Date: 20091118

File: 566-02-1218

Citation: 2009 PSLRB 153

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

FERN A. JENSEN

Grievor

and

DEPUTY HEAD
(Department of the Environment)

Respondent

Indexed as
Jensen v. Deputy Head (Department of the Environment)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: John Mooney, adjudicator

For the Grievor: Jeffrey Ryder, Professional Institute of the Public Service of Canada

For the Respondent: Bruce Hughson, counsel

Heard at Edmonton, Alberta,
May 6 to 8, 2009.
Written submissions filed June 2, 12 and 24, 2009.

I. Individual grievance referred to adjudication

[1] The grievor, Fern A. Jensen, was a toxic substances evaluator classified at the PC-02 group and level at the Department of the Environment ("EC" or "the respondent") when her employment was terminated for reasons other than breach of discipline or misconduct under paragraph 12(1)(*e*) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*). Specifically, her employment was terminated because she failed to report for work, as indicated in the letter of termination of employment, which reads in part as follows (Exhibit E-25):

. . .

> *This letter is following up on the letter sent to you by Ms. Cheryl Baraniecki, dated August 4, 2006, in which she advised you to report to work at the Michael Greenwood Centre, in the position of an Environmental Assessment Coordinator, on August 14, 2006. Ms. Baraniecki's letter to you also clearly advised of the consequences of not reporting to work as directed.*
>
> *As you failed to report for work or provide any rationale as to why you could not report for duty, Environment Canada finds it necessary to terminate your employment effective today, August 15, 2006. This action is taken under the authority of paragraph 12(1)(e) of the Financial Administration Act.*

. . .

[2] The grievor grieved her termination on September 18, 2006 and asked to be reinstated as of August 15, 2006 and to be reimbursed all lost pay and benefits.

[3] The grievor presented her grievance up to and including the final level of the grievance process. Since her grievance was not resolved to her satisfaction, she referred it to adjudication under subparagraph 209(1)(*c*)(i) of the *Public Service Labour Relations Act*, S.C. 2003, c.22 (*PSLRA*), on April 26, 2007.

[4] The grievor gave notice to the Canadian Human Rights Commission ("the Commission") that she intended to raise an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*). The Commission informed the Public Service Labour Relations Board that it did not intend to make submissions in this grievance.

[5] The grievor is covered by the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada (PIPSC) for the Applied Science and Patent Examination Group ("the collective agreement") (expiry date: September 30, 2007, Exhibit G-1).

II. Summary of the evidence

[6] The respondent called four witnesses. The grievor testified and called two witnesses.

[7] The grievor alleged that her supervisor had harassed her. Since that person was not called as a witness and did not have the opportunity to mount a defence, I have omitted his or her name in this decision. I will simply refer to that person as the grievor's supervisor or former supervisor.

A. Testimony of Dawn White

[8] Dawn White testified for the respondent. She joined the federal government in 1997. From 1997 to 1999, she worked in human resources in the Department of Western Economic Diversification. From 1999 to 2004, she worked for the Royal Canadian Mounted Police. She joined EC in 2004 as a manager of human resources. She was working in that position when the grievance was filed. She held that position until she left the federal public service to work for the Government of Alberta.

[9] Ms. White's testimony consisted mainly of explaining the extensive documentation that led to the termination of the grievor's employment. On July 8, 2003, Rodney Yaremchuk, Manager, Human Resources, EC, wrote to Dr. Donald of Health Canada (HC) to ask HC to perform a fitness to work evaluation because the grievor was frequently absent from work (Exhibit E-1A). The grievor had been absent in the previous month but had returned to work on July 7, 2003. During the grievor's absence, Mr. Yaremchuk had spoken to her, and he became convinced that she was not well. In a follow-up letter on July 15, 2003, Mr. Yaremchuk asked HC whether the grievor was able to return to work and, if so, whether she had any medical restrictions that needed accommodation (Exhibit E-1B). Mr. Yaremchuk also asked Dr. Donald to make recommendations to the grievor and to her treating physician on how to minimize her sick leave.

[10] Dr. Jim I. Cheng, Occupational Health Medical Officer, answered Mr. Yaremchuk's letter on HC's behalf (Exhibit E-1C). In his letter of July 31, 2003, Dr. Cheng stated that he had examined the grievor on July 24 of that year. The grievor had returned to work at that time. She had no medical restrictions. Dr. Cheng added that, in the short term, her absenteeism would be slightly higher than the norm, but he hoped that her sick leaves would be within the norm in time. On June 15, 2004, the grievor took sick leave without pay and some time later started receiving disability insurance benefits.

[11] On November 24, 2004, the grievor's physician, Dr. Daniel Ryan, sent the respondent a note in which he stated that the grievor was not ready to return to work (Exhibit E-2A). Dr. Ryan did not anticipate the grievor returning to work before January 2005. He added that the grievor ". . . may not be able to return to her previous position due to an unhealthy work environment."

[12] Ms. White stated that she was not aware of the unhealthy work environment referred to by Dr. Ryan. The grievor never made a complaint about it.

[13] Ms. White reviewed a memo that the grievor's supervisor wrote on December 24, 2004 (Exhibit E-2B). In that memo, the grievor's supervisor lists the grievor's frequent absences, often unexplained. Her absences had started several years before 2002 and had continued throughout her one-year assignment to the Alberta Division of EC as an environmental assessment coordinator in May 2003.

[14] On December 29, 2004, Ms. White wrote to the grievor to ask her to undergo a second fitness to work evaluation (Exhibit E-2C). She included consent forms that she asked the grievor to sign and return to her. That same day, Ms. White wrote to HC to ask for a fitness to work evaluation (Exhibit E-2D). Ms. White asked HC when the grievor, who had been absent form work since June 2004, could return to work and what work restrictions, if any, would be needed to accommodate her.

[15] Ms. White stated that Terri S. Mann, the grievor's counsel, sent the respondent a letter on January 31, 2005 to inform the respondent that she was representing the grievor (Exhibit E-3D). Ms. Mann's letter stated that the grievor wished to make a harassment complaint against her supervisor. Ms. Mann also asked for the "records" of a harassment complaint that the grievor had made about her supervisor's behaviour.

Ms. White stated that that was the first time that she had heard of the alleged harassment by the grievor's supervisor.

[16] Ms. White added that the grievor never made a harassment complaint or filed a grievance against her supervisor. Ms. White discussed the matter with the grievor's supervisor, who stated no awareness of the grievor's concerns.

[17] Ms. White wrote to Ms. Mann on February 14, 2005 to inform her that there were no records of any harassment complaint made by the grievor (Exhibit E-3G). Ms. White included with her letter EC's harassment policy and an information document on the grievance procedure. Ms. White also informed Ms. Mann that the respondent needed written documentation from the grievor's physician indicating her expected date of return to work since the last note from her physician had stated that the grievor would return to work in January 2005. Ms. White also reminded Ms. Mann that the grievor had not returned the consent forms that she had sent the grievor for a fitness to work evaluation.

[18] Ms. White stated that the grievor never asked for sick leave or explained the reason for her absence. The only document that Ms. White received was Dr. Ryan's note of November 24, 2004 (Exhibit E-2A).

[19] Ms. White wrote to Ms. Mann again on March 18, 2005 to remind her that the grievor's absence had not been authorized (Exhibit E-4B). The grievor did not send the respondent any document to substantiate her absence, other than Dr. Ryan's note of November 24, 2004 (Exhibit E-2A), and did not return the consent forms for the fitness to work evaluation. Ms. White asked the grievor to forward the respondent a medical note or a leave request indicating the reasons for her unauthorized absence. Ms. White's letter also stated that the grievor was expected to return to work by March 30, 2005 but that the grievor would have to undergo a fitness to work evaluation before returning to work. The letter also stated that failure to comply with management's requirement to substantiate the grievor's absence from the workplace by March 30, 2005 would likely result in discipline, up to and including termination. Ms. White also informed Ms. Mann that the respondent did not have access to the medical information that the grievor provided to the Sun Life Assurance Company of Canada ("Sun Life") to obtain disability insurance benefits.

[20] Ms. White met with Ms. Mann on March 21 and 22, 2005 to discuss the grievor's situation. Ms. White made a written account of those two meetings (Exhibit E-4C). Ms. White wanted to know the grievor's concerns about her supervisor, to determine the action to take. Ms. Mann stated that the grievor was the victim of emotional harassment by her supervisor but did not provide any details. Ms. White reminded Ms. Mann that the grievor needed to substantiate her absence since January 2005.

[21] The grievor finally underwent a fitness to work evaluation on March 24, 2005, as indicated in Dr. Cheng's letter of that date (Exhibit E-5A).

[22] Ms. White wrote to the grievor on March 16, 2005 to obtain more information on the grievor's concerns about her supervisor (Exhibit E-6A). Ms. White asked the grievor to provide the respondent with specific allegations about the alleged harassment by March 30, 2005. Failing to do so would compromise the respondent's ability to accommodate her on her return to work. The grievor did not respond to Ms. White's letter.

[23] On April 14, 2005, Ms. White wrote to HC to obtain clarification on Dr. Cheng's letter (Exhibit E-5B). Dr. Cheng answered on April 28, 2005, recommending an alternate work site because the grievor believed that her current work environment was harmful to her health (Exhibit E-5C). Dr. Cheng added that there was no medical reason that prevented the respondent from communicating directly with the grievor.

[24] Sun Life had agreed to pay the grievor benefits until June 30, 2005 (Exhibit E-9A).

[25] Ms. White wrote to the grievor on July 15, 2005, to ask her to provide medical information to substantiate her absence by July 25, 2005 (Exhibit E-9B). Ms. White added that, if the grievor did not comply with the request, she would be considered on unauthorized leave, which could result in corrective action up to and including termination.

[26] On July 15, 2005, Ms. White wrote to HC to ask when the grievor could return to work, whether there were any medical restrictions on her work and how the respondent could accommodate the grievor for a successful return to the workplace (Exhibit E-9C).

[27] On July 20, 2005, the grievor changed representatives. She chose to be represented by the PIPSC, as indicated in her letter of that date to Ms. Mann's legal firm (Exhibit E-10A).

[28] On July 21, 2005, Ms. White wrote to the grievor to inform her of the two ways to deal with a harassment situation. The grievor could file a harassment grievance or make a complaint (Exhibit E-8B). She attached relevant documentation.

[29] On July 26, 2005, the grievor forwarded to Ms. White a medical note from Dr. Ryan in which he stated that the grievor was not able to return to her previous job due to her medical condition (Exhibit E-10C).

[30] On July 28, 2005, Ms. White met with the grievor's new representative, James Bart, Regional Representative - Negotiator, PIPSC. They discussed the need to resolve the harassment issue and the possibility of temporarily assigning the grievor to another position.

[31] Ms. White testified that the consent forms for the grievor's fitness to work evaluation had expired and that new ones were required. Therefore, Ms. White wrote to the grievor on August 10, 2005 to ask her to sign new consent forms (Exhibit E-11A). The grievor forwarded the consent forms to HC on August 16, 2005 (Exhibit E-11B).

[32] Dr. Cheng examined the grievor on September 29, 2005, as indicated in his letter to Ms. White of that date (Exhibit E-12).

[33] On December 7, 2005, the grievor sent the respondent a medical note from Dr. Ryan indicating that her condition was improving but that she was still not well enough to return to her previous employment position (Exhibit E-13D).

[34] On December 8, 2005, Ms. White again wrote to the grievor to invite her to meet with her or with Cheryl Baraniecki, who at that time was the manager of EC's Toxic Substances Division, by December 16, 2005, to discuss the grievor's return to work and her unauthorized leave (Exhibit E-13C).

[35] On January 17, 2006, Ms. White received a call from Lara M. Levesque, the grievor's new counsel, in which she asked Ms. White and Ms. Baraniecki to meet with her and the grievor. They agreed to meet in February 2006.

[36] The respondent received a note from Dr. Ryan on February 15, 2006, in which he stated that the grievor had recovered but that she ". . . had been instructed by her medical professionals not to return to her previous position as it is not considered healthy or safe for her" (Exhibit E-14B).

[37] Ms. White stated that she and Ms. Baraniecki met with the grievor and her counsel, Ms. Levesque, on February 22, 2006. Ms. Baraniecki's email to the grievor of that date summarizes that meeting (Exhibit E-15B). Ms. Baraniecki told the grievor that the respondent was prepared to offer her a position at the same group and level in the Twin Atria building in Edmonton. That was the same building in which the grievor had previously worked, but it was a new position in a different work unit in the Environmental Assessment area, and she would report to a new supervisor, Dale Kirkland, Environmental Assessment Coordinator. Ms. Baraniecki also told the grievor that it was ready to search the public service's employment opportunities site for another position. They also discussed the possibility of priority entitlement employment. The grievor indicated at that meeting that she would like a position in a different city. A city in Ontario or Saskatchewan would have been fine with her.

[38] To clarify the grievor's required accommodation, Ms. White wrote to Dr. Cheng again on March 22, 2006, to ask him whether offering the grievor a different position in a different work unit with a different supervisor would meet her accommodation needs (Exhibit E-17A). Ms. White also asked whether it was necessary to offer the grievor a position in a different geographic location or a different city.

[39] On March 23, 2006, Dr. Cheng responded to Ms. White that offering the grievor a different position in a different unit reporting to a different supervisor would meet the recommendation (Exhibit E-17B). Dr. Cheng added that it was not necessary that the grievor work in a different city or geographical location.

[40] Ms. White stated that, on March 30, 2006, Ms. Levesque wrote to Ms. Baraniecki to inform her that the grievor could not work in the same building as her supervisor (Exhibit E-18A). Ms. Levesque reiterated the grievor's wish to work in a different city. Ms. Levesque also informed Ms. Baraniecki that the grievor would see her physician, Dr. Ryan, on April 3, 2006.

[41] Ms. White stated that the respondent had looked for vacancies in EC across Canada but that there were no suitable positions for the grievor other than the one it had offered her.

[42] Ms. Levesque forwarded the respondent a letter dated April 18, 2006 in which Dr. Ryan stated that that he could not support the grievor ". . . returning to the same geographical location . . ." because of the proximity of her previous supervisor (Exhibit E-20B).

[43] Given Dr. Ryan's letter of April 18, 2006, Ms. White wrote again to HC for its opinion on what was needed to accommodate the grievor (Exhibits E-19A and B). Dr. Cheng answered on June 23, 2006 that the proximity of the previous work unit of the grievor had to be considered in accommodating her needs (Exhibit E-20A). The grievor was not to work in a location where she could run into her previous supervisor. Employment in a large building would ensure that that would not happen, but employment in a small building would be a problem. Dr. Cheng added that the grievor's request to work in a different city was excessive.

[44] Ms. White stated that, on July 5, 2006, Shauna Sigurdson, who at that time was the regional director, Environmental Protection Operations, EC (Ms. Baraniecki's supervisor), wrote to the grievor to offer her a deployment to a different position at the same group and level in a different work unit in the Michael J. Greenwood Centre, a building five blocks from her previous office (Exhibit E-21A). The grievor would report to a different supervisor, Mr. Kirkland, who worked in the Twin Atria building. The grievor was to start work on July 18, 2006. Ms. Sigurdson stated in that letter that, if the grievor did not respond by July 14, 2006, the respondent would conclude that the grievor accepted the job offer and that she would report for work on the fixed date. The respondent received confirmation from Canada Post that the grievor received the letter.

[45] Ms. White stated that Mr. Kirkland had no previous history with the grievor and that he was excited to have the opportunity to work with her.

[46] Ms. White testified that, in preparation for the grievor's return to work, the respondent had moved the grievor's personal effects from her previous office to her new one and had set up a new computer. The expectation was that the grievor would present herself on the date fixed for her return.

[47] The grievor did not report for work on July 18, 2006 and did not inform the respondent that she would not show up for work.

[48] That same day, Ms. Sigurdson wrote to the grievor, and setting another deadline for reporting for work (Exhibit E-22A). Ms. Sigurdson told the grievor that, if she did not contact the respondent by July 25, 2006, it would commence action to terminate her employment.

[49] Ms. White stated that she received the second page of the offer of employment to the grievor on July 19, 2006 (Exhibit E-22B). The grievor had indicated that she rejected the offer.

[50] The respondent gave the grievor a third deadline to report for work. On August 4, 2006, Ms. Baraniecki wrote to the grievor to inform her that she had to report for work on August 14, 2006 at the Michael J. Greenwood Centre (Exhibit E-24). If she did not report for work, the respondent would commence proceedings to terminate her employment effective August 15, 2006. The respondent received confirmation from Canada Post that the grievor received the letter.

[51] Ms. White testified that the grievor did not report for work on August 14, 2006. Neither the grievor nor her representative communicated with the respondent to indicate that she would not show up.

[52] In cross-examination, Ms. White stated that she did not recall seeing Dr. Ryan's note of January 25, 2005 in which he stated that the grievor was anxious about returning to her previous position (Exhibit G-2) or his note of March 27, 2005, in which he stated that the grievor was being treated by a psychologist and that her return to work was predicated on the conditions of that return (Exhibit G-3). Ms. White did not see Dr. Ryan's note of April 25, 2005 in which he stated that the grievor was not ready to return to work under the then-current conditions (Exhibit G-4).

[53] Ms. White stated that the first time that she heard that the grievor wanted to work in a different city was at the February 22, 2006 meeting.

[54] Ms. White suggested that the grievor seek assistance from the Employment Assistance Program for her concerns with her supervisor.

B. Testimony of Ms. Sigurdson

[55] Ms. Sigurdson testified for the employer. She is currently the regional director of the Canadian Environmental Agency, an agency of the Government of Alberta. She began her involvement in the grievor's situation in April 2006. At that time, she was the regional director, Environmental Protection Operations, EC. She was Ms. White's supervisor.

[56] Ms. Sigurdson stated that Cécile Cléroux, Assistant Deputy Minister, EC, sent the grievor a letter on August 15, 2006 to inform her that her employment was terminated because she failed to report to work or failed to provide a rationale as to why she did not report for duty (Exhibit E-25).

C. Testimony of Dr. Cheng

[57] Dr. Cheng testified for the respondent. He holds several certifications and has occupied several positions in occupational health and safety, as indicated in his curriculum vitae (Exhibit E-26). For example, he was the director of the Occupational Health Program in the Faculty of Medicine and Dentistry of the University of Alberta in 2000.

[58] The respondent asked that I qualify Dr. Cheng as an expert witness in occupational health and safety medicine, including the preparation and provision of return to work assessments. The grievor did not object to that request. Given Dr. Cheng's education and experience in occupational health and safety medicine, as set out in his curriculum vitae, I accepted the respondent's request.

[59] Dr. Cheng explained that he performs medical work on a contract basis for HC.

[60] When Dr. Cheng examined the grievor on July 24, 2003, she had already returned to work in the previous three weeks. His prognosis was guarded. The grievor was working on personal issues at that time, including substance abuse. Dr. Cheng did not mention those personal issues in his letter of July 31, 2003 to the respondent (Exhibit E-1C) since it was personal and the respondent had not asked for it.

[61] Dr. Cheng examined the grievor a second time at the respondent's request on March 24, 2005. In his view, the grievor was not ready to return to work at that time, but there was hope for the future. The grievor believed that her supervisor was

harassing her emotionally. The grievor did not provide any details on that perceived harassment. Therefore, Dr. Cheng recommended that she work in an alternate unit under a different supervisor when she was ready to return to work. At that time, he did not specify whether the work unit should be in the same building as the supervisor's unit.

[62] Dr. Cheng examined the grievor a third time on September 29, 2005, at the respondent's request for another fitness to work evaluation. In his report (Exhibit E-11D), Dr. Cheng wrote that the grievor had told him that she had made a harassment complaint. Dr. Cheng stated that he recommended that the grievor work at a different site or a different unit. He did not specify whether the different unit should be in a different building.

[63] Dr. Cheng stated that he wrote the letter of March 23, 2006 (Exhibit E-17B) because the respondent wanted to know whether it was necessary for the grievor to work in a different city or geographical location. In Dr. Cheng's view, it was not necessary. The grievor's problems involved only her supervisor.

[64] The respondent informed Dr. Cheng that Dr. Ryan had recommended that the grievor work in a different geographical location (Exhibit E-20B). The respondent wanted to know if that was necessary. Dr. Cheng tried to set up an examination with the grievor on June 22, 2006, but she declined the invitation. Dr. Cheng reviewed the file, including Dr. Ryan's note of April 18, 2006, and answered on June 23, 2006 (Exhibit E-20A). In that letter, Dr. Cheng recommended that the grievor not work in the same building as her former supervisor if it was small. There would be no problem if the building was large. There would be no problem if the grievor and her supervisor worked in buildings that were not adjacent and did not have common elements, such as a parking lot. Buildings that were five blocks apart would meet his recommendation. There was no need to transfer the grievor to a position in a different city. The grievor did not provide him with any reason to believe that Edmonton constituted a toxic environment for her.

[65] Dr. Cheng stated that his recommendations on accommodations for the grievor became more specific as information about her and about the new position became more specific.

[66] In cross-examination, Dr. Cheng stated that the grievor was reasonably cooperative during his examinations.

D. Testimony of Ms. Baraniecki

[67] Ms. Baraniecki testified for the respondent. Starting in April 2006, she had been the manager of the Environmental Assessment Programs at EC. At the time of the grievance, she was the manager of the Toxic Substances Division in the same department. She has known the grievor since she joined EC in October 2000.

[68] Ms. Baraniecki met with the grievor on February 22, 2006. She took notes (Exhibit E-27). Ms. White and the grievor's counsel, Ms. Levesque, were also present. The purpose of the meeting was to gather information on the grievor's situation. The respondent also wanted the grievor to regularize her unauthorized leave status. The grievor stated that her supervisor had harassed her, but she did not provide any details. She said that she was not pursuing the harassment complaint.

[69] As a follow-up to the meeting, Ms. Baraniecki sent the grievor an email on February 24, 2006, asking her to provide the respondent with a leave request to regularize her absence status (Exhibit E-15D). The grievor did not respond to that request. Ms. Baraniecki sent the grievor a reminder on March 2, 2006 (Exhibit E-15A), but the grievor did not respond to that reminder either.

[70] On March 7, 2006, Ms. Baraniecki sent the grievor an email to inform her that there was a vacancy in a position of her group and level in her area of expertise in the same building in which she used to work, the Twin Atria building. The position was located on the same floor as the office of the grievor's supervisor, but the grievor would be reporting to a different supervisor, Mr. Kirkland. Ms. Baraniecki also asked the grievor to provide a leave request to regularize her leave status. The grievor did not respond to that email.

[71] Ms. Baraniecki did receive a response from Ms. Levesque on March 17, 2006 (Exhibit E-15C). Ms. Levesque asked that the grievor be transferred to a different work site. Ms. Baraniecki responded to Ms. Levesque on March 24, 2006 that the respondent was ready to offer the grievor a different position in a different work unit under a different supervisor, Mr. Kirkland (Exhibit E-16). The latter reported to Ms. Baraniecki.

Ms. Baraniecki asked that the grievor indicate by April 3, 2006 whether she accepted the offer.

[72] Ms. Baraniecki wrote to Ms. Levesque on April 18, 2006, informing her that the grievor's request to be transferred to a different city did not conform to the medical information in the respondent's possession (Exhibit E-18B). Dr. Cheng had stated that the grievor's medical condition did not require that she be transferred to a different city. Ms. Baraniecki asked Ms. Levesque to provide her with any new medical information by April 26, 2006.

[73] On April 27, 2006, Ms. Baraniecki emailed Ms. Levesque asking her to respond to the respondent's offer of employment by May 4, 2006 and to forward her any new medical information (Exhibit E-28).

[74] On May 1, 2006, the respondent received Dr. Ryan's note, recommending that the grievor not return to work in the same geographical location (Exhibit E-29C), and Ms. Levesque's letter of April 28, 2006 (Exhibit E-29B). Ms. Levesque stated in her letter that the respondent failed to accommodate the grievor and gave the respondent until May 15, 2006 to offer her proper accommodation.

[75] Ms. Baraniecki stated that the respondent decided to relocate the grievor's position to the Michael J. Greenwood Centre. The grievor would report to Mr. Kirkland, whose office was in the Twin Atria building. Ms. Baraniecki reviewed the office space and found that it was appropriate.

[76] Ms. Baraniecki stated that the grievor received the letter of offer to the position in the Michael J. Greenwood Centre (Exhibit E-21A). It was sent by registered mail, and Ms. Baraniecki verified that the grievor had received the offer. The grievor did not report to work on July 18, 2006, as requested in the letter of offer of employment (Exhibit E-21A).

[77] Ms. Baraniecki stated that she had always made herself available to the grievor.

E. <u>Testimony of Dr. Ryan</u>

[78] Dr. Ryan testified for the grievor. Dr. Ryan is a physician certified by the College of Family Physicians of Canada, as indicated in his curriculum vitae (Exhibit G-7). His special interest in addiction medicine was recognized by the College of Physicians and

Surgeons of Alberta. He is a member of the Canadian Society of Addiction Medicine, the American Society of Addiction Medicine and the International Society of Addiction Medicine. He practices general family medicine and substance abuse medicine.

[79] The grievor's representative asked that I qualify Dr. Ryan as an expert witness in family medicine with a special interest in substance addiction. The respondent did not object to that request. I accepted the request given Dr. Ryan's education and experience in those fields of medicine.

[80] Dr. Ryan stated that, from June 2004 to the end of 2008, he examined the grievor 30 times for alcohol abuse, anxiety and work-related issues. He started treating the grievor on June 15, 2004 for alcohol abuse. The grievor had told him that she had personal problems and that she suffered from anxiety. She was following a 12-step recovery program, and her family physician had prescribed medication. The grievor also told Dr. Ryan that she had issues relating to her work.

[81] Dr. Ryan stated that he completed the Attending Physician's Statement in the grievor's Claim for Disability Insurance on July 29, 2004 (Exhibit G-8). It shows a diagnosis of anxiety and alcohol dependence. Dr. Ryan indicated in that claim that the grievor was very anxious about returning to work and would have to consider a change of workplace.

[82] Dr. Ryan examined the grievor again on September 3, 2004. The grievor was not ready to return to work at that time.

[83] On November 10, 2004, Dr. Ryan referred the grievor to a psychologist, as indicated in his note of that date (Exhibit G-12).

[84] Dr. Ryan's next meeting with the grievor was on November 12, 2004. The grievor had solidly recovered from alcohol abuse, but she still felt anxious about returning to work. She was seeing a psychologist at that time for her anxiety problems. Dr. Ryan believed that returning to work would threaten her recovery from alcohol abuse. After that, Dr. Ryan saw the grievor once every three to four weeks. He told the grievor not to return to work before the end of 2004.

[85] Dr. Ryan stated that he wrote on January 25, 2005 that the grievor should not return to her former position because it could have had a negative effect on her recovery (Exhibit G-2).

[86] In March 2005, the grievor's recovery from substance abuse was stable, but she still had difficulties with the prospect of returning to work.

[87] Dr. Ryan stated that he wrote on March 27, 2005 that the grievor's return to work was predicated on certain conditions (Exhibit G-3). That note was sent to Sun Life.

[88] In April 2005, the grievor's condition had not changed. Dr. Ryan believed that she should not return to her previous position, given her overall mental health. On April 25, 2005, he wrote that the grievor was not ready to return to work (Exhibit G-4).

[89] Dr. Ryan wrote his note of April 18, 2006 (Exhibit E-20B) at the request of the grievor's legal counsel. Dr. Ryan did not believe that the grievor should return to work on the same floor as her former supervisor, even if she reported to a different supervisor.

[90] Dr. Ryan testified that, when the grievor lost her medical insurance benefits, she decided to return to university.

[91] The grievor told Dr. Ryan that she had been verbally abused for years by her supervisor. She did not provide details of that abuse and did not name her supervisor. The grievor told Dr. Ryan that she was discussing making a complaint against her supervisor with her bargaining agent. She also consulted several lawyers about that issue.

[92] Dr. Ryan testified that he saw Dr. Cheng's letters of September 29, 2005 (Exhibit E-11D) and of March 23, 2006 (Exhibit E-17B).

[93] Dr. Ryan did not send any correspondence directly to EC except for his letter of April 18, 2006 (Exhibit E-20B).

[94] Dr. Ryan testified that the first time he specifically recommended that the grievor and her former supervisor not work in the same unit was on April 18, 2006 (Exhibit E-20B).

[95] Dr. Ryan stated that a different work site could be located in the same building as the work site of the grievor's former supervisor as long as both of them did not work on the same floor and had no contact with each other.

[96] Dr. Ryan stated that he agreed with Dr. Cheng that the size of the building has an effect on whether the offer to the grievor was reasonable given her medical condition. He also agreed with Dr. Cheng that the grievor did not have to be transferred to a position in another city.

[97] Dr. Ryan testified that he did not recall whether the grievor had informed him of the job offer to the Michael J. Greenwood Centre. That job offer would have met his recommendation.

[98] The grievor did not ask him to write directly to the respondent to describe her condition.

F. Testimony of Dr. Deborah Deeter

[99] Dr. Deborah Deeter testified for the grievor. She is a registered psychologist in Alberta, as indicated in her curriculum vitae (Exhibit G-13). She worked as a counselling supervisor and addictions counsellor for the Alberta Alcohol and Drug Abuse Commission from 2000 to 2003.

[100] The grievor asked that I qualify Dr. Deeter as an expert witness in psychology. The respondent did not object. Given that Dr. Deeter is a registered psychologist, I granted the grievor's request.

[101] Dr. Deeter testified that she met with the grievor for the first time on September 29, 2004. The grievor sought her help for alcohol issues, workplace issues and a personal matter. Dr. Deeter's diagnosis at that time was that the grievor was in early remission of alcohol dependency and that she had an adjustment disorder with anxiety and depressed mood.

[102] Dr. Deeter had 40 sessions with the grievor from September 29, 2004 to November 15, 2008.

[103] In September 2005, the grievor was in full remission of her alcohol problems but still had an adjustment disorder. Usually, an adjustment disorder gets resolved within six months, but something prevented that from happening.

[104] Dr. Deeter gave the grievor her diagnosis in writing on September 21, 2005 (Exhibit G-14). Dr. Deeter indicated that the grievor's adjustment disorder was related

to an unresolved issue with her workplace environment. Dr. Deeter stated at the hearing that the grievor's symptoms were clearly related to her workplace environment.

[105] In cross-examination, Dr. Deeter stated that the grievor showed signs and symptoms of a person who had been harassed.

[106] Dr. Deeter stated that the grievor had told her about the job offer in the Michael J. Greenwood Centre, but the grievor was still frightened at that time because the respondent never acknowledged the harassment situation.

[107] Dr. Deeter stated that the grievor was ready to go back to work with proper accommodation.

[108] When asked by the respondent whether working in a different building would have resolved the harassment situation, Dr. Deeter answered that the situation might have required more subtle accommodations. In a harassment situation, feeling supported by management is an important factor for medical recovery.

[109] Dr. Deeter stated that the pressure from the employer to make a harassment complaint compounded the grievor's problems.

G. <u>Testimony of the grievor</u>

[110] The grievor began working for EC in 1988. She was a senior contaminants biologist in Yellowknife, Northwest Territories, from 1992 to 1995 and a northern environmental assessment coordinator in the same city in 1995 and 1996. She worked as a toxic substances evaluator in Edmonton beginning in 1996, as indicated in her curriculum vitae (Exhibit G-15).

[111] The grievor decided to take a position in Edmonton in 1996 because her father was ill and because she thought that it was a good career move. When she started working, her supervisor had just taken a supervisory job for the first time. Difficulties with her supervisor started soon after her arrival. Her supervisor would insult her which she found difficult. It jeopardized her self-esteem, self-confidence and sense of security. It also affected her ability to work. She did not complain at first. She wanted to wait to see if things would improve. Since she was not in a position of power, she did not want to antagonize her supervisor.

[112] The grievor started to complain in 2003 when she described her situation to Mr. MacNeil of Human Resources Services. He minimized her situation.

[113] Later that year, the manager of the Toxic Substances Division at that time, Gordon Mathews, approached her to discuss the situation. He told the grievor that "different people have different tolerance levels" and that "we have ways of getting rid of trouble makers [such] as yourself." She was not sure at the time if he was joking, but she did not complain about the situation after that discussion.

[114] The grievor stated that there were several reasons for her absences from work. She had several flus and colds and started drinking alcohol to cope with her situation at work. Alcohol gave her relief from her workplace problems.

[115] The grievor stated that she was disciplined for not reporting her absences according to the agreed-on protocol.

[116] In June 2004, the grievor's physician told her to take time off. She gave a medical note to her supervisor to that effect, who threw it back at her and stated that a complete diagnosis of her medical condition was required.

[117] The grievor described a disciplinary meeting that she and her shop steward attended on June 8, 2004 with her supervisor and Ms. White about her unreported absences. Her supervisor told her that her working privileges would be withdrawn, that she could no longer go on business trips and that she was not capable of working. Her supervisor ordered her to leave the workplace.

[118] The grievor consulted an Alcohol Anonymous counsellor in the summer of 2004. She completed the three-phase treatment program, as indicated in the letters of the Alberta Alcohol and Drug Abuse Commission (Exhibits G-17 and G-18).

[119] In September 2004, Sun Life accepted her disability claim. There was, however, a 12-to 14-week waiting period before she could receive any benefits.

[120] The grievor testified that Dr. Ryan gave her several medical notes. One indicated that she was not able to work until September 1, 2004 (Exhibit G-9). The grievor believed that the bargaining agent gave that note to the respondent. She also sent Dr. Ryan's note of September 3, 2004 to Lisa Shields, a PIPSC representative. That note indicated that the grievor could not return to work for another four to eight weeks

(Exhibit G-10). She sent the respondent Dr. Ryan's note of November 24, 2004 in which he stated that the he had serious concerns about the grievor returning to her previous position because of the unhealthy work environment (Exhibit E-2A).

[121] The grievor stated that the respondent never offered any assistance for her medical problem.

[122] The grievor stated that her bargaining agent representative informed the respondent that she was ready to return to work at the end of May 2005.

[123] Sun Life ceased to pay her disability benefits when she was fit to return to work.

[124] After July 2005, the grievor communicated with the respondent through her PIPSC representatives. Her representatives kept the respondent updated on her condition, as indicated by the following correspondence:

- The email of David Riffle, PIPSC representative, of July 16, 2004, to Ms. White, which indicated that the grievor could not return to work until September 1, 2004 (Exhibit G-19A).

- Mr. Riffle's email of August 27, 2004, which informed Ms. White that the grievor would provide her with another medical note about the extension of her sick leave (Exhibit G-19B).

- The email of Ms. Shields, who replaced Mr. Riffel, to Ms. White dated September 15, 2004, which stated that she would forward to Ms. White a medical note for a four-to eight-week extension of the grievor's sick leave (Exhibit G-19D).

- The grievor's note to Ms. Shields indicating that the grievor was consulting a psychologist (Exhibit G-19E).

- Ms. White's email of November 18, 2004 to Ms. Shields, which indicated that Ms. White received that note (Exhibit G-19F).

- The cover sheet of the fax that the grievor sent to Ms. Shields, which indicates that the grievor sent Ms. Shields Dr. Ryan's note of November 24, 2004 (Exhibit E-19G).

[125] The grievor pointed out that the respondent wanted her to resolve the harassment complaint before returning to work, as indicated in Ms. White's email of August 8, 2005 to Mr. Bart (Exhibit G-19H) and the email of the same date between the same persons (Exhibit G-19I).

[126] Mr. Bart sent the grievor an email on October 19, 2005 (Exhibit G-19L). Mr. Bart indicated that Ms. White wanted more information about the conflict between the grievor and her supervisor before considering any accommodation. Mr. Bart asked to meet with the grievor to obtain more information about that conflict.

[127] The grievor testified that she and Ms. Levesque met with Ms. Baraniecki on February 22, 2006 because the grievor wanted to know what to do. The respondent's representatives wanted more information about the grievor's situation.

[128] Ms. Baraniecki sent the grievor an email on March 7, 2006 to offer her a position on the same floor as her supervisor's office (Exhibit E-15B). The respondent refused to consider the grievor's conflict with her supervisor in devising an accommodation because the grievor had not made a harassment complaint or given the respondent more information on that conflict.

[129] The grievor stated that she did not accept the job offer for the position in the Twin Atria building because it was situated on the same floor as her supervisor's office.

[130] The grievor testified that she did not file leave requests because she was able to return to work if the respondent accommodated her.

[131] The grievor refused the job offer for the position in the Michael J. Greenwood Centre (Exhibit E-21A) because she had not been consulted. The grievor thought that it was a warehouse. The transfer also would have isolated her from her co-workers. She did not appreciate the tone of the respondent's letter of offer, which she thought was pushy. She also did not appreciate the short deadline to respond. She thought that the position that the respondent offered her was her own position, which the respondent had transferred to another building. The respondent had not approached her to discuss the start date. She was very anxious at the time and could not face any hostility, so she refused the offer.

[132] The grievor agreed that the job offer at the Michael J. Greenwood Centre met the accommodation criteria set by both Dr. Ryan and Dr. Cheng.

[133] The grievor did not receive any pay from May 2005 to July 2006. Her disability payments had ended May 2005.

[134] The grievor is now pursuing a university degree in food science.

[135] In cross-examination, the grievor stated that she got along well with Ms. Baraniecki.

[136] The grievor stated that she had a good relationship with Margaret Fairbairn during her one-year assignment to her unit in 2003. The grievor had informed Ms. Fairbairn of her alcohol problems that year. The grievor did not agree completely with the protocol established by Ms. Fairbairn to inform her of the grievor's absences (Exhibit G-16).

[137] The grievor stated that the workplace situation perpetuated her alcohol dependence.

[138] The grievor testified that, after Dr. Ryan diagnosed her with alcohol dependency in June 2004, she informed her bargaining agent representative of the diagnosis. However, she did not inform the respondent but did inform Sun Life when she asked for disability benefits.

[139] The grievor stated that she never made a harassment complaint against her supervisor. She did not feel that she was supported by management. She had recuperated from her alcohol problems, and she felt that it was not healthy for her to undergo a harassment investigation. Her priority was her health.

III. Summary of the arguments

A. For the respondent

[140] The grievor was terminated under paragraph 12(1)(*e*) of the *FAA*. The cause for the termination was the grievor's failure to report for work or to provide any rationale as to why she could not report for duty. The termination of the grievor's employment was carried out in accordance with the *FAA* and the collective agreement. While the

grievor did not establish that she suffered from a disability, the respondent did accommodate the grievor.

[141] The respondent's representative stressed that the essence of the contract of employment is, in the words of the Supreme Court of Canada in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008 SCC 43, ". . . the employee's duty to perform work in exchange for remuneration" (at paragraph 15). Similarly, the Supreme Court concluded in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCR 4, that "[i]nsofar as the operation of an enterprise relies on its workforce, there is no doubt that an employer may establish *bona fide* measures to ensure employees' regular attendance" (at paragraph 18).

[142] *Honda Canada Inc. v. Keays*, 2008 SCC 39, is another case on point. The Supreme Court stated that ". . . the need to monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce" (at paragraph 71).

[143] In *Pachowski v. Canada (Treasury Board)*, Docket No. T-1798-99 (20001016), the Federal Court, in dealing with a termination for reasons other than breaches of discipline or misconduct, stated that "I agree with the respondent that in the case at bar, it was a requirement of the applicant's position that she report to work" (at paragraph 54).

[144] The respondent accepts that it has a duty to accommodate employees who suffer from a disability. That obligation is set out in the *CHRA*. But the employee also has obligations. The employee cannot assume that the employer knows about the need or that the employer even suspects it. The employee is required to communicate his or her need for accommodation to his or her employer. An employer may be absolved of the need to accommodate an employee if the employee does not communicate his or her need, as indicated in the document published by the Commission, *Duty to Accommodate Frequently Asked Questions and Answers*, question 18 (tab 6 of the respondent's written arguments).

[145] The respondent's representative stressed that employees are expected to be cooperative and reasonable when considering proposals that effectively respond to their needs. Employees cannot make impractical accommodation demands. If the employee rejects a reasonable accommodation, he or she may be absolving the employer of liability. In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, the Supreme Court stressed the need for the employee's cooperation as follows:

> . . .
>
> *The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in* O'Malley *. . . .*
>
> . . .
>
> *To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.*
>
> . . .

[146] When considering the duty to accommodate, the employer is entitled to sufficient information about the need to be accommodated, about suitable accommodations and about the employee's prognosis, as indicated in the document published by the Commission, *Duty to Accommodate Frequently Asked Questions and Answers*, question 20 (tab 6 of the respondent's written argument).

[147] The evidence in this grievance indicates that the respondent met its obligations under the *FAA*. When the respondent learned of the need to accommodate the grievor, it acted in accordance with the fitness to work evaluations conducted by Dr. Cheng and ultimately endorsed by the grievor's own physician, Dr. Ryan. The respondent did so in the complete absence of any information as to the alleged nature of the harassment that led to the need to accommodate.

[148] The respondent's representative pointed out that it was uncontested that by the end of September 2005 the grievor was able to return to work, albeit in a different

work site or different work unit. After receiving Dr. Cheng's report, the respondent immediately requested a meeting with the grievor and her representative. Unfortunately, the meeting was delayed, through no fault of the respondent, until February 22, 2006. The respondent made an offer of accommodation, which met the requirements of Dr. Cheng, within two weeks of the meeting. It would have seen the grievor assigned to a different work unit with a different supervisor, albeit in the same building. The grievor rejected that accommodation proposal.

[149] On July 5, 2006, after receiving Dr. Ryan's letter of April 18, 2006 and Dr. Cheng's letter of June 23, 2006, which confirmed the need to accommodate the grievor by transferring her to another building, the respondent offered the grievor a deployment to a position in a different work unit, under a different supervisor and in a different building. The offer of accommodation met the requirements of both Dr. Cheng and Dr. Ryan. The grievor rejected that offer without attempting to inform the respondent of her reasons.

[150] When the grievor refused to report for work on July 18, 2006, the respondent advised her that, if she did not contact the respondent by July 25, 2006, it would be left with no alternative but to commence action to terminate her employment. The grievor did not contact the respondent by July 25, 2006. On August 4, 2006, she was given a final extension and told to report for work on August 14, 2006. She was told that, if she failed to report for work on that date, the respondent would commence proceedings to terminate her employment effective August 15, 2006. When the grievor failed to report for work on August 14, 2006 and did not make any attempt to contact the respondent, the respondent sent her a letter advising her that it was necessary to terminate her employment.

[151] The respondent's representative argued that failing to report to work constitutes cause under a contract of employment. The respondent acted in good faith. It fully informed the grievor of what was required from her. It informed her that the consequence of failing to attend work or to contact management to explain why she could not report for work would result in the termination of her employment. The respondent provided the grievor with three successive job offers, made numerous attempts to assist her and explored alternative solutions before terminating her employment.

[152] By rejecting the respondent's reasonable accommodation without an explanation, the grievor absolved it from any liability. After receiving the accommodation proposal on July 5, 2006, which met the criteria established by both HC and the grievor's own physician, the grievor had a duty to facilitate its implementation. Similarly, she also had an obligation to accept a reasonable accommodation. As the Supreme Court stated in *Central Okanagan School District No. 23*, ". . . [i]f a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged." The grievor refused the direction to return to work at her peril.

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

[153] The grievor's position is that the respondent discriminated against her because of her disability, contravening the *CHRA* and article 44 of the collective agreement, which prohibits discrimination. The respondent has failed to establish that it accommodated the grievor to the point of undue hardship.

[154] The grievor's representative pointed out that the respondent knew that the grievor had medical problems as far back as 2002, when she showed erratic attendance and clear signs of alcohol dependency. The evidence also shows that the respondent was aware of her disability in 2004, when Sun Life approved her disability claim.

[155] The respondent did not conduct any inquiries on how to accommodate the grievor. The respondent chose instead to follow a path of discipline. The respondent did not offer the grievor any assistance, financial or otherwise, other than suggesting that she avail herself of the Employee Assistance Program. The grievor sought treatment on her own. She attended two alcohol treatment programs in 2004 and consulted a psychologist at her own cost.

[156] The grievor was cooperative. She agreed to undergo three fitness to work evaluations, despite having to wait over three months for each evaluation, as indicated in her letter of August 16, 2005 to HC (Exhibit G-19N).

[157] The grievor's representative argued that, instead of accommodating the grievor in accordance with Dr. Ryan's and Dr. Cheng's recommendations, the respondent continued to request further clarifications from the grievor. It continued to ask her to provide a formal leave request and to initiate a harassment complaint.

[158] The respondent's intimidation exacerbated the grievor's illness, which evolved into anxiety and depression. When she went on sick leave on June 8, 2004, the respondent ignored its responsibility to accommodate her.

[159] The evidence shows that the respondent did not accommodate the grievor because it wanted her to make a harassment complaint. That requirement had a negative effect on the grievor who suffered from adjustment disorder, to which her psychologist testified.

[160] The final two fitness to work evaluations were consistent. They recommended that the respondent offer the grievor an alternative position. HC recommended in March 2005 and in September 2005 that the respondent offer her another position. The respondent waited until May 2006 before offering her another position, in other words, almost a year. It should have consulted the grievor before offering her that position. The offer was not reasonable since she would have to have work on the same floor as her former supervisor.

[161] At the meeting of February 22, 2006, the grievor gave the respondent the option of offering work in a different city. The respondent should have chosen that option.

[162] The grievor's representative pointed out that, beginning in March 2005, Dr. Cheng had recommended that she work either in an alternate unit or at an alternate site or both. But it was not until July 2006 that the respondent finally offered the grievor a position in another building. It did not consult the grievor or her representative about that offer. The offer was made in the form of an ultimatum; if she did not accept it, the respondent would terminate her employment. The offer was not satisfactory. The position was situated in a former warehouse and was isolated from other EC workers. It was in fact the grievor's former position, moved to that warehouse.

[163] The respondent tried to shift the blame to the grievor by arguing that she failed to communicate with the respondent. However, the evidence shows that her physician provided the respondent with numerous medical certificates (Exhibits E-2A, E-10C, G-2, G-3, G-4, G-9, G-10 and G-12). Although the respondent did not admit having received them, the evidence establishes that they were sent to the respondent by the grievor or by her representatives.

[164] The grievor's representative referred me to several decisions about the duty to accommodate. In *Herritt v. Treasury Board (National Defence)*, PSSRB File No. 166-02-27188 (19961217), the adjudicator held that alcoholism abuse is an illness and that the employer must assist the employee in dealing with it through treatment and rehabilitation programs.

[165] In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, the Supreme Court enumerated as follows the factors that the employer can consider in accommodating an employee: the financial cost of the accommodation, whether there would be any disruption of the collective agreement, whether there would be morale problems with other employees and the interchangeability of the work force. In this grievance, accommodating the grievor would not have represented any meaningful cost, and it would not have disrupted the collective agreement or the workforce, or affected the morale of other employees. EC is a national employer, and it could have offered the grievor a position in another city.

[166] In *Gunderson v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File Nos. 166-02-26327 and 26328 (19950912), the adjudicator held that, when an employee is disabled, the employer can terminate the employee only if it has attempted to assist the employee in his or her rehabilitation over a reasonable period of time and if those attempts have failed. In this grievance, the respondent did not attempt to assist the grievor in her rehabilitation.

[167] The grievor's representative argued that the jurisprudence that the respondent relies on can be distinguished from this grievance. In *Hydro-Québec*, the facts were different. In that case, the employer had accommodated the employee for a number of years, and the employee was unable to report to work in the foreseeable future. In this grievance, the respondent did not accommodate the grievor, and the grievor was ready to return to work.

[168] In *McGill University Health Centre (Montreal General Hospital)*, the facts were also very different. In that case, the employee was totally disabled when the employer terminated her employment. In this grievance, the grievor was ready to return to work.

[169] In *Honda Canada Inc.*, the employee refused to be examined by an independent doctor. In this grievance, the grievor agreed to be examined by an HC medical examiner.

C. Respondent's rebuttal

[170] The respondent's representative argued that being on sick leave does not automatically constitute a disability within the meaning of the *CHRA*. The grievor failed to establish a disability that required accommodation. If she did suffer from a disability, it was no longer evident in September 2005 when she was cleared to return to work.

[171] The respondent's representative pointed out that the evidence shows that the grievor did not have alcohol dependency problems in the critical period of this grievance.

[172] The respondent wanted the grievor to return to work and was ready to make the necessary accommodations to her perceived concerns. It made an offer of accommodation in accordance with Dr. Cheng's recommendation two weeks after the February 22, 2006 meeting. It was the grievor's failure to cooperate that made termination necessary. The delay in meeting with the grievor after she was deemed fit to work was entirely her fault.

[173] By repeatedly failing to report to work in a position that accommodated her needs, and by ignoring the respondent's requests for information as to why she would not report to work, the grievor forced the respondent to terminate her employment.

[174] The grievor erroneously stated that the respondent knew about her problems with alcohol as far back as 2002. She testified that the first time she was diagnosed for alcohol dependency was when she first met with Dr. Ryan in June 2004. Furthermore, that diagnosis was not disclosed to the respondent.

[175] The respondent did not follow a path of discipline with respect to the grievor, as she contends. The instances that the grievor referred to about disciplinary action occurred before 2004, that is, before the respondent knew of the grievor's alcohol problems.

[176] The respondent never required that the grievor make a harassment complaint. The respondent was trying to determine how the work environment was unsafe in the grievor's eyes. It is difficult to accommodate in a vacuum.

[177] In his note of November 24, 2004 (Exhibit E-2A), Dr. Ryan did not indicate the nature of the grievor's problem or how it could be accommodated. The respondent learned of the allegations of harassment only in February 2005 through Ms. Mann, the grievor's lawyer at that time.

[178] The respondent did not receive the medical certificates that the grievor alleges that she sent. In particular, the respondent never received Dr. Ryan's letter of January 25, 2005 (Exhibit G-2). In fact, the letter is date stamped by the PIPSC.

[179] The respondent did not become aware of the nature of the grievor's medical problem until she filed her grievance.

IV. Reasons

[180] The grievor referred her termination of employment grievance to adjudication under subparagraph 209(1)(*c*)(i) of the *PSLRA*, which reads as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> . . .
>
> *(c) in the case of an employee in the core public administration,*
>
> *(i) demotion or termination under paragraph 12(1)(d) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*
>
> . . .

[181] The grievor's employment was terminated for reasons other than breach of discipline or misconduct under paragraph 12(1)(*e*) of the *FAA*, which reads as follows:

> ***12.*** *(1) Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*
>
> . . .

> *(*e*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct. . . .*

[182] Subsection 12(3) of the *FAA* specifies as follows that termination under paragraph 12(1)(*e*) must be for cause:

> *(3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(*c*), (*d*) or (*e*) or (2)(*c*) or (*d*) may only be for cause.*

[183] The employer argued that it had cause to terminate the grievor's employment since she failed to report to work on August 14, 2006. The grievor argued that she did not report to work because the respondent failed to accommodate her disability. The respondent replied that she did not suffer from a disability, and if she did, it accommodated her disability. Therefore, in this grievance the issue of cause and accommodation are somewhat intertwined.

[184] The Supreme Court stated as follows in *Hydro-Québec* that performing the work of the position is the essence of a contract of employment:

> . . .
>
> *[15] However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. . . .*
>
> . . .

[185] In *Pachowski,* a case that dealt with termination for reasons other than breaches of discipline, the Federal Court held that an employer can terminate the employment of an employee who fails to report to work.

[186] In my view, the respondent in this grievance had cause to terminate the grievor's employment. According to Dr. Cheng, the grievor was ready to return to work as of September 29, 2005 (Exhibit E-11D). She refused a first offer of deployment to a position in the Twin Atria building because it was located in the same building as her supervisor's office. To accommodate her, the respondent, on July 5, 2006, offered the grievor a deployment to the Michael J. Greenwood Centre, a building five blocks from her previous work location (Exhibit E-21A). The letter of offer specified that, if she did

not respond to the letter, the respondent would presume that she accepted the offer and that she would report for work on July 18, 2006. She did not report for work; nor did she inform the respondent that she did not intend to report.

[187] On July 18, 2006, the respondent asked the grievor to communicate with it by July 25, 2006 (Exhibit E-22A). It warned the grievor that, if she failed, it would commence action to terminate her employment.

[188] On July 19, 2006, the respondent received the second page of the letter of offer of deployment in which the grievor indicated that she refused the offer (Exhibit E-22B). She did not explain why she refused.

[189] The respondent extended the grievor's deadline to accept the offer of deployment a second time on August 4, 2006 (Exhibit E-24). It asked that she report for work at the Michael J. Greenwood Centre on August 14, 2006. It warned her again that, if she did not report for work, it would terminate her employment effective the following day. She did not report for work on that day; nor did she inform the respondent that she would not report for work, and she did not explain why she did not want that deployment. As warned, the respondent terminated the grievor's employment on August 15, 2006, effective that same day (Exhibit E-25).

[190] Therefore, the respondent had cause to terminate the grievor's employment. She failed to fulfill an essential part of her contract of employment, that is, reporting for work. The respondent acted reasonably in giving her fair warning of the consequences of her failure to report to work. It even extended twice the deadline to accept the deployment to the Michael J. Greenwood Centre.

[191] The grievor's argument is that she had the right to refuse the respondent's deployment offer and to not report for work because the respondent did not accommodate her disability. I agree that the respondent had an obligation to accommodate her disability. Sections 3 and 7 and subsection 15(2) of the *CHRA* provide that an employer must accommodate an employee who suffers from a disability, short of undue hardship. However, in this grievance, a close examination of the evidence shows that the respondent fulfilled its obligation to accommodate the grievor.

[192] It is important to point out at the outset that by July 2006, the grievor's disability that needed accommodation was not her alcohol dependency. The alcohol dependency is a non-issue since Dr. Ryan testified that the grievor had that problem under control since November 2004. In fact, the grievor never asked for accommodation for her alcohol dependency. Her problems with alcohol were not the reasons she refused the respondent's employment offers and had nothing to do with her failure to report for work, which is the reason the respondent terminated her employment.

[193] The medical evidence establishes that the reason the grievor did not want to return to work was that she suffered from an adjustment disorder with anxiety and depression due to her work environment, specifically to the perceived harassment by her supervisor. Therefore, the disability that needed accommodation was her adjustment disorder, which, in her view, was linked to her perceived harassment by her supervisor. I would like to point out that it is not relevant, for the purposes of this grievance, whether the grievor was harassed or not; what is relevant is that she believed so, and that perception affected her adjustment disorder.

[194] It is important to bear in mind that accommodation is not the sole responsibility of the respondent. The respondent, the bargaining agent and the employee have to work together to find a proper accommodation for the employee's disability, as the Supreme Court stressed in *Central Okanagan School District No. 23* as follows:

. . .

> *The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in* O'Malley *. . .*

. . .

[195] The first time that the respondent learned that the grievor had a disability related to her work environment was when it received Dr. Ryan's note of November 24, 2004, in which he wrote that the grievor would not be able to return to work until January 2005 and that she ". . . may not be able to return to her previous position due to an unhealthy workplace environment" (Exhibit E-2A).

[196] In reaction to that note from Dr. Ryan, the respondent asked that the grievor undergo a fitness to work evaluation on December 29, 2004 (Exhibit E-2D), which was a normal reaction. The respondent had the right to ensure that the grievor was fit to return to work. The respondent also wanted more information about what in the work environment would prevent her from returning to work since Dr. Ryan's note of November 24, 2004 did not specify what was wrong with that environment. The fitness to work evaluation was carried out on March 24, 2005, and Dr. Cheng wrote on that day that the grievor was not expected to work in the foreseeable future but that she hoped that she could return to work in summer 2005 (Exhibit E-5A). He added that, when she returned to work, she should work in a different work unit.

[197] The first time that the respondent learned that the "unhealthy work environment" was the perceived harassment of the grievor by her supervisor was when it received Ms. Mann's letter of January 31, 2005 (Exhibit E-3D).

[198] Since the grievor was not ready to return to work when Dr. Cheng examined her on March 24, 2005, it was reasonable that the respondent asked Dr. Cheng on July 15, 2005, to examine her again before she returned to work (Exhibit E-9C). Some of the delays for the fitness to work evaluation in summer 2005 were due to necessary paperwork and the grievor changing her representative. The respondent needed a new consent form to release information from the grievor since the previous one had expired, as indicated in Ms. White's letter of August 10, 2005 to the grievor (Exhibit E-11A).

[199] Dr. Cheng performed the fitness to work evaluation for the grievor on September 29, 2005 (Exhibit E-11D). He stated that she was ready to return to work with ". . . an alternate work arrangement, such as a different work site or different work unit . . . ." That was the first time that the grievor was well enough to return to work. It is also important to note that Dr. Cheng's recommendation did not stipulate that she had to be assigned to a different location; he recommended either a different work site or a different work unit. Therefore, the respondent, at that point, did not have any indication that she needed to be assigned to a different building.

[200] The exchange of correspondence between the grievor and the respondent's representatives indicates that the respondent tried to meet with the grievor in fall 2005, but she wanted to have a representative present, and none was available (Exhibits E-13A and E-13C).

[201] The respondent finally met with the grievor on February 22, 2006. She was represented at that time by Ms. Levesque. At that meeting, the respondent offered her a different position in a different work unit reporting to a different supervisor. That offer was therefore made a little less than five months after the grievor was ready to return to work. In my view, that was not an unreasonable delay to find alternate employment. Some of the delays were simply due to the fact that the parties did not or could not meet before that date.

[202] At the meeting, the grievor refused the offer of employment because the position was located in the same building as her former supervisor's office. According to the testimony of Ms. White and to Ms. Levesque's letter of March 30, 2006 (Exhibit E-18A), the grievor asked at that meeting to be transferred to a different city. The respondent refused that request because its offer met Dr. Cheng's recommendation. He did not require the grievor to work in a different location or city at that point; he recommended that the grievor work at a different site or different unit. The respondent offered a position in a different work unit reporting to a different supervisor. At that point, the respondent had fulfilled its obligation to accommodate the grievor.

[203] On March 22, 2006, to ensure that it met HC's recommendation, the respondent asked Dr. Cheng to clarify whether deploying the grievor to a different position in a different work unit under a different supervisor met his recommendation (Exhibit E-17A). Dr. Cheng answered the next day that it did (Exhibit E-17B). Dr. Cheng added that it was not necessary to move the grievor to a different geographical location or to a different city.

[204] On March 24, 2006, the respondent wrote to Ms. Levesque to again offer the position to the grievor (Exhibit E-16). There was no response.

[205] The first time that the respondent received any medical evidence that the grievor should be transferred to a different geographical location was on May 1, 2006, when it received Dr. Ryan's letter of April 18, 2006 (Exhibit E-20B). Dr. Ryan recommended that she be transferred to a different "geographical location." (In my view, that recommendation was not very clear since a "geographical location" can refer to many things.) The respondent lost no time in accommodating the grievor. It asked Dr. Cheng for his view on Dr. Ryan's recommendation. Dr. Cheng answered that she could be transferred to the same building in which her former supervisor worked if the

building was large enough that the grievor would not run into her former supervisor. However, it would not be appropriate to transfer her to a small building where she could run into her former supervisor. (At the hearing, Dr. Ryan agreed that Dr. Cheng's recommendation met his own.) Since the Twin Atria building was small and there was a possibility that the grievor and her supervisor would run into each other, the respondent sought and offered her, on July 5, 2006, a position in the Michael J. Greenwood Centre, which was situated five blocks from the Twin Atria building (Exhibit E-21A). That offer was made two months after receiving Dr. Ryan's letter. Therefore, the respondent acted quickly to accommodate the grievor once it received the medical evidence that supported her request. It is important to note that the respondent was not required to accommodate her requests; it had to accommodate her disability, and it was the medical evidence that established the required accommodation.

[206] As I have explained earlier in this decision, the grievor refused the offer that met both Dr. Ryan's and Dr. Cheng's recommendations. The respondent extended the offer twice, but the grievor never reported to work and never explained why she refused the accommodation. At the hearing, the grievor stated that she believed that the Michael J. Greenwood Centre was like a warehouse and that she would feel isolated there. However, the grievor never communicated these concerns to the respondent, neither in July, nor in August 2006.

[207] The grievor also argued that the respondent should have consulted her before making the offer of employment. I would first like to point out that, although preferable, consultation is not in itself a condition of the duty to accommodate. The employer is required to provide a reasonable accommodation, and in this grievance, the respondent fulfilled that obligation. That being said, although it was not ideal, some consultation did take place. When the respondent offered her the deployment to the Michael J. Greenwood Centre three times, the grievor could have contacted the respondent to explain why she did not want to be deployed there. She did not, and she did not inform the respondent why she would not report for work on the dates it had fixed. The grievor did not show any signs of wanting to communicate with the respondent.

[208] In summary, the respondent accommodated the grievor several times. It offered her a position in the Twin Atria building since the medical information in its

possession at that time indicated that it was a proper accommodation. When the respondent received information that the grievor needed to be transferred to a different building, it offered her a position in the Michael J. Greenwood Centre. That offer satisfied the recommendations of both her personal physician and the HC physician. It extended that offer twice, but the grievor did not respond and did not explain why she did not want to be transferred to the Centre.

[209] I agree with the grievor that the respondent should not have insisted that she make a harassment complaint, as it did, for example, in its letter of May 16, 2005 to the grievor (Exhibit E-6A), since she had no such obligation. However, the respondent, as the employer, had an obligation to inquire into the matter of whether the grievor's supervisor had harassed her. Also, the grievor had some responsibility to explain the harassment since it was determinative of her return to work.

[210] Nothing turns on the fact that the grievor did not submit leave requests from 2004 to 2006 since the respondent did not rely on that omission in terminating her employment.

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

(The Order appears on the next page)

V. Order

[212] The grievance is dismissed.

November 18, 2009.

John Mooney,
adjudicator