel for the employer asked me to consider the decision rendered by the Supreme Court of Canada in *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095, where it was found that the arbitrator exceeded his jurisdiction by relying on subsequent-event evidence as grounds for annulling a dismissal.

[233] Counsel for the employer also referred me to *Funnell v. Treasury Board (Department of Justice)*, PSSRB File No. 166-02-25762 (1995)(QL), which also discusses post termination evidence and where it is acknowledged that accommodation is a two-way street; *Ivaco Rolling Mills v. United Steelworkers of America, Local 8794* (2001), 102 L.A.C. (4th) 364, where the employer's obligation to warn its employee is balanced with the seriousness of the situation; *Air Canada v. International Association of Machinists & Aerospace Workers District Lodge 148 (Esposito Grievance)*, [1984] C.L.A.D. No. 22, on the notion of a culminating incident in a non-disciplinary demotion; *Wire Rope Industries Ltd. v. United Steelworkers, Local 3910* (1983), 13 L.A.C. (3d) 261, outlining the principles to be applied in cases of demotion and *Steel Co. of Canada Ltd. v. United Steel Workers, Local 1005* (1976), 7 L.A.C. (2d) 132 with respect to the role of the Public Service Labour Relations Board ("the Board").

[234] Counsel for the employer summed up by arguing that, for all the reasons mentioned, the demotion was not arbitrary, discriminatory or done in bad faith and that the grievance should be dismissed.

For the grievor

[235] Counsel for the grievor indicated that there were three issues to be determined in addressing this grievance. The first is: Was the employer justified in demoting Mr. O'Leary? The second is: In reinstating the grievor, is the employer required to make accommodation for his disability? The third is: Is the grievor entitled to financial compensation?

[236] Dealing with the first issue, counsel for the grievor argued that the employer had the onus of establishing that the demotion was justified. Counsel relied on the decision rendered in *Steel*, where it is said that ". . . a demotion . . . to be considered proper, the employer must demonstrate the grievor's inability to do the job. . . ."

[237] In *Nnagbo v. Treasury Board (Public Works and Government Services Canada)*, 2001 PSSRB 1, the adjudicator summarized the requirements the employer must meet to justify a decision under paragraph 11(2)(g) of the *FAA*. Paragraphs 53 and 54 read as follows:

...

In cases of termination for cause due to incompetence, the employer must show:

- that it has acted in good faith;*
- that it has set appropriate standards of performance which were clearly communicated to the employee;*
- that it gave the employee the necessary tools, training and mentoring to achieve the set standards in a reasonable period of time;*
- that it warned the employee in writing that failure to meet the set standards by a reasonably set date would lead to termination of his employment, and finally,*
- that the employee has failed to meet these standards.*

The employer has rephrased these obligations in its Treasury Board Manual, referred to earlier, and added to the list the duty to explore alternative solutions before an employee is terminated or demoted for cause.

...

[238] Counsel for the employer submitted that in this type of case what the adjudicator is ultimately asked to accept is the employer's assessment of the employee's performance. In such circumstances, it is essential that the adjudicator be satisfied that the evaluation was made in good faith and not the product of another agenda. Counsel for the grievor referred me to *Smith v. Municipality of Vanier et al.* (1972), 30 D.L.R. (3d) 386, where good faith is discussed in the following fashion: ". . . In the house of good faith there are many mansions. Good faith or want of it is not an external fact but rather a state of mind that can be judged by verbal or physical acts. To my mind good faith is a composite thing referable to all the relevant circumstances. Included in the circumstances is the manner in which the discretion was exercised."

[239] Counsel for the grievor argued that the best evidence of the employer's motive is found in what it said and did. Mr. O'Leary was hired by the previous manager, who left a few days prior to the grievor's arrival in Iqaluit. The new manager quickly realized that the grievor was not what she wanted in an HR officer. The grievor was inexperienced, it was his first job as a PE-02 and he had a disability, which slowed him down. What Ms. Hodder had wanted, as she told the grievor, and had thought she was getting, was ". . . someone who could hit the ground running." It was a very telling comment she made to the grievor when she told him the people who had hired him had no vested interest in the situation. The grievor had been foisted on her.

[240] From that point on, Mr. O'Leary's supervisor set out to build a case against him. Less than three months after he started in the position, the grievor was threatened with disciplinary dismissal: ". . . Please be assured that failure to make very substantive improvements in all of the areas noted could result in disciplinary actions that could lead to termination of your employment for cause. . . ." (Exhibit E-11).

[241] Counsel for the grievor noted that the grievor testified that his supervisor was aggressive and intimidating and that he had felt pressured and intimidated. Counsel for the grievor commented that after reading the document dated November 12, 2003 (Exhibit E-11), it would not be surprising to anyone that the grievor had felt this way.

[242] Counsel for the grievor noted that on February 26, 2004, Ms. Hodder wrote the following to the grievor: ". . . Now that we have dealt with your medical concern, we can no longer use your medical condition to justify your poor performance. . . ." (Exhibit G-13).

[243] Counsel for the grievor expressed surprised that the employer would try to portray the action plan of March 1, 2004 (Exhibit E-27), as a training guide. The action plan had nothing to do with training. The message the action plan carried was that Ms. Hodder was in control and that she had the ability to make Mr. O'Leary's life intolerable. Counsel expressed the view that this was not a consensual meeting of the minds. What followed was a threat of termination for cause forwarded to the grievor on April 6, 2004 (Exhibit E-26).

[244] Counsel for the grievor noted that the Health and Welfare medical officer, Dr. Jeffries, wrote in May 2004 (Exhibit E-33) that he believed that Mr. O'Leary should apply for sick leave in the usual manner and that when his eyesight was treated, if

under adequate control, his position and ability to work in Iqaluit could be re-examined. Counsel noted that prior to June 7, 2004, the grievor requested leave without pay to get treatment down south. Ms. Hodder responded by refusing his request for leave without pay for operational reasons, although he claimed the grievor's replacement had already been hired on May 27, 2004.

[245] Counsel submitted that perhaps what was most telling of all was the fact that Mr. O'Leary had simply been left languishing without any duties or income other than the work he performed as a security guard.

[246] Counsel for the grievor argued that it was clear that Ms. Hodder's objective was to get Mr. O'Leary out of the job and that demotion was the culmination of that agenda. Once gone, it was as if he no longer existed.

[247] Counsel for the grievor submitted that the employer had not established that it had acted in good faith. The performance standards set for Mr. O'Leary were not realistic or appropriate. Ms. Hodder's expectation was someone who could ". . . hit the ground running", come to handle a heavy workload and assume independent activity on all staffing matters from start to finish.

[248] Counsel for the grievor noted that it was Ms. Hodder who had told Mr. O'Leary what to put in the objectives and expectations document (Exhibit E-6). Counsel added that the problem was that the grievor, through no fault of his own, was inexperienced in staffing. It was his first true PE job after being in a developmental PE position. A realistic standard for an employee without any experience should be different than one set for an experienced employee. In the grievor's case, no allowance was made for his lack of experience. To compound matters, there is unanimous agreement on the fact that the workload was very heavy from day one. The grievor was involved in 44 staffing actions in the nine months he was in Iqaluit. The entire DIAND, including its 11 regions and head office, handled approximately 300 staffing actions a year. Counsel pointed out that there were now three HR advisors to handle the workload in Iqaluit.

[249] Counsel for the grievor argued that performance standards that are reasonable should take into account the workload. He noted that Mr. Kan had indicated that a zero-error rate was expected for written documents (Exhibit E-11). Counsel for the grievor added that establishing no margin of error was not a realistic standard given Mr. O'Leary's experience and given his workload. This standard of perfection also

makes no allowances for the grievor's visual disability. As the grievor explained, accommodation was not just a matter of providing equipment. It takes the grievor longer to read and write. He performs tasks differently than a normally sighted person. The grievor has to rely more on oral interaction. Counsel pointed to the fact that in the action plan the grievor was directed not to use the telephone but to go to websites.

[250] Counsel for the grievor argued that the standard for performance also made no allowances for the escalating medical problems Mr. O'Leary was experiencing while in Iqaluit. The employer was aware that the grievor was experiencing eye problems, headaches and uncontrolled pressure in his eyes. The grievor's emotional and psychological state began to crack under pressure and by March 2004, he was in pretty bad shape. The grievor submitted certificates of illness (Exhibits E-36 and E-37), indicating that he was suffering from depression. Counsel added that although Ms. Hodder and others did not initially realize that the grievor was starting to crack, by the time the decision was made to demote him the employer was fully aware that the grievor was suffering from depression, in addition to other health problems. There are no indications that the performance expectation took this situation into account.

[251] Counsel for the grievor argued that an employer has an obligation to provide tools, training and mentoring to a new employee. He noted that the employer did not meet the burden of establishing that it did so. When Mr. O'Leary arrived in Iqaluit there was no orientation or briefing and there were no memos or notes to assist him in any way. It was a jump-and-swim situation. It took the employer six weeks to provide the grievor with a 21-inch monitor and he never received the headset he required. The Zoom Text training was only offered in December 2004. The grievor had no mentor or experienced colleague he could rely on. The HR administrative assistant was brand new to her job. Ms. Hodder was also new in her position. Although the grievor thought he could rely on Ms. Leal as a resource available to him, the evidence revealed that she resented his questions. She was not there to do training and the one day set aside for her to go over matters with the grievor was cancelled because he was sick on that specific day. The training was never rescheduled.

[252] Mr. Millican was also in Iqaluit in November. He and Mr. O'Leary spent a couple of days together. They worked on files and the grievor showed him the November 12, 2003 letter. The grievor asked Mr. Millican for assistance and together

they developed an action plan. However, when the document was given to Ms. Hodder, she said it was not what she was looking for.

[253] Counsel for the grievor noted that the training that would have been helpful to Mr. O'Leary, would have been modules 1 and 2 of the Staffing for Specialists course. The grievor requested this training, which was denied by Ms. Hodder.

[254] Counsel for the grievor noted that much was made of the fact that Ms. Hodder had an open-door policy and held daily meetings to implement Mr. O'Leary's action plan. However, counsel argued that a careful reading of the action plan shows that this was not a document about training but a document about control. The document stated that the grievor should limit his phone calls and inform his supervisor of all phone conversations and emails, in addition to providing a copy to her of all emails relating to staffing. In counsel for the grievor's view, this was demeaning and had nothing to do with constructive training. He noted that Ms. Leal was on target when she noted that what the grievor needed was a period of training with another HR officer. However, that never happened. That training would have occurred in June 2004, at the time of Mr. O'Leary's demotion, as another HR officer had been hired. However, counsel for the grievor argued that this was not what the employer wanted. Its agenda was to get rid of him. The grievor was not given the tools or the mentoring necessary for him to be successful in the position.

[255] Counsel for the grievor indicated that, although the grievor had received a warning, it related to the fact that he was not wanted and was not being provided with a reasonable opportunity to perform. The grievor was absent from work from May 15, 2004, onwards. He received his demotion on June 10, 2004, after not being at work for a month.

[256] Counsel for the grievor noted that the letter of demotion (Exhibit E-38) does not provide specific details whatsoever of Mr. O'Leary's alleged failures. There is no mention of the concerns expressed by the PSC. The evidence provided at the hearing is mostly about vague generalities. When looking at specific files, the mistakes noted do not suggest someone fundamentally incompetent. Rather, counsel argued, the mistakes that were noted are more typical of an employee who was very busy, working alone, inexperienced, working with an inexperienced assistant and new to the job.

[257] Counsel for the grievor reviewed the email sent to Mr. O'Leary and dated November 12, 2003 (Exhibit E-18). He noted that the first competition file mentioned in the email is not on the list of files the grievor worked on (Exhibit G-7). He also noted that in the second competition file (the land operations clerk), reviewed by Ms. Hodder, some documentation was missing. The land operations clerk competition had been started long before the grievor started to work in Iqaluit. The competition was closed two days after his arrival. Although it may very well be correct that documents were missing, the grievor cannot be blamed for such. It was obvious that there was confusion on the scoring of candidates. Counsel for the grievor argued that the employer's account of the events was misleading, as the marks had been adjusted. While there was confusion about the document sent to the PSC, the mistake has to be viewed in its context. It surely does not show fundamental incompetence and is hardly a capital offence.

[258] Similarly, with regard to the water management specialist competition, the issue raised about the timing of the letter of regret sent to the second-ranking candidate who was eventually offered the position seems to have been blown out of proportion. Although it was a mistake, it is hardly an important one and the employer admitted that it was never repeated. If any conclusion can be drawn from this event it is that Mr. O'Leary can learn from his mistakes.

[259] The issue raised by Ms. Hodder with regard to the wording she sent by email to Mr. O'Leary for a letter requiring a medical clearance, after which the grievor proceeded to use the wrong wording, was also somewhat exaggerated. The error was caught prior to the letter being issued and was never repeated.

[260] With regard to the competition for a computer support specialist position, counsel for the grievor pointed out that Ms. Hodder insisted that the successful candidate did not meet the education requirement of the position, as he had only one year of post secondary training, while the position required two years. Ms. Hodder held the grievor responsible for allowing this appointment to occur. Counsel pointed out that the statement of qualifications for the position allowed, under education qualification, for an equivalency (Exhibit E-23). Counsel for the grievor argued that the fact that the successful candidate had a 1-year college certificate and 10 years of experience in informatics technology, the fact that he was already working for the DIAND as a support specialist and the fact that Mr. Kan was satisfied that the

successful candidate met the requirements could hardly be debated. Counsel for the grievor could not understand why Ms. Hodder considered this an error.

[261] Counsel for the grievor noted that the last staffing issue raised by the employer was the contaminant coordinator file. This issue related to the appointment of a term employee hired on a name-referral basis without the PSC's authorization and with a candidate that did not meet the basic requirements. The situation came to light when, at the end of the initial six-month term appointment, the manager requested an extension. Counsel for the grievor argued that little was known about the circumstances of the initial appointment and what involvement Mr. O'Leary had in the process. It was one of the first staffing files the grievor worked on. There is no evidence of any other case in which this error was repeated.

[262] Counsel for the grievor pointed out that those situations made up only one side of the balance sheet. Mr. O'Leary had carried out 15 percent of all staffing actions conducted in the department. Out of the 44 staffing actions conducted by the grievor, the employer only showed us five of them. There is no evidence to the effect that the managers for whom he conducted the staffing actions had any problems with his work.

[263] Counsel for the grievor argued that, while the testimony of Ms. Leal indicated she had discussed concerns with the employer in regard to the staffing conducted by Mr. O'Leary, she had not said the PSC was going to revoke the DIAND's staffing delegation authority. Although a number of insinuations were made during the course of the hearing with regard to the removal of staffing delegation authority, there was no mention of such revocation in any correspondence, including in emails or in notes taken from telephone calls. No audit was conducted by the PSC and there is no reference in the grievor's letter of demotion to the risk of revocation of the DIAND's delegation staffing authority. Counsel for the grievor added that Ms. Leal did not provide a single example of staffing advertisements or translation work that had to be redone.

[264] Counsel for the grievor argued that, when taking a fair and balanced look, there was no evidence to suggest that this was a case of irreparable incompetence. The employer has not come close to justifying Mr. O'Leary's demotion.

[265] Counsel for the grievor addressed the issue as to whether Mr. O'Leary was entitled to be reinstated to a PE-02 position and, in reinstating the grievor, whether the employer was required to make accommodations for his disability.

[266] Counsel for the grievor indicated that if a grievor is wrongly demoted, that grievor will request to be reinstated in his previous position. In the present case, it would appear that the reinstatement to the previous position is not possible. Counsel for the grievor noted that the employer had appointed someone else to that position and that since December 2004, Mr. O'Leary had been found unfit to work in Iqaluit. Counsel for the grievor added that the evidence indicated that the grievor had been on sick leave at the time of his demotion and had returned to Toronto to obtain treatment. He was treated for depression and it was not until November 2004, that he was declared able to return to work, but not in Iqaluit.

[267] Counsel for the grievor argued that there were three issues involved in dealing with the reinstatement: Does the scope of Mr. O'Leary's grievance allow the adjudicator to deal with the terms of the reinstatement? Does the adjudicator have jurisdiction to look at accommodation under the *Canadian Human Rights Act (CHRA)*? Is the DIAND obligated to accommodate the grievor by appointing him to a position in the South?

[268] With regard to the scope of the grievance, counsel for the grievor referred me to *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, 2003 SCC 42, paragraphs 67-69, urging me not to take an overly technical approach and that it was important to address the factual dispute. In the present case, the grievor is requesting reinstatement and the employer is well aware that the grievor is seeking employment in Southern Canada (Exhibits G-24 and G-29). Counsel for the grievor argued that there was no need for a new grievance and that the terms of Mr. O'Leary's reinstatement should be such that they are an effective and appropriate remedy.

[269] Counsel for the grievor noted that the Federal Court of Appeal in *Canada (Attorney General) v. Tourigny*, [1989] F.C.J. No. 31, ruled that the powers of an adjudicator were not limited to reinstating a grievor in his position, and that an arbitrator could direct an employer to reinstate a grievor to a position at an appropriate location. Counsel for the grievor also noted that it was not unusual at all for conditions to be imposed on reinstatements. He relied on *Spawn v. Parks Canada*

Agency 2004 PSSRB 25, arguing that reasonable and appropriate conditions should be imposed on the employer to provide an effective remedy to the situation.

[270] Counsel for the grievor argued that the Board had jurisdiction to consider the issue of accommodation as it was one of the issues raised in the complaint to the CHRC. Mr. O'Leary had been left to languish for a year and a half without being assigned any duties. The employer should not be surprised that the issue of accommodation was raised as the CHRC gave direction to the grievor to exhaust the grievance procedure (Exhibit G-43). Counsel for the grievor referred me to *Djan v. Treasury Board (Correctional Service of Canada)*, 2001 PSSRB 60, rendered by former Chairperson Tarte.

[271] Counsel for the grievor, asking the question “. . . In this case, does reasonable accommodation require that he be reinstated outside of Iqaluit. . . ?” replied in the affirmative. He argued that it would be contrary to the purpose of the *CHRA* to reinstate Mr. O'Leary to a position in which he is unable to work because of his medical disability. Counsel referred me to *Guibord v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-25249 (1995); and *Creamer v. Treasury Board (Health Canada)*, PSSRB File No. 166-02-27300 (1997).

[272] Counsel for the grievor indicated that it was quite clear Mr. O'Leary was seeking a transfer to a location where he would be able to obtain the medical services of an ophthalmologist, which are available in most Canadian cities.

[273] Counsel for the grievor noted that the employer had provided no explanation as to why Mr. O'Leary had languished for over a year. He added that the employer was the Treasury Board and that, as the employer, the Treasury Board could not evade its responsibilities and leave it up to the Nunavut region of the DIAND to find employment for the grievor.

[274] On the issue of compensation, counsel for the grievor noted that Mr. O'Leary requested full compensation. The grievor has been found fit to work since November 2, 2004, and the employer has been aware of this since December 2004, as well as the fact that the grievor requested a southern placement. Counsel submitted that the treatment of the grievor by the DIAND over the past 14 months is part and parcel of the events that led up to his demotion. If the DIAND had acted in good faith, they would have assigned the grievor new duties and would have done so no later than

March 2005. Counsel asked for remuneration at the PE-02 group and level for a period of 12 months, minus the compensation he received as a security guard.

[275] Counsel for the grievor requested that Mr. O'Leary be made whole and that I remain seized to deal with issues that may arise in determining the quantum of damages.

Reply

[276] In reply, counsel for the employer noted that opposing counsel was giving his interpretation of good faith and that his whole case was based on the allegation that the employer had an agenda to get rid of Mr. O'Leary.

[277] Counsel for the employer noted that Mr. O'Leary had not been dismissed, but had been demoted to an AS-01 group and level position. He added that of the two positions considered, the grievor had been demoted to the position supervised by Mr. Traynor. Counsel argued that if the intent was to get rid of the grievor that intent was not carried out. He added that in most cases of termination for incompetence, the employer is asked to look for other positions in which a person may be able to perform in a satisfactory manner. This is precisely what occurred in this case. Mr. Traynor considered many factors in finding an appropriate position to which to demote the grievor.

[278] With respect to training, counsel for the employer noted that Ms. Leal had clearly indicated that a period of training with a senior HR officer was a good idea. He added that the advice was followed and that Mr. Millican was sent from headquarters to Iqaluit to provide this training.

[279] As for the competition referred to in Exhibit E-18, counsel for the employer argued that it gave him great concern that no competition file was created and that an incumbent had been in the position since October 2003. He also noted that in the case involving whether the successful candidate met the education requirement there was no mention on file that the candidate was considered to have an equivalency with regard to the education requirement.

[280] Counsel for the employer argued that taken separately mistakes can be seen as trivial, but that the accumulation of mistakes can be a very serious matter. He added that an HR officer should be meticulous in administering the merit principle. Counsel

pointed out that there were serious mistakes made on eligibility lists and concerning the qualifications of candidates. While there may not have been appeals on those staffing actions, nonetheless, the DIAND, Iqaluit could have faced losing the staffing delegation authority given to it by the PSC. This was confirmed by Mr. O'Leary himself in the email he sent to Mr. Traynor on April 14, 2004 (Exhibit E-28).

[281] Counsel for the employer noted that opposing counsel questioned the credibility of Ms. Hodder. He noted that, despite the rule in *Brown v. Dunn*, opposing counsel had not questioned Ms. Hodder on the competition files, other than on the land operations clerk file. He noted that Mr. Kan was never questioned on the appointment of the successful candidate to the computer support specialist position.

[282] Counsel for the employer argued that, on the issue of jurisdiction, a Board adjudicator has no jurisdiction to appoint a grievor to a specific position other than to the position he or she occupied prior to the demotion. Although direction can be given to look for another position, in the end, as in *Spawn*, the grievor can only be reinstated to his or her former position.

[283] Counsel for the employer also argued that I could not extend my jurisdiction to deal with the issue of accommodation for the period after the demotion. The decision of the CHRC to ask Mr. O'Leary to exhaust the grievance procedure does not have the effect of transferring the powers of the CHRC to the adjudicator. Counsel referred me to *Lundin v. Canada Customs and Revenue Agency*, 2004 PSSRB 167.

[284] Counsel for the employer added that Mr. O'Leary could grieve the fact that the DIAND had not found him a position since his departure from Iqaluit but this was not the matter raised by his grievance that is before this adjudication.

[285] As for compensation, counsel for the employer noted that Mr. O'Leary's claim was pure speculation. There was no evidence to support the claim that the DIAND could have found a position for him. The second HR officer hired in Iqaluit was assigned to a specific project that had nothing to do with the work carried out by the grievor. Neither situation can be used to assess damages.

Reasons

[286] Section 11 of the *FAA*, providing authority to the employer to demote an employee for non-culpable behaviour, requires that the employer establish cause for such action.

[287] The Board Chairperson summarized in *Nnagbo* what the employer had to show in order to establish cause to terminate an employee. The employer must show: that it has acted in good faith; that it has set appropriate standards of performance, which were clearly communicated to the employee; that it gave the employee the necessary tools, training and mentoring to achieve the set standards within a reasonable time frame; that it warned the employee in writing that the failure to meet the set standards by a reasonable set date would lead to termination of his or her employment; and finally, that the employee has failed to meet these standards.

[288] Since this case also involves the demotion of an employee recently appointed to a new position, it is noteworthy to mention that the legislative framework does not provide for a probation period beyond the initial probation period upon entry into the Public Service, which is not the case here. The employee was promoted from within the Public Service and was not under a probationary period. The employee not being under a probation period, the employer's obligations to assist the employee in attaining the desired level of productivity are greater than they would be had he been a probationary employee. This is not a situation where the employer can make a determination if the employee is suitable for the position as they would with a probationary employee.

[289] It is also my view that although demotion may be a less dramatic consequence for unsatisfactory performance than termination, nonetheless, the same questions need to be addressed in order to establish that the employer had reasonable grounds to act in the manner it did.

[290] Counsel for the employer objected to the introduction of post demotion evidence on the grounds that such evidence was not relevant to determine if the employer was justified in demoting the grievor. I essentially agree, although in some circumstances post demotion evidence may shed some light on the motives or the reasons behind the actions of the parties. In the present circumstances the determination as to whether or not the demotion was justified was solely based on the

pre-demotion evidence. Post demotion evidence was relevant in determining the appropriate remedy in the present circumstances.

[291] The evidence put forward in this case has led me to make the following observations.

[292] Mr. O'Leary was inexperienced in staffing at the time he was appointed to the position of HR advisor in the summer of 2003. Counsel for the employer, although he did not claim the grievor had lied in his resume, argued that "the grievor was supposed to have a basic knowledge of staffing" and "now claims he knew nothing of staffing". He added that the grievor was attempting to shift the blame on the employer. I disagree with this assessment.

[293] There is no evidence to suggest that the employee misled the employer. It was incumbent on the employer to establish appropriate selection criteria and proper assessment of the candidates. Having chosen to appoint to the position a person with minimal experience in actually conducting staffing competitions and documenting such files, it is not surprising that it would experience difficulties. The appointment of an inexperienced HR officer would also lead to that person requiring extensive training in the intricacies of Public Service staffing in the best of circumstances. To compound difficulties further, the employer's representatives who conducted the staffing leading to the appointment of the grievor had both left their positions within a few days of his arrival on the job. A new supervisor was taking over who herself had little experience in conducting staffing in the federal Public Service.

[294] At the time Mr. O'Leary was employed there, the DIAND's staffing needs in the Nunavut region were handled by a sole HR advisor assisted by a support staff. It is important to note that, because of the high turnover of personnel, the Nunavut region accounts for 15 percent of all staffing actions conducted by the DIAND. In his short period of employment in Nunavut, from August 2003 to May 2004, the grievor worked on 44 staffing files of which 50 percent were competitive processes (Exhibit G-7).

[295] Mr. O'Leary is also visually impaired and has difficulties in reading. These difficulties have the consequence of not only requiring accommodations for the grievor with regard to equipment and computer programs but also of requiring approaches to work that may differ from the standard. For instance, the grievor must rely more heavily on oral communications and will likely spend more time in

conducting certain tasks with a large visual component than would a person with normal vision.

[296] It did not take much time for the supervisor, Ms. Hodder to realize that she did not have an experienced HR advisor capable of handling the staffing actions without any glitches. A first formal meeting between Ms. Hodder and Mr. O'Leary occurred on September 3, 2003. This meeting was to discuss the grievor's personal learning plan and his goals and objectives. The two discussed the action plan to staff vacant positions in the region and the performance review processes. More significantly, they discussed getting the grievor's training started on his staffing certification. Ms. Hodder also indicated to him that the expectations set for an HR advisor included that he be involved in the staffing process for positions from start to finish. The details of the expectations set at this first meeting, as reported in the November 12, 2003, memorandum to the grievor (Exhibit E-11) left little room for a learning experience. From September onwards, Ms. Hodder made it quite clear that she was expecting that he would perform as an experienced staffing officer. The stage had been set for what followed.

[297] Mr. O'Leary's inexperience, coupled with his visual impairment, would have required a comprehensive training and support program, along with time to allow him to achieve the desired level of proficiency. What the grievor received was little more than close supervision aimed more at documenting his failings than at helping him to overcome them. The results seem to have been disastrous to his health, which as the months passed, became more and more problematic.

[298] It is also significant to note that the physical accommodations to alleviate his visual impairment were somewhat delayed. The 21-inch monitor arrived four to six weeks after he arrived and the Zoom Text software was installed with a similar delay. Training for the software occurred in November 2003 consisting of one hour over the phone. However, the software was of limited use, since it did not operate correctly and he never received the headset that was to be provided. While it is true that the grievor did not complain of these delays and thanked his superiors for having provided these tools, nonetheless, the delays surely had an impact on his ability to operate effectively, particularly in the first months he occupied the position.

[299] My first observation is that the level of performance expected of Mr. O'Leary was not appropriate, taking into account his experience. Staffing procedures in the

federal Public Service are to say the least complex and quite bureaucratic. To expect an employee who has never performed any staffing to be able to perform without any glitches in a high-volume environment is unreasonable. To expect the employee to complete documentation with a zero error rate is unreasonable. It is even more unreasonable given the requirement that he be involved with each staffing process from start to finish. By November 2003 this final requirement was removed, but the damage had been done. Errors had occurred and it is really those errors that have been submitted in evidence before me in support of the demotion. Errors that occurred in the early stages of his tenure. The standards of performance set by the employer should have taken into account the employer's own decision to hire an employee who had in reality no direct staffing experience. These standards could have been progressively upgraded to allow the employee to attain over a period of time the desired result. Such was not the case here.

[300] The assessment of that performance conducted in early November 2003 and reflected in the letter dated November 12th, 2003 (Exhibit E-11) is in the same vein. Mr. O'Leary is told that the position he occupied warranted a high calibre of proficiency and that, while he had been in the position for just over two months he was unable to do the basic tasks involved in the job. The examples that follow are meant to demonstrate that fact. However, what is more telling of the situation are some of the comments included by the supervisor in the November 2003 document.

[301] In this document, Ms. Hodder acknowledged that Mr. O'Leary approached her on several occasions since he had started work to indicate that he had concerns with the workload and that, after consulting other HR advisors, he thought he should not be involved in the staffing process from start to finish. Ms. Hodder mentioned that she initially responded by assigning support staff to work directly with the grievor and indicated that, finally, on November 3, 2003, she removed the obligation for the grievor to be involved in the hiring panel. She did so grudgingly, as she indicated this was an expectation of his position.

[302] Ms. Hodder also indicated in the letter dated November 12th, 2003 (Exhibit E-11) that she had a discussion with Mr. O'Leary on what involvement he had with staffing in his previous employment, as she had serious concerns about his performance. She stated that ". . . You advised me that this is completely new to you and you are starting from scratch, even though your resume reflect that you completed Staffing Modules 1

and 2, Staffing course for delegated managers twice, experienced with personnel systems, advise to management on all resources related matters and recruitment. As you can understand, this astounded me, however, I am prepared to deal with it. You were hired as a PE-02 to perform as a Staffing Advisor, looking at the fact that you had never been involved in the staffing process would certainly explain your performance to date. . . .[Sic throughout]”

[303] While there is little doubt that Mr. O’Leary was not operating at the level of an experienced staffing officer, it is relevant to note that Ms. Hodder acknowledged that his contre-performance was explainable. However, even though this was explainable, the supervisor felt it necessary to tell the grievor that if he failed to make very substantive improvements in all of the areas noted, he could face disciplinary actions that could lead to termination of his employment for cause. This was hardly an approach that would give one confidence.

[304] Nonetheless, Mr. O’Leary posed a problem, as he did not possess the experience that would have allowed him to be fully effective in his position. What tools, training and mentoring the employer would provide would determine the progress the grievor would make in his job.

[305] Mr. O’Leary had requested time to work on his staffing certification. In the November 12, 2003, document (Exhibit E-11), Ms. Hodder denied this request on the grounds that “. . . Given the fact that you are unable to complete basic tasks at hand, I don’t think it is the best time for you to be working on your certification. . . .”

[306] Ms. Hodder did take steps to ensure that a senior staffing officer, Mr. Millican, came from headquarters and spent some time with Mr. O’Leary. Mr. Millican came to Iqaluit on November 18, 2003, and spent a couple of days with the grievor. He reported to Ms. Hodder that he thought the grievor could get the job done, that he needed on-the-job training and that he was concerned that the grievor was thinking defensively and not focusing enough on the job to be done. As for the one-day meeting planned with Ms. Leal, it never took place, as the grievor was sick on that specific day and no other effort was made to reschedule it. The grievor testified that he obtained Mr. Millican’s assistance to draw up an action plan, but that this document was discarded by Ms. Hodder, who indicated that it was not what she was looking for. Ms. Hodder prepared the action plan (Exhibit E-27) that she and the grievor signed on March 1, 2004. Aside from the fact that the action plan mentioned that Ms. Hodder and

Mr. O'Leary would meet on a daily basis, nothing in the action plan was aimed at addressing the problems the grievor was experiencing on the job. It is a list of the tasks a staffing officer should perform and contains no real actions that would provide the support and mentoring the grievor needed for the job to overcome his lack of experience in staffing. This support and mentoring could not be provided by Ms. Hodder, as she herself did not possess the required knowledge. In actual fact, no on-the-job training was provided to the grievor beyond Mr. Millican's visit and the grievor was left on his own to achieve the level of proficiency of an experienced staffing officer.

[307] I have also noted that Ms. Hodder, in an email dated February 26, 2004 (Exhibit G-13), indicated that she could not approve the grievor's request to undertake the staffing modules training until such time as he was able to clean up the competition files and complete the backlog of work by March 31, 2004. Putting emphasis on the clean-up of the files and backlog deprived the grievor of any means to improve his performance. The grievor, in spite of his lack of experience, was already ensuring 15 percent of all DIAND's staffing.

[308] Ms. Hodder's approach was also evident in another comment she made in her email to Mr. O'Leary dated February 26, 2003. Having received a report indicating that the grievor was fit to work, she wrote ". . . Now that we have dealt with your medical concern, we can no longer use your medical condition to justify your poor performance. . . ." Nothing in the previous correspondence or description of conversations indicated in any fashion that the grievor was claiming that his medical condition justified poor performance. In the email he sent in response to the one received from Ms. Hodder on February 26, 2004, the grievor indicated that his research in the HR community throughout the federal government had led him to observe that HR advisors were never required to participate on every selection board. The grievor noted that this requirement, combined with his disability, was what led to the situation of his work falling behind and to all of the other related problems associated with his file backlog and mistakes that he may have made. I would add that this, combined with the grievor's inexperience in staffing, is what led to the mistakes and backlog.

[309] Six staffing files or incidents were submitted by Ms. Hodder in support of her assessment of Mr. O'Leary's performance. These were the land operations clerk competition, the contaminated site project officer, the water management specialist

position, the land specialist officer job offer, the computer support specialist competition and the contaminant coordinator name-referral appointment.

[310] With regard to the land operations clerk position, this file supported the allegation that the documentation was not prepared properly by Mr. O'Leary. It contained confusing information and amendments to the eligibility list and the screening board report appeared to have been forwarded to the PSC after the fact. This prompted a call from the director of operations at the PSC, who expressed concerns in May 2004 about the grievor's knowledge level. It is however important to note that the initial eligibility list and screening board report had been completed in September and October 2003, at a point when he was new to the job.

[311] With regard to the contaminated site project officer file, Ms. Hodder complained that Mr. O'Leary had proceeded to staff the position without a statement of qualifications and that he had delayed the issuance of the letter of offer for a four-week period. These events occurred in October 2003. Again, he was, at the time, fairly new to the position and dealing with a heavy workload.

[312] With regard to the water management specialist position, Ms. Hodder raised three issues. One was that Mr. O'Leary was going to send a letter of offer without mentioning the requirement for a pre-employment medical certification. Such a certification was mandatory for positions in the North. It appeared that despite instructions, the grievor used a wrong template. The error was caught before the letter was sent and the grievor issued the letter with the proper wording. The second issue related to the fact that the grievor sent a form to the successful candidate that had not initially been properly completed. This prompted an email from the grievor to the candidate providing the missing information. Ms. Hodder also complained that the grievor issued a letter of regret to the second-ranking candidate before making sure that the highest-ranking candidate had accepted the position. When the highest-ranking candidate declined the position, the second-ranking candidate was offered the position. Ms. Hodder claimed this situation was embarrassing. All these errors were brought to the attention of the grievor and there is no evidence that such problems occurred again. It appears to me that these errors were somewhat not surprising from someone who was learning the job in a heavy-workload environment. Furthermore, these events took place prior to the meeting November 7, 2003, which led to the November 12, 2003, letter.

[313] With regard to the land specialist job offer, Ms. Hodder complained that Mr. O'Leary failed to use the information she had provided him in response to his seeking advice on the appropriate wording to use with regard to medical clearance. These events occurred on November 13 and 14, 2003. These documents were submitted to Ms. Hodder, who caught the error. The documents were subsequently amended before being issued.

[314] With regard to the computer support specialist competition held from February to April 2004, Ms. Hodder, in cross-examination, complained that a person not meeting the education requirement for the position had been appointed to it. However, the evidence revealed that the person in question did possess equivalent education and that the appointment had also been signed by Mr. Kan.

[315] With regard to the position of contaminant coordinator, Ms. Hodder complained that the person appointed on a name-referral basis did not meet the basic education requirement for the position and that no authorization had been sought from the PSC to proceed in such a fashion. The initial appointment occurred in September 2003. However, the situation only came to light in March 2004, when the manager sought an extension of this term appointment. The actual mistake occurred very early on in the grievor's tenure.

[316] As I indicated at the beginning of the reasons for my decision, there is a sequence of events necessary in order for the employer to establish that the performance of an individual is unsatisfactory to the point of warranting a demotion. It is my view that the employer has failed to demonstrate that its assessment of Mr. O'Leary was reasonable. While the employer, through its evidence, has established grounds to show that the grievor had serious difficulties in meeting the level of performance that Ms. Hodder expected of him, this level of performance was somewhat excessive given the experience of the grievor. The employer can only blame itself for having hired the grievor. I am also of the view that the employer failed to provide sufficient training to assist the grievor in overcoming his difficulties. The training and assistance provided were deficient in more than one way. The action plan did not propose any real means to remedy the problems, additional training was refused until files and backlog were cleaned up, and, other than two days with Mr. Millican, no on-the-job training was offered. Furthermore, the employer failed to show, in any explicit way, that the grievor continued to have the same problems. The

documentary evidence of problems submitted by the employer in support of its decision to demote related to problems that occurred very early on in the grievor's tenure. At one point counsel for the employer argued that Mrs Hodder should not have been expected to bring the 50 files the grievor worked on. That may be correct in a general sense but it is nonetheless incumbent on the employer to bring forward the files that support their case. If anything, the fact that the employer allowed the grievor to work on so many files demonstrates that he was doing something right.

[317] Consequently, I find that the demotion was unreasonable in the circumstances and that Mr. O'Leary should be reinstated in his position at the PE-02 group and level.

[318] Mr. O'Leary became so ill that he left Iqaluit on sick leave prior to his demotion taking effect. The following December he was found unfit to work in an isolated post. The employer has not offered any position to the grievor other than an AS-01 position in Iqaluit. As a result, other than two weeks of employment as a security guard, the grievor has remained unemployed ever since his grievance was lodged. It appears that the responsibility within the DIAND to find alternate employment resides with the Iqaluit region of the DIAND, which has little else to offer than positions in isolated posts. I find this appalling; the obligation to accommodate an employee who is incapacitated because of a medical condition is employer-wide and not limited to a region of a department.

[319] In these circumstances, I believe it necessary, in order to make Mr. O'Leary whole, that the employer pay for his lost earnings as a PE-02, up until such time as he is reappointed to a PE-02 position in the Public Service.

[320] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[321] That the grievor be reinstated in the PE-02 position he occupied prior to his demotion.

[322] That he be compensated for all lost earnings and benefits since he left Iqaluit on sick leave minus what was earned during the same period and that such compensation be continued until such time as the employer provides him with an offer of employment at his substantive group and level of PE-02, in a location other than an isolated post.

[323] I shall remain seized for a period of 90 days should issues need to be addressed with regard to the compensation order mentioned above.

January 18, 2007.

**Georges Nadeau,
adjudicator**