Date: 20080422

File: 166-02-37035

Citation: 2008 PSLRB 24

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

JULIET ENGLISH-BAKER

Grievor

and

TREASURY BOARD
(Department of Citizenship and Immigration)

Employer

Indexed as
English-Baker v. Treasury Board (Department of Citizenship and Immigration)

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

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Doug Hill, Public Service Alliance of Canada

For the Employer: Karen Clifford, counsel

Heard at Ottawa, Ontario,
February 5 to 7, 2008.
(Written submissions filed February 28 and March 4, 2008.)

I. Grievance referred to adjudication

[1] Juliet English-Baker ("the grievor") has grieved the termination of her employment for incapacity under the *Financial Administration Act* (*FAA*) and has also alleged a breach of the No Discrimination clause in the applicable collective agreement (Treasury Board and the Public Service Alliance of Canada, Program and Administration Services, expiry: June 20, 2003; Exhibit G-1). Her employment was terminated on May 6, 2004, and she filed her grievance on May 27, 2004. She received the final-level response to her grievance on November 18, 2005. Her grievance was referred to adjudication on February 16, 2006.

[2] After opening statements by both parties, I received a joint request from them to assist in a mediation of the matters in dispute. The parties consented to having me conduct the mediation and return to my role as an adjudicator if the mediation proved unsuccessful. After a half day of ultimately unsuccessful mediation discussions, we returned to the adjudication process.

[3] The parties provided an agreed statement of facts (Exhibit J-1). Six witnesses testified on behalf of the employer. The grievor elected to present no evidence. On the second day of the hearing, a request was made by the grievor's representative for an order excluding witnesses. The employer did not object, and an order was granted.

[4] Dr. Joanne Lloyd-Jones, of Health Canada, was the individual responsible for conducting the grievor's Fitness to Work Evaluations. Dr. Lloyd-Jones received a subpoena to bring her files relating to the grievor to the hearing, including medical reports.

[5] Medical information relating to the grievor's disability was submitted at the hearing. On the consent of both parties, I issued an order sealing the following Exhibits: E-2; E-4; E-5; E-6; E-7; and E-3, tab 21.

[6] The grievor filed a complaint with the Canadian Human Rights Commission (CHRC) on January 17, 2005, alleging differential treatment, refusal to accommodate and termination of employment based on disability. On June 22, 2005, the CHRC informed the parties that it would not deal with the complaint until the grievance process, including adjudication, had been completed, pursuant to paragraph 41(1)(*a*) of the *Canadian Human Rights Act* (*CHRA*).

[7] On April 1, 2005, the *Public Service Labour Relations Act*, 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 (*PSSRA*).

II. Summary of the evidence

[8] The grievor commenced employment with the Department of Citizenship and Immigration (CIC) in August 1987 as a quality assurance support clerk, classified at the CR-03 group and level (Exhibit J-1). In 1996, the grievor filed a harassment complaint against "M" in the Query Response Centre (QRC), and the complaint was settled in 1998 (Exhibit J-1). In April 1999, the grievor was assigned to the departmental library for a career development assignment, which was terminated after one month.

[9] On December 10, 1999, she was asked to remain away from the workplace until a Fitness to Work Evaluation could be conducted by the Occupational Health and Safety Agency of Health Canada ("Health Canada"), based on management's concern with her behaviour in the office (Exhibit E-3, tab 3). The evaluation was completed by Dr. Lloyd-Jones on March 3, 2000 (Exhibit E-2, tab B). She concluded that the grievor was not able to meet the medical requirements of her position because of a mental health condition. She also stated that the grievor required treatment and regular follow-up for a medical condition, and "unless she receives this treatment, she will remain unfit for work." She concluded her evaluation by stating that should the grievor's treating physician suggest a readiness to return to work in the future, it was recommended that she be retested by Health Canada's consulting specialist.

[10] The grievor was on leave with pay from December 10, 1999, to June 29, 2000, at which point she started receiving disability benefits under the disability insurance plan with Sun Life Financial (Exhibit J-1). She received disability insurance benefits from June 30, 2000, to June 29, 2002 (Exhibit J-1). During that period, Sun Life Financial concluded that she no longer qualified for benefits.

[11] On January 4, 2001, Dr. Lloyd-Jones sent a letter to Paula Fitzsimons, Chief of Staff Relations and Compensation, CIC Headquarters (copied to the grievor; Exhibit E-2, tab C), stating that she had received a letter from the grievor's treating physician recommending a return to work. She also noted that the treating physician had stated

that the grievor "would benefit from a transfer to a different ministry, as the conflict at her workplace has affected her health." On April 26, 2001, Dr. Lloyd-Jones wrote to the grievor (Exhibit E-2, tab E) noting some concerns with the medical information provided by her physician. Dr. Lloyd-Jones stated that she could not recommend a return to work unless testing was done to verify the previous results.

[12] On May 15, 2001, the disability insurer (Sun Life Financial) wrote to the grievor, stating that she no longer qualified for disability benefits because she was no longer "totally disabled" (Exhibit E-3, tab 21):

. . .

> *. . . Totally disabled means that you are in a continuous state of incapacity due to illness which prevents you from performing each and every duty of your regular occupation or employment.*
>
> *According to the medical information on file, you do not have any medical condition or restrictions that would prevent you from performing the full time duties of your regular occupation. As both you and your treating physician agree that you do not have any condition causing total disability, you no longer qualify for Disability Insurance Plan benefits.*
>
> . . .
>
> *It would appear that there are work conflicts and difficulties in communication between yourself and your employer which are now the cause of the delay in your return to work.*
>
> *The Plan is not designed for workplace situations which do not result in a totally disabling condition.*

. . .

[13] Sun Life Financial stated in its letter to the grievor that in order to consider reinstatement of benefits it would require written confirmation from either Health Canada or the employer indicating that a Fitness to Work Evaluation had been scheduled and confirmation of the date of that evaluation (Exhibit E-3, tab 21). The correspondence was sent to the grievor and to Ms. Fitzsimons. The grievor did not appeal the decision of the insurer that she no longer qualified for benefits.

[14] The grievor had a further medical assessment done on April 3, 2002, by Dr. David Conn (Exhibit E-4). He reported that she denied his suggestion that she might be "suffering from an illness which is affecting her thinking and emotions". He also reported that she stated that she would not take medication if it were prescribed. Dr. Conn concluded that in order to return to work, the grievor required ongoing psychiatric treatment and a graduated return to work. He also concluded that it would not be appropriate for her to return to work unless she cooperated with both psychiatric treatment and vocational rehabilitation. He also stated that he thought that she was "significantly disabled". After receiving the results, Dr. Lloyd-Jones concluded that the grievor was not fit to return to work and that she was "significantly disabled by her medical condition" (June 12, 2002; Exhibit E-2, tab H). Dr. Lloyd-Jones also set out the necessary conditions for any future return to work:

. . .

> . . . *In order for Ms. English-Baker to return to work in the future, she would require ongoing medical treatment for a chronic medical condition. If she were to respond favourably to this treatment, she would then require a graduate* [*sic*] *vocational re-integration*. . . .

. . .

[15] Dr. Lloyd-Jones testified that mental health professionals use a 100-point scale called Global Assessment of Functioning (GAF) to measure the ability of those with mental health conditions to function in the workplace. She stated that the cut-off point for functioning in the workplace is a GAF score at around 60. From 51 to 60, an individual would have moderate symptoms and moderate difficulties in functioning in the workplace. If the score is below 50, the individual is unable to work. The grievor was rated by Dr. Conn at GAF "fluctuating from 30 to 50" (Exhibit E-4).

[16] Ms. Fitzsimons requested a further Fitness to Work Evaluation on May 5, 2003 (Exhibit E-3, tab 36). Dr. Richard Spees examined the grievor for Health Canada and provided a report on June 3, 2003 (Exhibit E-5). He reported that the grievor stated that she "feels quite well". He stated that her GAF score was "about 60." He concluded that there was no reason to believe that she could not carry out the duties contained in her job description. He concluded as follows:

. . .

> *. . . it would be more direct and even accurate to simply return her to work and see how she does. I don't recommend any medication at the present time. It should be noted that. . . medications are generally ineffective, and if she returns to work, she might as well return to work full-time. Success of return to work will of course be facilitated by her being in a slightly different environment. Going back to the same environment where she charged people with harassment and felt that she was being further harassed after the resolution of her case, is highly problematic. In order to maximize her chances, it would be best if she were out of direct contact with the people with whom she had difficulty previously.*

. . .

[17] On June 12, 2003, Dr. Lloyd-Jones wrote to Ms. Fitzsimons and provided her recommendation. She concluded that the grievor was fit to return to work on a full-time basis and that there were no limitations to her ability to perform clerical duties (Exhibit E2, tab J). Dr. Lloyd-Jones concluded as follows:

. . .

> *It would be preferable if she did not return to the immediate work environment where she previously charged people with harassment.*

. . .

Dr. Lloyd-Jones testified that this was not a requirement or a condition for a return to work but was a "preferable" course of action.

[18] Allan Quaile, Chief of Records Services, wrote to the grievor on June 17, 2003 (Exhibit E-3, tab 39), stating that arrangements were being made for her return to work "as early as June 23, 2003". The letter addressed the suggested restrictions raised by Dr. Lloyd-Jones:

. . .

> *. . . On a short-term basis, finding other suitable employment would be very difficult therefore, for expedience purposes we are arranging for your immediate return to your substantive position. Notwithstanding, I would like to mention that, during your absence, there has been a significant turnover of staff. I have attached an organization chart for your reference. . . Since we are not clear on the allegations of the harassment*

> *referred to by Health Canada, I would ask that you provide your supervisor with the names of the people you have particular concerns about and we will assess if any special arrangements should be made. . . .*
>
> . . .

[19] Mr. Quaile also noted in his letter that there was a new management team in place. He testified that the individual she had previously accused of harassment ("M") was not working in her area. Mr. Quaile also testified that there were only two CR-03 positions available and that one was encumbered. Mr. Quaile testified that because there had been issues in the past with other people in her work area, it was decided that her workstation would be "out of the general flow" where she would not have to see other employees. He also testified that well over half of the employees on the floor had not been working there when the grievor was previously at work. He testified that the grievor did not provide him with any names of individuals she felt uncomfortable working with. He also testified that the grievor's union representative was involved in her reintegration and did not indicate any problems with the working arrangement.

[20] She returned to work on June 23, 2003 (Exhibit J-1). Mr. Quaile met with the grievor and her union representative on that day. He testified that the purpose of the meeting was to discuss her reintegration and the work she would be doing. He testified that in the meeting he emphasized that he was not overly concerned with her productivity and that she was not to worry about it. He stated that the main concern was her successful reintegration into the workplace. Her duties entailed preparing documents for microfilming. He testified that neither she nor her union representative raised any accommodation issues, apart from requesting an ergonomic chair.

[21] Mr. Quaile testified that he met with the grievor and her union representative on July 29, 2003, to discuss the presence of a salt-like substance in the workplace, in particular on the documents that were to be microfilmed. He testified that she told him that she had no knowledge of it. In a note that he prepared at the time (Exhibit E-3, tab 43), he wrote that she was "very defensive" and "only talked about past issues."

[22] In August 2003, the grievor was required to attend training at a different building. She did not want to attend because of the location. She told Mr. Quaile that she had had a bad experience working with people in that building and did not wish to

return and be near them again. He arranged for someone to give her the "highlights" and did not require her to attend the training course.

[23] On August 12, 2003, Mr. Quaile received three phone calls from the grievor's phone while he was away from his desk. She left him a voice mail stating that she would like to meet with him as soon as possible. He testified that when he arrived at her workstation, she was talking very loudly to two employees and accusing them of harassing her. He asked her not to yell, and she did quiet down. He testified that one of the employees was quite upset with the allegation and did not want to work in that area as a result.

[24] Around the middle of August 2003, the presence of a salt-like substance on the carpet and in the women's washroom was becoming pervasive. Mr. Quaile testified that the cleaning staff would clean it up and it would reappear the next day. There were also complaints from employees about an ammonia-like odour in the workplace. When Mr. Quaile asked the grievor about the salt-like substance and the ammonia odour on September 4, 2003, she told him that she "had no idea how it got there." He testified that they had the conversation at her workstation and that he could see the salt-like substance on and beside her desk. At the time, he concluded that it was obvious that she was responsible.

[25] On September 10, 2003, the grievor received a verbal reprimand regarding her behaviour in the workplace (Exhibit J-1). She had alleged harassment by a manager when he had delivered a pay cheque envelope to her desk. The verbal warning was documented in a letter to her on September 17, 2003, from Mr. Quaile (Exhibit E-3, tab 46). The letter summarized the meeting, and the consequences if the behaviour continued, as follows:

. . .

> *As I stated at the meeting, your reaction to this routine occurrence is inappropriate and will not be tolerated. Moreover, I must tell you that should this type of behaviour continue I will be forced to take disciplinary action. I sincerely hope that this will not be necessary.*

. . .

[26] Dale Plumb testified that on September 29, 2003, he observed the grievor throwing a white substance on the floor by her desk. He sent an email to his supervisor and to Mr. Quaile confirming his observation (Exhibit E-3, tab 49). Wally Bigford testified that he had observed the grievor spraying a substance with a strong ammonia odour on the carpet on October 1, 2003. He advised his supervisor and Mr. Quaile by email later that day (Exhibit E-3, tab 50).

[27] Mr. Quaile arranged a meeting with the grievor to discuss the two incidents on October 8, 2003. The grievor's union representative was present. Mr. Quaile testified that the grievor denied the allegations. She stated that others in the office were responsible and were harassing her. When he asked her for the names of the individuals harassing her, she refused to provide them. He asked her to point at the people in the office who were harassing her. She agreed and walked at a pace that Mr. Quaile described as "almost running," pointing to almost all the employees on the floor. Mr. Quaile testified that it was very disruptive.

[28] On October 9, 2003, the grievor was asked to leave the workplace and was given two letters. One letter was a written reprimand (Exhibit E-3, tab 52), and the other was a request that she remain away from the workplace pending a Fitness to Work Evaluation by Health Canada (Exhibit E-3, tab 53). The grievor initially refused to leave the workplace and was eventually escorted out by her union representative.

[29] The letter of reprimand referred to spreading the salt-like substance and to spraying the substance with the strong ammonia odour and concluded as follows:

. . .

> *I have carefully reviewed the information before me and, although you maintain your innocence, I have concluded that you are the one responsible for these actions. Previously on September 17, 2003 you were given a warning regarding your personal behaviour in the office. Given the seriousness of these latest actions, this is to be considered a letter of reprimand and a copy will be placed on your personal file.*
>
> *Such actions are considered inappropriate in the workplace and it is expected that in the future, you will behave in a manner that will respect your work environment. I remind you that should any further incidents of misconduct occur, you will be subject to more severe disciplinary action.*

[30] Ms. Fitzsimons testified that she did not know if the letter of reprimand was ever placed into the grievor's personal file.

[31] The letter requesting that the grievor undergo a Fitness to Work Evaluation (Exhibit E-3, tab 53) referred to her allegations that others were responsible for the incidents in the workplace and to the fact that she pointed to almost all of the employees as those responsible:

. . .

> *I do not consider your allegations as reasonable and your reaction has again caused the staff uneasiness. I am concerned for your health and safety, as well as for the safety of others. For these reasons I have decided that a reassessment with the Occupational Health and Safety Agency (OHSA) is required before I will allow you in the workplace.*

. . .

[32] Mr. Quaile explained that he had given the grievor both a disciplinary letter and a request for a Fitness to Work Evaluation because there was a "disciplinary part to it" and because he wanted an evaluation of whether she was fit to work. When he was asked a further question by counsel for the employer about why he issued a disciplinary letter, he stated: "It was a disciplinary issue. If she was found fit to be at work but wasn't disciplined I would be caught in the middle . . . I didn't think she was fit to work so she needed to be evaluated." In re-examination, he testified that if she had been found fit to work, progressive discipline principles would have applied.

[33] After receiving a signed consent form from the grievor, a letter was sent to Dr. Lloyd-Jones on October 30, 2003, by Ms. Fitzsimons, requesting a reassessment of the grievor's fitness to work (Exhibit E-2, tab 61). The letter was copied to the grievor. It summarized the recent events in the office in some detail. Ms. Fitzsimons also wrote:

. . .

> *. . . we also need to know if you consider that she was fit during her reintegration period. Please be aware that since her return to her substantive duties in June, she has been unable to meet the requirements of her job. However, Management postponed addressing this matter with her because they wanted to ensure she was given ample time to adjust and to avoid any additional pressure that might be detrimental to her successful reintegration. Also, as your file*

> *probably indicates, previous attempts to have her succeed in other environments within CIC have failed. Therefore, if you determine that she is fit to return to work but is unable to return to a specified workplace, we will require your assistance in determining her ability to learn a new job and to reintegrate her in another new environment.*
>
> . . .

[34] Ms. Fitzsimons provided a subsequent document to Dr. Lloyd-Jones on November 7, 2003 (Exhibit E-3, tab 64), that contained additional information about the grievor's behaviour in the workplace, including over three pages of detailed notes from Mr. Quaile that described the incidents for which she had been disciplined. In those notes, he stated that ". . . the decision was taken to proceed with disciplinary measures. . . ."

[35] Dr. Lloyd-Jones again referred the grievor to Dr. Spees for an assessment. In his report to Dr. Lloyd-Jones (Exhibit E-2, tab K), he concluded that "at the present time this lady is unfit to work." He also stated that there was no real treatment for her condition and that medication would not be effective. He concluded that the symptoms were "nevertheless disabling" and that it appeared that she was disabled on medical grounds. He also concluded that he believed that "similar trends would develop in any new workplace to which she transferred." He assessed her GAF score as "about 50."

[36] In a letter to Ms. Fitzsimons dated December 8, 2003 (Exhibit E-2, tab L), Dr. Lloyd-Jones advised the employer that, based on Dr. Spees' report, the grievor was unfit for work "due to a chronic medical condition." She stated that Dr. Spees did not believe that a transfer to a different work environment would be of benefit. She concluded the letter as follows:

> . . .
>
> *Should Ms. English-Baker choose to apply for a retirement on medical grounds, her application would be reviewed favourably.*
>
> . . .

[37] Dr. Lloyd-Jones testified that she based her recommendation entirely on the report from Dr. Spees. She also testified that her reference to the fact that a transfer to a different environment would be of no benefit was intended to clarify that changing her work location or accommodating her would not change the situation. She testified

that someone with the grievor's condition might be able to function in the workplace with the assistance of a trusted psychotherapist. To her knowledge, the grievor did not want to pursue psychotherapy. Dr. Lloyd-Jones based this assessment, in part, on the comments of Dr. Conn in his medical report completed in 2002 (Exhibit E-4).

[38] In cross-examination, Dr. Lloyd-Jones testified that she did not perform a detailed analysis of each job duty, although she did review the job description for the grievor's position. She testified that one cannot isolate a job duty from the overall working environment.

[39] Dr. Lloyd-Jones testified that in her view, the grievor met the requirements for medical retirement. Medical retirement entitles an employee to their pension under the *Public Service Superannuation Act* with no penalties. Dr. Lloyd-Jones testified that 5 to 10 percent of the recommendations on fitness to work that she makes refer to medical retirement. She defined the criteria for granting medical retirement as a disability severe enough to prevent an employee from substantially gainful employment that is expected to last for a lifetime or for a prolonged period. On the basis that the grievor had been off work since 1999 and that Dr. Spees concluded that there was no effective treatment, Dr. Lloyd-Jones testified that she believed that the grievor would qualify for medical retirement.

[40] On December 12, 2003 Ms. Fitzsimons wrote to the grievor, referring to Health Canada's finding that she was considered unfit for work (Exhibit E-3, tab 67). She stated that where an employee is absent on sick leave without pay for an extended period, Treasury Board policy required that "management must decide upon the termination date for such leave within a two year period." The letter continued as follows:

. . .

> *. . . Following your failed trial of a return to work, this is to advise you that it is once again imperative that a termination date of your employment be determined in the near future.*

. . .

[41] In cross-examination, Ms. Fitzsimons admitted that the grievor was never advised that her return to work was a "trial of a return to work."

[42] Ms. Fitzsimons suggested in the letter that the grievor apply for medical retirement effective January 15, 2004. The grievor's lawyer wrote to Mr. Quaile on December 17, 2003 (Exhibit E-3, tab 68). He stated that she would be obtaining a medical assessment by her own doctor. He further stated that she was willing to return to work and was open to "accommodation measures to facilitate her expeditious return." Mr. Quaile replied directly to the grievor on January 7, 2004, as follows (Exhibit E-3, tab 70):

. . .

> *. . . Given that your current absence is a continuation of a long standing medical absence, we intend to proceed with regularizing the situation without delay.*

. . .

[43] In the letter, Mr. Quaile stated that if she did not apply for medical retirement by January 26, 2004, the employer would recommend that her employment be terminated for incapacity. He also reminded her that she was eligible to apply for disability insurance benefits as long as she was an employee.

[44] On January 15, 2004, the grievor's lawyer requested an extension of time to allow the grievor to discuss medical retirement with her union representative, who was away on holiday. An extension was granted until February 13, 2004 (Exhibit E-3, tab 71). The grievor's lawyer requested a further one-month extension on February 12, 2004, to allow the grievor time to "explore her options with regard to medical retirement" (Exhibit E-3, tab 73). A further extension was granted, until March 5, 2004 (Exhibit E-3, tab 74). In the letter granting the extension, Ms. Fitzsimons stated that should the situation not be resolved as of that date, the employer would proceed with a termination of her employment for reasons of incapacity. On March 4, 2004, the grievor's lawyer advised Ms. Fitzsimons as follows (Exhibit E-3, tab 75):

. . .

> *. . . my client is adamant that she is fit to return to the workplace and is open to engaging in discussions with the Employer regarding a timetable to implement her return to work.*

. . .

[45] Steven Poole, Chief Information Officer, CIC, wrote to the grievor on March 31, 2004 (Exhibit E-3, tab 76), stating that she had until April 15, 2004, to exercise her option to apply for medical retirement and that if she did not do so he would proceed to terminate her employment for incapacity. He "strongly urged" her to seek medical retirement and wrote that once approved, her retirement would be considered a resignation. He further stated that if her employment were terminated, she would remain eligible to apply for medical retirement but would no longer be eligible for disability benefits.

[46] On May 5, 2004, Mr. Poole sent a letter to the grievor (Exhibit E-3, tab 84) terminating her employment for non-disciplinary reasons (incapacity) under paragraph 11(2)(*g*) of the *FAA*, effective May 6, 2004. He testified that he found the recommendation from Health Canada "unequivocal." He had no recollection of the discussions he had had with labour relations advisors on the matter.

[47] The grievor filed a grievance on May 27, 2004. She grieved her termination of employment and alleged a breach of the No Discrimination clause of her collective agreement. She also grieved the employer's "discriminatory and harassing actions against me in forcibly removing me, without pay, from the workplace." As corrective action she requested that she be "made whole," including being reinstated to her former position. At the hearing, her representative suggested that as corrective action, she should be reinstated with a condition that she be required to undertake a Fitness to Work Evaluation and be found fit to return to work.

III. Summary of the arguments

[48] The parties made oral submissions at the hearing. After the hearing, I asked them for written submissions on two recent decisions: *Canada (Attorney General) v. Sketchley,* 2005 FCA 404, and *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4. The written submissions are on file with the Public Service Labour Relations Board (PSLRB). I have summarized those submissions below.

A. For the employer

[49] Counsel for the employer submitted that this was a straightforward case of a termination of employment for incapacity based on the assessment of Health Canada that the grievor was unfit for work because of a chronic medical condition. The

employer had no choice but to terminate the grievor's employment. It was reasonable for the employer to do so, and the grievance should therefore be dismissed.

[50] Counsel referred me to *McCormick v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26274 (19950918):

. . .

> *Illness can in some situations frustrate the employment contract. Although an employee is entitled to leave benefits to cover temporary and even lengthy absences, there comes a time, after such earned leave has been liquidated, when an employee's inability to perform the duties of his or her position and the fact that he or she will not be able to do so in the foreseeable future will lead inexorably to termination.*

. . .

[51] Counsel also referred me to *Scheuneman v. Treasury Board (Natural Resources Canada)*, PSSRB File No. 166-02-27847 (19981020), and the decision of the Federal Court of Appeal in the same case (A-795-99, 20001201), which held that termination for incapacity where the employee is not able to return to work in a reasonable time is not discriminatory:

. . .

> *In my opinion these facts do not establish a breach of section 15* [of the Charter]. *The appellant was dismissed because he was unable to perform* any *work and was unlikely to be able to do so in the foreseeable future. It is a basic requirement of the employment relationship that an employee must be able to undertake work for the employer or, if temporarily disabled by a medical condition from so doing, must be able to return to work within a reasonable period of time. Dismissing a person who cannot satisfy this requirement is not, in the constitutional sense, discrimination on the ground of disability.*

. . .

[52] Counsel submitted that the definition of disability for obtaining medical retirement — severe and prolonged — quite clearly applied to the grievor, and Dr. Lloyd-Jones was quite comfortable with that assessment. The employer based its decision to terminate on the letter from Health Canada, and the evidence showed that Dr. Lloyd-Jones considered all of the medical reports in coming to her recommendation.

[53] Counsel noted that the grievor was requesting a return to work, although there was no evidence that she was fit to return to work. Counsel also noted that in the *McCormick* decision, the adjudicator stated that the "foreseeable future" for a return to work was in the six-month range.

[54] Counsel submitted that the employer had met its duty to accommodate the grievor. When the grievor returned to the workplace in 2003, her union representative was involved in the reintegration at each step. The grievor was provided with an organization chart with the names of her colleagues, and she expressed no concerns. She also never expressed any concerns with her workstation arrangement or location. With respect to the recommendation that she be returned to a different work environment, Dr. Lloyd-Jones stated that it was a preferable and not an absolute requirement. Furthermore, the grievor was not working at the QRC where she had previously worked, and she was not working with the individual that she had accused of harassment ("M"). A new management team was in place.

[55] Counsel also submitted that accommodation was a "two-way street," that there was a duty on the grievor to advise the employer of any accommodations that might be required and that she did not advise the employer of any need to be accommodated. Counsel referred me to *Begley v. Treasury Board (Public Works and Government Services Canada)*, PSSRB File No. 166-02-26311 (19960522), and *Beattie v. Treasury Board (National Defence)*, 2000 PSSRB 12.

[56] Counsel also referred me to *Isfeld v. Treasury Board (National Defence)*, PSSRB File No. 166-02-27680 (19970626), and *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095.

[57] Counsel submitted that the employer had exercised extreme good faith in attempting to reintegrate the grievor. She also noted that there were very few CR-03 positions within the organization that she could be assigned to.

[58] Counsel submitted that there was no breach of the No Discrimination clause of the collective agreement. The clause states that no one can be disciplined for having a disability, but that does not mean that individuals with a disability cannot be disciplined. The grievor was disciplined for acts of misconduct, which does not preclude her from being terminated for incapacity. An alcoholic can be disciplined for misconduct as well as terminated for incapacity. In this case, the disciplinary letter had

no bearing on the decision to terminate for incapacity. Counsel referred me to *Campbell v. Treasury Board (Canadian Radio and Television Commission)*, PSSRB File No. 166-02-25616 (19960513), where the grievor received progressive discipline and was terminated for incapacity.

[59] Counsel submitted that the employer acted appropriately in this case. Every attempt was made to facilitate the grievor's transition back to work. The employer gave her every opportunity to apply for medical retirement and did not terminate her employment for approximately five-and-a-half months after she was asked to leave the workplace. The employer also preserved her employment status during that period to allow her to apply for disability insurance benefits.

[60] Counsel submitted that the test for termination for incapacity had been met and submitted that the grievance should be dismissed.

[61] In her written submissions on the *Sketchley* and *McGill University Health Centre* decisions, the employer's counsel stated, in part (the full submissions are on file with the PSLRB):

. . .

> *At the Federal court of Appeal level, the* Scheuneman *case has relevance because of the determination by the court, at paragraph 7 of its decision, that:*
>
> *It is a basic requirement of the employment relationship that an employee must be able to undertake work for the employer or, if temporarily disabled by a medical condition from so doing, must be able to return to work within a reasonable period of time. Dismissing a person who cannot satisfy this requirement is not, in the constitutional sense, discrimination on the ground of disability.*
>
> *In the case of* Sketchley v. Canada (A.G.), *the Federal Court of Appeal does* ***not*** *distinguish the above-noted conclusion (and, indeed, this reasoning is supported and affirmed by the Supreme Court of Canada in* McGill, *as discussed below).*
>
> *Instead, the Court in* Sketchley *is concerned with whether an investigation done pursuant to a Canadian Human Rights complaint had contained sufficient investigative omissions so as to breach the duty of fairness. The subject matter of the human rights complaint was the policy of Treasury Board requiring that there be a resolution of the employment relationship for those employees on leave without pay for*

> *medical reasons within two years of the leave's commencement. In the* Scheuneman *No. 1 case, the Federal Court Applications judge had considered whether this policy amounted to a breach of the* Charter of Rights and Freedoms*; in the* Sketchley *case, there is discussion about whether the policy breached the* Canadian Human Rights Act*. The court in* Sketchley *states that* Scheuneman *cannot be seen as binding on that point since it was not considered in that context, it lacked a full analysis of the relationship between the Charter and the Canadian Human Rights Act, and also because of some factual differences. The court in* Sketchley *points out that, since* Scheuneman *No. 1 at the Federal Court of Appeal level did not address the policy being challenged, it cannot be taken as binding in that regard. The employer submits that the distinguishing of the* Scheuneman *case is with respect to this issue, not with respect to the issues for which the case was relied upon in the English-Baker adjudication.*
>
> . . .
>
> [Emphasis in the original]

B. <u>For the grievor</u>

[62] The grievor's representative submitted that the termination of the grievor's employment was improper because it was not a termination for incapacity under paragraph 11(2)(*g*) of the *FAA*, but was rather a termination for disciplinary reasons. There was no evidence that the letter of reprimand was rescinded by the employer. He also submitted that the fact that she had been disciplined was communicated to Dr. Lloyd-Jones on a number of occasions, and therefore, it became part of her assessment. He submitted that the letter of reprimand was contrary to the No Discrimination clause of the collective agreement.

[63] The grievor's representative submitted that the medical evidence does not support the employer's decision to terminate. The medical evidence does not conclude that she was unfit to work in the foreseeable future. Her disability insurer concluded that she was not totally disabled. Dr. Spees' report stated that she was not fit to return to work "at the present time." In cross-examination, Dr. Lloyd-Jones admitted that she did not go through a checklist of duties to determine if the grievor could not perform each duty. Mr. Poole also did not take the job description into account when coming to the conclusion that the grievor's employment should be terminated for incapacity.

[64] The grievor's representative also questioned the employer's good faith in advising Health Canada that it was not satisfied with the grievor's performance even though Mr. Quaile specifically told her that management was not concerned with her productivity. The grievor was never advised that her productivity was at issue.

[65] The grievor's representative also argued that the overall manner in which the employer dealt with her reintegration as well as its actions on October 9, 2003, when she was escorted from the building, were unfair and unreasonable. The employer has not met its burden of showing that termination of employment for incapacity was reasonable.

[66] The grievor's representative submitted that the employer had breached the No Discrimination clause of the collective agreement. He referred me to *Brown and Beatty*, Canadian Labour Arbitration, 2nd ed., paragraph 7:3510: "When the cause of the employee's failure is not a matter of choice, it is generally accepted that discipline of any kind is not a proper response." He also referred me to *Deering v. Treasury Board (National Defence)*, PSSRB File No. 166-02-26518 (19960208), where the adjudicator allowed the grievance partly on the basis that the employer had treated the grievor's conduct as disciplinary rather than as non-culpable behaviour.

[67] The grievor's representative also argued that mere speculation about the risk of a return to work is insufficient to justify terminating employment (*Dugal v. Treasury Board (Canadian Heritage Parks Canada)*, PSSRB File No. 166-02-25955 (19950626)). In the grievor's case, the assessment that her condition was chronic was based on a "snapshot," and the evidence had shown that her GAF score had fluctuated in the past. He also referred me to *Gunderson v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File Nos. 166-02-26327 and 26328 (19960725), where the adjudicator ordered that the grievor undergo another health assessment and that the grievor be required to follow a course of treatment.

[68] The grievor's representative submitted that the duties contained in the grievor's job description were not taken into consideration by Health Canada or the employer and neither asked how her disability affected her ability to do her job. Her employment was terminated because of an episode or incident in the workplace and not because she was unable to perform her duties. As a result, the grievance should be allowed.

[69] The grievor's representative submitted the following written submissions with respect to the *Sketchley* and *McGill University Health Centre* decisions:

> . . .
>
> *. . . I will limit my submission to the issue of whether or not an error was made by finding that the Treasury Board policy constitutes prima facia discrimination, in the case of a disabled employee who cannot provide a definite date for return to work.*
>
> . . .
>
> *Further at paragraph 91 of the Sketchley decision, the applications judge's analysis is agreed with in holding that "the relative inflexibility of the two-year deadline imposed by the Treasury Board policy on leave for medical reasons, in comparison with the absence of such deadlines in the policy applicable to leave without pay for other reasons, is sufficient to establish a prima facia case of discrimination under Section 10 of the Act".*
>
> *Paragraph 92 address the second basis of differentiation and the applications judge noted that "workers with disabilities who can confirm the date of their return to work and presumably less disabled in that point in time than workers who cannot yet state the date of return to work. The difference is based on the degree of disability, a prohibited ground of discrimination.*
>
> . . .

C. <u>Employer's reply</u>

[70] Counsel for the employer submitted that the grievor's version of events was also provided to the medical professionals, through correspondence from her lawyer. Therefore, the medical professionals had both sides of the story.

[71] Counsel for the employer submitted that the decision by Sun Life Financial was not relevant to this grievance. It was a different contract, and the parties were not the same. The grievor could have appealed that decision and did not do so.

[72] Counsel for the employer stated that the evidence showed that Dr. Lloyd-Jones did review the entire file on the grievor and had a copy of the job duties. Dr. Lloyd-Jones also testified that the functions of a job cannot be isolated from the work environment. The performance of tasks was never the issue; it was the interpersonal difficulties that were the focus.

[73] Counsel for the employer submitted that Mr. Quaile had concerns about the grievor's behaviour in the workplace but that it was not up to him to determine if she was in fact fit to work. If she was found fit to work, there needed to be documents on file with respect to her behaviour. If he did not document his concerns, he could be in breach of labour relations policy.

[74] Counsel for the employer submitted that the *Deering* case involved a termination for incompetence, not incapacity. In the *Dugal* case the grievor had a shoulder injury, and there was never any suggestion that he was totally disabled. With respect to the decision in *Gunderson*, counsel for the employer argued that the facts are different in this case, since an attempt was made to have the grievor return to work, and it failed.

[75] In her reply to the written submissions of the grievor's representative, counsel for the employer wrote as follows:

> 1. *The Union contends that Ms. English-Baker's termination constitutes a prima facia case of discrimination, as per the discussion in* Sketchley. *In* Sketchley, *it was decided that the inflexible application of a Treasury Board policy regarding termination for incapacity after a fixed period of leave for medical reasons constituted discrimination under Section 10 of the* Canadian Human Rights Act.
>
> 2. *Ms. English-Baker has never grieved the automatic application of any Treasury Board policy regarding termination for incapacity after a fixed period of leave. The Union did not present any evidence of such a policy existing, or of it having being applied by the Employer, neither throughout the grievance process, nor during the adjudication procedures. In any event, the Employer submits that there is no policy requiring "termination" of employees after a two-year absence, so that there is no such issue arising in the case at hand.*
>
> *During the grievance and at the hearing of this matter, the Union has argued strictly that Ms. English-Baker's termination constituted an unlawful termination for discipline under section 11(2)(f) of the* Financial Administration Act, *and a disciplinary action for reason of incapacity contrary to section 19 of her Collective Agreement. By now submitting that Ms. English-Baker was subjected to discrimination via an unlawful application of a purported Treasury Board policy, the Union is changing the nature of Ms. English-Baker's grievance.*

When a grievor fails to raise an issue until after the conclusion of the grievance process, the Burchill v. Attorney General of Canada, *[1981] 1 FC 109, interpretation holds that the grievor has not in fact presented a grievance regarding the newly raised issue up to and including the final level in the grievance process, that failure thereby constituting a bar to adjudication;*

Should the Board find that it is competent to hear a grievance based on the application of a Treasury Board policy, the Employer respectfully reminds the Board that this adjudication is to be decided as per the provisions of the Public Service Staff Relations Act *and that, under this Act, it is does not have jurisdiction to hear matters regarding discrimination under the* Canadian Human Rights Act*; and*

Should the Board find that it is competent to hear a grievance based on discrimination according to any other source of law, the Employer submits that the decision in Sketchley *is not applicable, given that it is specifically based on an interpretation of section 10 of the* Canadian Human Rights Act.

3. *The Union contends that the Employer did not properly accommodate the grievor on her return to work.*

4. *Ms. English-Baker has never grieved any failure to accommodate her on her return to work. Again, the Employer submits that the* Burchill *interpretation applies and that this matter is barred from adjudication;*

   Should the Board find that it is competent to consider a grievance on the basis of a failure to accommodate, the Employer submits that the context of the McGill *decision is distinguishable from the case at bar, given that there was no evidence presented by the Union of either the existence, or application by the Employer, of any automatic termination policy;*

   Should the Board find that the McGill *decision is applicable, the Employer submits that the Employer carried out the termination in conformity with the criteria set out in* McGill. *Specifically, the undisputed facts before the Board are that:*

   i. *Ms. English-Baker was absent due to illness for a period of 4 years and 5 months with the exception of the 15-week period spanning June 23, 2003 to October 9, 2003.*

> ii. *Ms. English-Baker's illness was an ongoing, continuous condition throughout all this time. The uncontradicted medical evidence was that her condition was chronic, and that her disorder could be seen on a continuum. Thus, paragraph 29 of the Union's submission is incorrect.*
>
> iii. *Ms. English-Baker suffered from a chronic illness for which a transfer to a different work environment would be of no benefit.*
>
> iv. *During the 15-week period spanning June 23, 2003 to October 9, 2003, Ms. English-Baker's manager went to extraordinary lengths to accommodate her, notably by ensuring that she work in a different unit which was located in a different building and in which fewer than half of her previous colleagues worked, thereby satisfying Dr. Lloyd-Jones's recommendation that she "not return to the immediate work environment where she previously charged people with harassment".*
>
> *As stated in the Agreed Statement of Facts, Ms. English-Baker's "previous charges of harassment" had been against an individual, "M", in the Query Response Centre. She was not returned to the Query Response Centre, and "M" was not in the work unit in which the Employer attempted to re-integrate Ms. English-Baker in 2003. Therefore, the Employer complied with the recommendation of Health Canada.*
>
> *Any duty to accommodate does not stem from Article 23 of the Collective Agreement, which addresses specific situations of workforce adjustment initiatives rather than individual terminations for incapacity. The Employer submits that Article 23 has no bearing on the facts of this case.*

[Emphasis in the original]

IV. Reasons

[76] This grievance is governed by the provisions of the *PSSRA*. In *Canada (Attorney General) v. Boutilier*, [1999] 1 F.C. 459 (T.D.); aff'd, [2000] 2 F.C. 27, the Federal Court concluded that an adjudicator under the *PSSRA* did not have jurisdiction over human rights matters. However, the Court also concluded that in the event that the CHRC has relied on sections 41 and 44 of the *CHRA* to allow for the exhaustion of a grievance process, an adjudicator does have jurisdiction. In this case, the CHRC has relied on

sections 41 and 44 of the *CHRA*. The decision in *Djan v. Treasury Board (Correctional Service of Canada)*, 2001 PSSRB 60, thoroughly canvassed the implications of a direction from the CHRC to a grievor under sections 41 and 44 of the *CHRA*. After receiving submissions from the CHRC and a number of bargaining agents and employers, the adjudicator concluded:

. . .

> *. . . I conclude that the fact that the CHRC advised Ms. Djan that she could revive her complaint once she had exhausted the grievance procedure does not deprive an adjudicator appointed under the PSSRA of the necessary jurisdiction to hear and determine her grievance.*

. . .

[77] This grievance raises four questions:

- Was the grievor's employment terminated for disciplinary reasons or for reasons of incapacity?
- If her employment was terminated for incapacity, was the employer justified in reaching the conclusion that she was incapable of working?
- Did the employer meet its duty of accommodation before ending the employment relationship?
- Were the actions of the employer in disciplining the grievor for her actions in the workplace contrary to the No Discrimination article of her collective agreement?

[78] For the reasons set out below, I have concluded that the grievor's employment was terminated for reasons of incapacity and was not disciplinary. The employer was justified in reaching this conclusion and met its duty of accommodation. I have also concluded that the employer breached the No Discrimination article of the collective agreement when it disciplined the grievor by way of a written reprimand for behaviour that was non-culpable.

[79] In his written submissions, the grievor's representative relied on a job security provision of the collective agreement. That article of the collective agreement was not grieved, and I am therefore without jurisdiction to consider it.

[80] The grievor's representative relied, in part, on the decision of the disability insurer that the grievor was not totally disabled. The employer's counsel has argued that that insurer's decision is not relevant. I agree that the determination by the disability insurer is not relevant because it was not made at a time relevant to this grievance. The determination by Sun Life Financial was made in May 2001 — two-and-a-half years before the Fitness to Work Evaluation was completed. Even if the decision of the insurer had been timely, it would not be determinative. This is because a finding that an employee is not totally disabled is not the same as finding an employee to be fit to return to work.

[81] The grievor's representative argued that the employer's disciplinary actions (the oral reprimand and the written reprimand) tainted the process for termination of employment for incapacity, and made the termination a disciplinary one. There is no evidence that the characterization of the events in the workplace as disciplinary influenced the medical conclusions on the grievor's Fitness to Work Evaluation. The medical assessments referred to events in the workplace as manifestations of a medical condition, but also relied on independent assessments of her medical condition. I have addressed the written reprimand below in the context of the alleged breach of the No Discrimination article of the collective agreement.

[82] The grievor's representative also raised concerns about performance issues being mentioned to Dr. Lloyd-Jones when Mr. Quaile had told the grievor that she should not worry about job performance. There was no evidence that the mention of this concern to Dr. Lloyd-Jones influenced her conclusion on the Fitness to Work Evaluation.

[83] Counsel for the employer has submitted that the employer's policy on leave of absence for medical reasons was not at issue in this grievance. The policy was not introduced as an exhibit, but it is clear from the evidence that it played a part in the employer's decision to terminate the grievor. Ms. Fitzsimons wrote to the grievor that "Treasury Board policy required that management must decide upon the termination date for such leave within a two-year period" (Exhibit E-3, tab 67). The letter also stated:

. . .

> *Following your failed trial of a return to work, this is to advise you that it is once again imperative that a termination date of your employment must be determined in the near future. . . .*

. . .

[84] Counsel for the employer has also suggested that there is nothing in the grievance that relates to the duty of accommodation and that the grievor has always denied that she suffered from a disability. The grievor has grieved her termination for incapacity based on discrimination. In addition, the grievor has raised the issue of accommodation in her human rights complaint. This is sufficient to raise the issue of accommodation before an adjudicator. The grievor did not testify, and there is no direct evidence that she does not consider herself to be disabled. The grievor's counsel wrote to the employer in May 2004 that his client was "adamant" that she was fit to return to work (Exhibit E-3, tab 75). However, the fact that the grievor was of the view that she was fit to return to work does not mean that she is denying that she is disabled. In one medical report (Exhibit E-4) it is noted that the grievor denied that she might be "suffering from an illness that is affecting her thinking and emotions". However, it is demonstrated by the medical evidence, the testimony of the employer's witnesses and the testimony of Dr. Lloyd-Jones that the grievor did suffer from a disability. In fact, if there were no evidence of a disabling condition, the employer would lose all of the foundation for its decision to terminate the grievor for incapacity.

[85] In *Sketchley*, the Federal Court of Appeal distinguished its reasoning in *Scheuneman*, and ruled that the employer policy on mandatory termination of employment after two years of leave for medical reasons was *prima facie* discriminatory:

. . .

> *[91] . . . the relative inflexibility of the two-year deadline imposed by the TB policy on leave for medical reasons, in comparison with the absence of such deadlines in the policy applicable to leave without pay for other reasons, is sufficient to establish a* prima facie *case of discrimination . . . .*

. . .

> *[95] . . . In this case, the impugned standard has a wider effect than suggested by the appellant: barring "exceptional" circumstances, it applies adversely to those employees on*

> *medical leave without pay who cannot, at the two year point, demonstrate the ability to return to work within the foreseeable future. As the Applications Judge rightly held, this distinction is* prima facie *discriminatory, in that the TB policy will foreseeably force the premature retirement of those disabled employees who, by reason of the nature of their disability, cannot at the two-year mark predict their date of return to work, yet at the same time, again by reason of the nature of their disability, cannot yet determine whether the disability has caused permanent incapacity for gainful employment on a regular basis. . . .*
>
> . . .
>
> [Emphasis added]

[86] As noted above, it is clear that the employer relied, in part, on the Treasury Board policy that was at issue in *Sketchley*. In any event, the employer took steps to terminate the grievor's employment on the basis that she could not "demonstrate the ability to return to work within the foreseeable future" (*Sketchley*).

[87] Once an employer policy has been determined to be *prima facie* discriminatory, the analysis then moves to whether the employer's policy is a *bona fide* occupational requirement (BFOR). The applicable three-stage test was set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 54 (commonly referred to as "*Meiorin*"). To qualify as a BFOR, the employer must show that the standard:

> (1) was adopted for a purpose rationally connected to the performance of the job;
>
> (2) was adopted in an honest and good-faith belief; and
>
> (3) is reasonably necessary to the accomplishment of the legitimate work-related purpose.

A standard is considered "reasonably necessary" if the employer can demonstrate that it is impossible to accommodate individual employees without imposing undue hardship on the employer.

[88] In *McGill University Health Centre*, the Supreme Court examined a case involving a long-term absence from the workplace. It concluded that there was no doubt that an

employer could establish *bona fide* measures to ensure the regular attendance of its employees. It was not argued in the case before me that the employer's standard was adopted in anything but an honest and good-faith belief by the employer. Accordingly, the first two parts of the test set out in *Meiorin* have been met.

[89] Whether the standard is "reasonably necessary" will depend on the circumstances of each case. In *McGill University Health Centre*, the Supreme Court held that there must be an individualized response to long-term absences from the workplace. In that case, an automatic termination clause in a collective agreement was regarded as a factor in determining reasonable accommodation, but was not determinative in and of itself:

. . .

> *22. The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made. . . . The obligation of the employer, the union and the employee is to come to a reasonable compromise. Reasonable accommodation is thus incompatible with the mechanical application of a general standard. . . .*
>
> . . .
>
> *25. To sum up, the conclusion to be drawn from the case law is that a termination of employment clause will be applicable only if it meets the requirements that apply with respect to reasonable accommodation, in particular the requirement that the measure be adapted to the individual circumstances of the specific case. . . .*

. . .

[90] In this case, the employer did not mechanically apply the standard. The period of time from the initial leave because of a disabling condition until the decision to terminate employment for incapacity was over four years.

[91] The grievor's representative argued that the employer failed to meet its duty of accommodation in reintegrating the grievor in the workplace. Counsel for the employer argued that the reintegration was not properly before me. The Supreme Court addressed that issue in *McGill University Health Centre* and concluded that "undue hardship

resulting from the employee's absence must be assessed globally starting from the beginning of the absence." As well, the court concluded that the arbitrator was correct in assessing the dynamics of a failed return to work as well as the state of the employee's health after the employer's decision to terminate the employment. The employer's decision to terminate the grievor's employment on the basis of incapacity was based on her first absence from the workplace, the events in the workplace following her return to work and the last Fitness to Work Evaluation. The employer made honest and well-intentioned efforts to facilitate the grievor's reintegration to work. The employer asked the grievor if there were individuals she could not work with and made efforts to find a space for her to work in that was out of the regular traffic flow. The employer also involved the bargaining agent in discussions about accommodation. Neither the grievor nor the bargaining agent identified any additional need for accommodation at the time. I can only conclude, based on the evidence presented, that the employer met its duty to accommodate in its efforts to reintegrate the grievor.

[92] In her submissions, counsel for the employer suggested that the grievor failed to assist in her accommodation by not seeking the therapy that was recommended to her. The evidence is contradictory on that point. While it is true that Dr. Conn recommended a course of therapy in 2002 (Exhibit E-4), the most recent medical report (and the one primarily relied on by Dr. Lloyd-Jones) specifically states that there is no available course of treatment for her disability (Exhibit E-2, tab K). On balance, the more recent medical report is the most reliable because it assesses her condition at the time closest to her return to work. Accordingly, the grievor was under no obligation to seek therapy or treatment that was not available.

[93] The grievor has been found not fit to work by medical professionals. More specifically, she has been found to have a disabling condition that would prevent her from returning to work in the foreseeable future. The grievor's representative argued that the diagnosis was only a "snapshot," since it stated that she was not fit to work "at this time." In its totality, the medical evidence does not support the view that the medical condition is only temporary. There was no evidence presented by the grievor to contradict the medical evidence. As succinctly stated in the *McGill University Health Centre* decision:

. . .

> *The duty to accommodate is neither absolute nor unlimited. The employee has a role to play in the attempt to arrive at a reasonable compromise. If in Ms. Brady's view the accommodation provided for in the collective agreement in the instant case was insufficient, and if she felt that she would be able to return to work within a reasonable period of time, she had to provide the arbitrator with evidence on the basis of which he could find in her favour.*

. . .

[94] The grievor's representative also argued that Dr. Lloyd-Jones should have examined each and every duty of the job description to determine if the grievor was fit to work. In assessing fitness to work, it is appropriate to look at the whole of the job, including social interaction, in determining both fitness to work and any necessary accommodations. In this case, the evaluation could not identify any accommodations that would have allowed the grievor to continue to work in her position.

[95] The duty of accommodation does not require that employers keep employees who are permanently incapable of performing their jobs on their workforce indefinitely (*Desormeaux v. Ottawa (City)*, 2005 FCA 311, at para 21). The grievor has provided no evidence to contradict the conclusion that she is incapable of performing her duties for the "foreseeable future" (*McCormick*) nor any evidence that she is able to return to work "within a reasonable time" (*McGill University Health Centre*). In my view, "foreseeable future" and "reasonable period of time" amount to the same standard. Accordingly, I conclude that the employer has reached the point of undue hardship and the termination of the grievor's employment for incapacity was justified in the circumstances.

[96] The grievor has also grieved that the employer breached the No Discrimination clause of her collective agreement. The applicable portion of article 19 of her collective agreement provides that there shall be no "disciplinary action exercised" by reason of mental disability. The grievor was both issued a written reprimand and asked to leave the workplace pending a Fitness to Work Evaluation on the same day. I have already concluded that the termination of her employment was not disciplinary. Although the letter of reprimand referred to different events in the workplace than the letter requiring a fitness to work evaluation, the letter to Health Canada referred to all of the events, so it is clear that the employer viewed all of her behaviour in the workplace as

related. Given what the employer knew about her behaviour, and the nature of that behaviour, it is difficult to understand how the employer could regard it as culpable (behaviour subject to discipline).

[97] The employer's opinion that progressive discipline would apply if the grievor had been found fit to work is not supported by the facts or the law. First, the opinion is hypothetical, since the grievor was found not fit to return to work. Second, the law is not so black and white. An employee can be fit to work and still not be disciplined for non-culpable behaviour. The important consideration is whether the behaviour is non-culpable, not whether the employee is fit for work. In this case, the grievor's behaviour was clearly non-culpable, and she should not have been disciplined for it.

[98] Counsel for the employer also suggested that an employee could be disciplined for such behaviour based on a "hybrid" approach, as has been done in cases involving employees with addictions. The approach has been described as "hybrid" because there are both disciplinary and non-disciplinary responses to the behaviour of an employee on the basis that there are culpable and non-culpable elements of the behaviour. Counsel for the employer referred me to the adjudicator's decision in *Campbell* where an employee who received progressive discipline was also terminated for incapacity. However, the issue of progressive discipline was not addressed by the adjudicator, and the grievance did not refer to the No Discrimination clause in the collective agreement. Counsel provided no case law to support a hybrid approach to mental disability cases where addictions are not present, and I am not convinced that it is appropriate to apply that approach in such cases. The British Columbia Court of Appeal has articulated the rationale behind a "hybrid" approach: "Addiction, as a treatable illness, requires an employee to take some responsibility for his rehabilitation program" (*Health Employees Association of British Columbia (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union*, [2006] BCCA 57. In the grievor's case, the most recent medical evidence was that her disability was not treatable. So, even if it is appropriate to apply a "hybrid" approach to mental disabilities without addictions, it is clearly not appropriate here, where a medical professional has concluded that there is no treatment for her condition.

[99] There was no evidence that the letter of discipline had ever been rescinded. As far as the grievor is concerned, it still exists. Even if it is no longer on her record

because of a "sunset clause" in her collective agreement, it is still a disciplinary letter that is contrary to the collective agreement.

[100] Accordingly, I will issue a declaration that the employer breached article 19 (No Discrimination) of the collective agreement and will also order the employer to rescind and destroy the letter of reprimand of October 9, 2003.

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

(The Order appears on the next page)

V. Order

[102] The grievance is allowed, in part.

[103] The termination of employment under the *Financial Administration Act*, paragraph 11(2)(*g*) is maintained.

[104] The employer has breached article 19 (No Discrimination) of the collective agreement.

[105] The disciplinary letter of reprimand dated October 9, 2003, is rescinded and shall be destroyed by the employer.

April 22, 2008.

Ian R. Mackenzie,
adjudicator