Binder

File: 166-2-28543

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

LINDA PACHOWSKI

Grievor

and

TREASURY BOARD
(Revenue Canada – Customs and Excise)

Employer

Before: Joseph W. Potter, Deputy Chairperson

For the Grievor: David M. Landry, Public Service Alliance of Canada

For the Employer: Debra L. Prupas, Counsel

Heard at Toronto, Ontario
April 26 to 30, 1999.
(Written submissions filed June 22; July 27; and August 10, 1999.)

This reference to adjudication concerns a grievance arising out of the employer's termination of employment of Mrs. Linda Pachowski, a secretary (ST-SCY-02) at Pearson International Airport with Revenue Canada, Customs and Excise.

Mrs. Pachowski's employment was terminated pursuant to the provisions of paragraph 11(2)(g) and subsection 11(4) of the *Financial Administration Act* for failing to report to work as directed. The termination letter, dated September 19, 1997, signed by R.J. Howard, Assistant Deputy Minister, Southern Ontario Region, reads, in part:

> ...
>
> *You were previously advised that failure to report for work as directed would result in termination of your employment with Revenue Canada. As noted, you have chosen not to comply with my letter dated August 18, 1997. Specifically, you did not report for work in your substantive position on September 2, 1997 at 9:00 a.m., as instructed.*
>
> ...

Five witnesses testified and the parties agreed regarding what a sixth witness would have said had he testified. The exclusion of witnesses was requested and granted, with one exception. Mr. Landry requested that Mr. Tom Hamilton, a shop steward, be allowed to remain throughout the proceedings to act as his co-advisor, although it was likely he would testify. The employer's counsel objected, but I allowed Mr. Hamilton to remain throughout the proceedings, with the understanding that I would weigh his evidence accordingly.

The parties jointly submitted Exhibit E-1, a book of documents containing some 55 tabs. These will be referred to as "T", followed by the appropriate alpha or numerical reference. In addition, the employer introduced seven other exhibits and the bargaining agent, fifteen.

Background

The facts leading up to the termination of the grievor's employment are not materially in dispute and can be summarized as follows.

Mrs. Pachowski commenced her employment in the federal Public Service with the Coast Guard in 1988, and went to Pearson Airport, Terminal 2, with Revenue Canada in April 1993. She was a secretary in the administration office working primarily for Mr. Kirk Palmer, Chief, Customs Passenger Operations. There were five permanent and two term employees working in the administration office.

On January 12, 1994, the grievor wrote a memorandum to her supervisor, Mr. Palmer, explaining that a fellow employee, Mrs. Beryl Stott, had harassed her (Exhibit G-4). The grievor alleged Mrs. Stott made some disparaging comments to her; she also complained that Mrs. Stott was smoking in the front sitting area of the office and the smoke was negatively affecting Mrs. Pachowski. Some two days later, Mrs. Pachowski again wrote to her supervisor complaining of her colleagues' smoking in the office area (Exhibit G-5); she noted that her past complaint had not resulted in any action being taken to stop this practice, and she advised that she was proceeding to the doctor. She testified she went on sick leave for a period of one year.

Mrs. Pachowski's allegations of harassment were investigated internally, with the result being a finding on May 10, 1994 that on one occasion Mrs. Stott's conduct constituted "...a form of harassment of a personal nature...." (Exhibit G-6). The allegations of harassment against Mrs. Pachowski's other colleague were "...considered to be unfounded...." (Exhibit G-6).

Feeling the internal investigation was biased, Mrs. Pachowski referred the matter to the Public Service Commission (PSC) for investigation. In the interim, the Department, on October 5, 1994, offered the grievor a temporary ST-SCY-02 position at a location outside the airport (Exhibit G-8). The offer was made while Mrs. Pachowski was still away from work for medical reasons; however, the Department understood she was medically fit to return to work (Exhibit G-9). Mrs. Pachowski testified she turned down this offer as she was not medically ready to return to work and her doctor estimated she could return on January 1, 1995. She further testified she had indicated an interest in being transferred to Niagara Falls, and submitted this request in writing pursuant to an October 14, 1994 letter (Exhibit G-9).

The grievor testified this transfer request was made on the understanding that her husband, who worked for Canada Post, could also obtain a transfer there. The parties agreed that Mr. Pachowski would say that he had been offered a position in Niagara Falls, but ultimately he had to turn it down because his wife, at that time, had not been offered a position there.

The Department did investigate the possibility of transferring Mrs. Pachowski to Niagara Falls, but wrote to her on December 20, 1994 telling her they could not deploy her there, and further "...there are no positions in Niagara Falls that would ensure that you would not have direct contact with a Management representative...." (Exhibit G-10).

The grievor testified this sentence disturbed her as she had never made such a request and, in fact, did not think such a position existed anywhere. Although she did not know the basis for this statement, she ultimately discovered it was due to factual distortion (see T-1, page 36).

As mentioned earlier, the grievor had referred her harassment complaint to the PSC but before a formal investigation commenced, the PSC attempted to mediate the dispute.

The grievor remained off work, and on April 20, 1995, the PSC faxed a document to the Department of a proposed solution the Pachowskis had proposed titled "Memorandum of Agreement" (see T-1, page 9, paragraph 21, and also Exhibit G-11). The proposal called for the grievor's relocation to an indeterminate position at the ST-SCY-02 or CR-03 level at one of six different locations, the preferable location being Barrie. Also included in the proposed agreement was a requirement to reimburse Mrs. Pachowski for expenses, as well as payment of a lump sum for hurt feelings in relation to the harassment complaint.

On May 1, 1995, the Department sent its reply to the PSC (Exhibits G-12 and G-13). While most of the elements of the agreement could be agreed to, including compensation, the issue of finding a suitable position elsewhere proved difficult. The Department stated that "...Particular attention was given to her first choice - Barrie...." (Exhibit G-12, paragraph 5), but a reorganization was taking place there which would ultimately reduce the number of CR-03 and ST-SCY-02 positions. The letter said: "...Should we relocate Mrs. Pachowski to Barrie at this time, the Department is not

convinced that she would be able to have the fresh start that we are all striving for..." (Exhibit G-12, paragraph 5). The letter further stated that Mr. Pachowski had informed the Department that "...he and Mrs. Pachowski would prefer not to have to relocate. This was the reason that Barrie was [our] first choice, because Mrs. Pachowski would be able to commute to work...." (Exhibit G-12, paragraph 5, page 2). The Department, believing that Mrs. Pachowski lived in the Toronto area, proposed "...that Mrs. Pachowski consider a position within the Tax Services side of the Department within the Greater Toronto Area....", and offered her "...a CR-03 position (salary protected) in Toronto West...Toronto Core...Toronto North... or Toronto East...." (Exhibit G-12, paragraph 5, page 2).

Mr. Pachowski claimed he never made the statement attributed to him (see T-1, page 11) and after further mediation efforts by the PSC, a counter-offer was sent back to the Department (see T-1, page 11, paragraph 25). It listed Barrie, Brantford, Sarnia or Fort Erie as possible alternate locations.

The Department replied to this proposal on May 12, 1995 (Exhibit G-14 and T-1, page 11, paragraph 27). The letter outlined why none of the suggested locations were feasible, and said: "...The Department is prepared to give Mrs. Pachowski her choice of one of five locations: her substantive position...or one of the four Taxation Services offices in the Greater Toronto Area...." (Exhibit G-14).

Mrs. Pachowski rejected the counter-offer (see T-1, page 12, paragraph 28) and authorized the PSC to formally investigate her complaint (see T-1, page 13). Its report outlines the chronology of events that the Department, Mrs. Pachowski and the PSC made in trying to resolve the matter (see T-1, pages 6 to 13).

Ms. Anna Preto conducted the PSC investigation and she issued her findings on November 15, 1995 (see T-1). At page 37 of T-1, Ms. Preto wrote:

> ...
>
> *Two of the respondents, Ms. Stott and Ms. Cook, currently work at Pearson International Airport, and it is entirely within the realm of possibility that, were the complainant to return to her position, she would come into contact with them, particularly with Ms. Stott, who was found to have harassed her. The latter case is particularly troubling, because the record shows no trace of follow-up or*

> *implementation of corrective measures by management with respect to Ms. Stott's harassing behaviour towards the complainant.*

The PSC's report states: "...The department has simply failed to conduct a proper investigation into the original complaints....", but also noted that "...The re-investigation of issues with respect to Ms. Stott and Ms. Cook at this late point in time would probably do more harm than good...." Ms. Preto further wrote: "...I wonder, however, whether all that could have been done has been done with respect to the identification of an alternate placement for the complainant...." (see T-1, page 38).

The PSC's report had been sent to the Department and Mrs. Pachowski for comments prior to finalization and "...the department stated that it had found no points that were in dispute...." (see T-1, page 27). In other words, the Department acknowledged wrongdoing.

Ms. Barbara Cattelan was the Senior Coordinator, Human Resources, at the time of the above events and was one of the departmental representatives trying to resolve the issue, along with Ms. Florence Fava who took over for Ms. Cattelan during the latter's absence. Mrs. Pachowski was represented by a variety of individuals at various points in time, including her husband, Mr. Tom Hamilton and Mr. John King.

The PSC's report was released on November 15, 1995 and five days later, Mr. Pachowski spoke to Ms. Cattelan. Ms. Cattelan's notes of this conversation were identified as T-3. The notes indicate Mr. Pachowski said he was his wife's representative (see T-3, page 2) and he and Ms. Cattelan discussed what jobs were available (see T-3, page 4). The notes also indicate Mr. Pachowski stated his wife could not return to the ST-SCY-02 job at Terminal 2, and this conversation was not disputed.

Shortly after that conversation, Florence Fava commenced to act for Ms. Cattelan due to the latter's illness. The PSC was still involved in trying to mediate the dispute and, accordingly, sent the Department a proposed "Memorandum for Agreement" in December 1995 (see T-4). Apart from the compensation issues to cover "pain and suffering" and reimbursement, the Memorandum stated: "Provide Ms. Pachowski with a fresh start by appointing her on an indeterminate basis to the

position of ---...." (see T-4, paragraph 7). Neither a specific position nor location were included in the document.

Ms. Fava testified she received this offer of settlement and signed the counter-offer (see T-4A). This proposal stated: "Appoint Ms. Pachowski to a CR-03, Counter Clerk Cashier position with salary protection in Niagara Falls, Ontario.... This position requires shift work...." (see T-4A, paragraph 6).

Mrs. Pachowski replied to the departmental offer on January 17, 1996 (see T-5) and testified that, at the time she received the offer, she was no longer interested in relocating to Niagara Falls for two reasons: (1) her husband no longer had a specific job in Niagara Falls to transfer into, and (2) she found shift work to be unacceptable. She closed her letter by asking for a meeting with all parties to discuss "...other job opportunities available at the previous locations I have stated...." (see T-5, page 2).

Not receiving a reply by February 1, 1996, Mrs. Pachowski faxed a letter to Ms. Fava asking for a response (see T-6). In addition, Mrs. Pachowski testified she and her husband went to the Regional Office that same day and met with Ms. Fava and Mr. Ron Banks, the assistant to the Deputy Minster. Ms. Fava testified that Mr. Pachowski did most of the talking at this meeting and he requested relocation to St. Catharines for his wife. Ms. Fava also testified that the grievor was offered a position in the West Keaton Warehouse, although there was no specific job description for such a position.

Mrs. Pachowski recalled the events differently. She testified Mr. Banks asked her if she would go to West Keaton, whereupon she inquired what it was. At that point, she testified Mr. Banks yelled at her saying nothing would satisfy her. Mrs. Pachowski started to cry and that ended the meeting. In fact, Mrs. Pachowski stated that the February 1996 meeting was the last one she ever had with management.

On February 9, 1996, the Department wrote to Mrs. Pachowski asking her to clarify her position on the proposed settlement (see T-8). On February 21, Mrs. Pachowski replied (see T-9) disputing some of the facts as outlined in the afore-mentioned letter and asking that the Department reconsider its last position and offer her a fresh start in a location she had previously indicated an interest in moving to.

On March 12, 1996, the PSC wrote to the Department (see T-10):

> ...
>
> *The complainant has indicated non acceptance of a* Memorandum of Agreement *which, in light of the investigation* Findings, *we consider to represent a reasonable settlement to the complaint.*
>
> *Accordingly, we have closed our file in this matter and have so advised the complainant.*
>
> ...

On April 17, 1996, the Department wrote to Mrs. Pachowski saying they were not prepared to extend her leave without pay any further, and put forward three options (see T-13). Those options were to: (1) return to her substantive position; (2) accept a CR-03 General Services Clerk position in Hamilton; or (3) resign. She was to report for work by May 6, 1996, failing which her employment would be terminated. Ms. Fava testified the Hamilton position was a full-time one, but Mrs. Pachowski testified she never asked to be relocated to Hamilton.

Mrs. Pachowski did not agree to any of the three options put forward to her, nor was her employment terminated at that point in time. The reason, according to Ms. Cattelan's evidence, was that Mrs. Pachowski's bargaining agent representative, Mr. Tom Hamilton, contacted Ms. Cattelan (who was back from sick leave) and asked the Department to reconsider its position. Ms. Cattelan's notes of a meeting held May 10, a telephone conversation May 14, and a further meeting on May 31, all with Mr. Hamilton, were introduced as Exhibit E-2. In these discussions, Mr. Hamilton indicated Mrs. Pachowski would return to Pearson Airport. This was based on the understanding that those involved in the harassment complaint were no longer in the work area to which Mrs. Pachowski would be returned. In cross-examination, Ms. Cattelan said that management expressed concern about Mrs. Pachowski returning to Pearson Airport. Mr. Hamilton's recollection of the meeting was that, as the employer was not prepared to remove the harassers, both parties agreed having Mrs. Pachowski return to the airport would not resolve the issue and would not be in the best interests of either party. The grievor stated she never requested to go back to Pearson Airport.

On June 21, 1996, R.J. Howard, Assistant Deputy Minister, Southern Ontario Region, wrote to Mrs. Pachowski informing her that Mr. Hamilton had indicated she had chosen to return to her substantive position (see T-16). She was told she could begin on part-time status; she would receive training in order to reintegrate her into the workplace; she was informed about the Employee Assistance Program (EAP); and she was to report on July 22, 1996.

Neither Mr. Hamilton nor Mrs. Pachowski responded to the June 21 letter by way of a reply letter.

On August 8, Mr. Hamilton spoke to Ms. Cattelan and informed her that, through his contacts, he thought the Department of Immigration might be interested in taking Mrs. Pachowski on a six-month assignment. Following a reference check with Ms. Cattelan, the Department of Immigration withdrew the offer of a position.

On October 7, 1996, Mr. Hamilton again met with Ms. Cattelan and Ms. Fava to try to resolve the placement issue of Mrs. Pachowski. Mr. Hamilton told them that Mrs. Pachowski would like to work in the St. Catharines area and on December 5, the Department offered Mrs. Pachowski a six-month term assignment in St. Catharines (see T-22). She was also told that should she decline this, she must report to her substantive position on December 16 or her employment would be terminated.

Mrs. Pachowski testified she and her husband travelled to St. Catharines to speak to staff there about the position and to see if a full-time job could be available. The grievor stated she was told there was no full-time position available.

In November, Mrs. Pachowski advised the Department that her bargaining agent representative would be Mr. John King (see T-20), and on December 11, 1996, Mr. King advised Ms. Cattelan that he had reviewed the above-referenced December 5 letter with Mrs. Pachowski (see T-23). He further stated that Mrs. Pachowski would accept the St. Catharines relocation only if the position were a permanent ST-SCY-02 position. He went on to say Barrie remained the grievor's first preference as far as work location was concerned.

Mr. King sat on a placement committee and learned that another employee was being deployed to Barrie. Mr. King sent an e-mail to management objecting to the deployment, saying Mrs. Pachowski should be the one moved (Exhibit G-1). On December 21, Ms. Cattelan sent Mr. King an e-mail saying that a six-month assignment would be made available for Mrs. Pachowski in Barrie (see T-24). She was to report on January 13, 1997, but on December 27, Mr. Pachowski telephoned Ms. Cattelan to ask that his wife be allowed to report on January 27 instead due to an illness in the family (see T-25).

Mrs. Pachowski reported for work, in Barrie, on January 27 but, she testified, she was not made to feel welcome. She stated management was not expecting her and she had to wear a visitor's pass throughout the day. She heard other employees talking about her, indicating she was a threat to them. Also, she testified she was not given any meaningful work to do that day.

The next day, she set out to go to work but at the last minute she said she felt it was not really a fresh start and it was only a six-month assignment so she did not go in to work. Her husband called to say she would not be in, and in fact she did not report again to the Barrie job.

On January 28, 1997, Mrs. Pachowski wrote to Ms. Howard and complained she was harassed by her supervisor on her first day at work in Barrie (see T-27). The matter was investigated and ultimately found to be without merit (see T-37).

On February 14, 1997, Ms. Howard wrote to Mrs. Pachowski saying that Mr. King had advised the Department that Mrs. Pachowski was terminating the Barrie assignment and wished to be reinstated at Pearson Airport (see T-29). She was advised that failure to report to Pearson Airport by February 21 would result in termination.

She did not report and, once again, the Department did not terminate her employment.

On August 18, 1997, the Department sent a follow-up letter to their February 14 letter, again instructing the grievor to report to Pearson Airport on September 2, 1997 or else her employment would be terminated (see T-44). On August 21, Mrs. Pachowski replied asking questions about individuals who would be working in the office she was

to go to, and ending with the words "...as you must be aware this environment is not acceptable." (see T-45).

Mr. Hamilton was back in the picture as Mrs. Pachowski's bargaining agent representative at this time and testified the Pachowskis called him in early September and informed him about the latest letter. Mr. Hamilton called Ms. Cattelan and asked for a copy of the letter and Mr. Hamilton discussed a possible settlement with the Pachowskis. He testified Ms. Cattelan told him she would be prepared to look at a settlement but only if it was first signed by Mrs. Pachowski.

As a result, Mr. Hamilton put together a settlement document, had Mrs. Pachowski sign it, and faxed it to the Department on September 18, 1997 (see T-46). Mr. Hamilton testified he was hopeful it would resolve matters because, as far as he was concerned, it removed all the previous stumbling blocks. The critical concern was the work location, and the document read (at paragraph 6):

> 6. *Deploy Ms. Pachowski to a similar position in one of the following geographic areas with salary protection, if required:*
>
> - *Barrie*
> - *Niagara Peninsula (Excluding Revenue Canada Taxation)*
>
> ...

Mr. Hamilton stated he felt this could resolve matters because any opening at all in the Niagara Peninsula could be offered. However, in cross-examination, Mr. Hamilton stated it was his expectation that if the matter could not be resolved, the employer would terminate the grievor's employment, and he so advised Mrs. Pachowski. In her cross-examination, Mrs. Pachowski agreed that Mr. Hamilton took the August 18 letter very seriously, and told her so.

Mrs. Pachowski stated, in cross-examination, that she had no intention of going back to Pearson Airport at that point in time; however, she did testify that she would be willing to go back there now.

Ms. Cattelan stated the Department could not accept paragraph 6 of the settlement document because it had already found a job for the grievor in Barrie that did not work out, as well as jobs in St. Catharines and Niagara Falls that she turned down. Ms. Cattelan stated she felt there was no need to offer more.

Ms. Cattelan contacted Mr. Hamilton and stated the Department would not accept the proposed settlement and they were going to proceed with the termination of her employment. Mr. Hamilton advised Mrs. Pachowski of this fact, and she agreed in cross-examination that she knew the Department would proceed. She said she became aware of this fact some two days after Mr. Hamilton sent the settlement document to the Department (about September 20, 1997). In re-examination, Mrs. Pachowski said she felt it was too late to return to Pearson Airport at that time.

On September 29, 1997, the Department sent Mrs. Pachowski the letter of termination.

Arguments

Written arguments were filed by the parties and are reproduced below.

For the Employer

The Employer submits that the non-disciplinary termination of the Grievor was for cause and that the Employer acted in good faith and made extreme efforts to return the Grievor to the workplace.

I FACTS

1. The subject matter of this Adjudication is the termination of the Grievor, Linda Pachowski, (the "Grievor") from her employment with Revenue Canada (the "Employer") on September 29, 1997 pursuant to paragraph 11(2)(g) of the Financial Administration Act (the "F.A.A.")

Exhibit E-1, Tab 47

2. The Grievor joined the Public Service with the Coast Guard in 1988 and was appointed to the position of SCY-03, Revenue Canada Customs & Excise (the "Grievor's Substantive Position") at Pearson International Airport ("PIA") in April 1993.

3. The Grievor filed a harassment complaint against Beryl Stott ("Stott"), a co-worker, on January 12, 1994.

Exhibit G-4

4. The Grievor filed a harassment complaint against John Lowe, ("Lowe"), the office Superintendent, on January 16, 1994.

Preto Report, Exhibit E-1, Tab 1, page 2, paragraph 4
Examination-in-Chief of the Grievor

5. The Grievor left the workplace on sick leave on January 14, 1994. After exhausting her sick leave credits, the Grievor received Unemployment Insurance followed by Disability Insurance which ended on October 16, 1994.

Preto Report, page 1 paragraph 3 (page 4, paragraph 7)
Examination-in-Chief of the Grievor

6. The Employer appointed Rod Hart, the Acting Manager, International Mail Processing Centre, Revenue Canada to investigate the Grievor's complaints. The Grievor was notified of the results of Mr. Hart's investigation by letter dated May 10, 1994. The Grievor's complaint against Stott was upheld with respect to one incident and her complaint against Lowe was dismissed. The Grievor's complaints regarding the infractions of the no-smoking policy were acknowledged and addressed.

Preto Report, page 2 paragraphs 5 & 6
Examination-in-Chief of the Grievor

7. While on leave the Grievor filed a harassment complaint against Sylvia Cook (July 15, 1994). Mr. Hart investigated the complaint on August 3, 1994 and the Grievor was notified that it was dismissed on October 11, 1994.

Exhibit G-7
Preto Report, page 4, paragraphs 5 & 6

8. On July 15, 1994 the Grievor filed a complaint with the Public Service Commission ("PSC") regarding the manner in which the Employer investigated her complaints against Stott and Lowe.

9. On October 5, 1994 the Grievor was offered a temporary secondment to the Revenue Canada Office at 1 Front Street. The Grievor refused it due to its temporary nature.

Preto Report, page 4, paragraph 15
Examination-in-Chief of the Grievor

10. The Grievor was deemed (by her doctor) ready to go back to work in January 1995.

11. The Employer and the Grievor agreed to participate in mediation to resolve the Grievor's complaint to the PSC. The mediation was conducted by Anna Preto of the PSC from March 27 to May 25, 1995 and it was unsuccessful. In July 1995 Preto commenced her investigation into the Grievor's complaint referred to in paragraph 8 above.

Preto Report, pages 6 to 13

12. The fact finding portion of Preto's Report was sent to the Grievor and the Employer for rebuttal. The Employer had no dispute with the facts and the Grievor's rebuttal is set out on page 27 of Preto's Report. The Grievor made no other objections to the facts as set out.

Preto Report, page 27
Cross-Examination of the Grievor

13. Ms. Preto issued her report on November 15, 1995. The Employer accepted the finding that the Grievor's complaint was founded in that the Employer failed to conduct a proper investigation. Ms. Preto concluded that a new investigation would not be useful in the circumstances. Anna Preto continued to try to mediate a settlement between the Grievor and the Employer.

Preto Report, page 27
Examination-in-Chief of Barbara Cattelan

14. The Grievor testified that she was advised by John King and Tom Hamilton, her union representatives, and she believed, that she had a right to work in a harassment free environment. In addition, she was entitled to and the Employer was obligated to find another position for her.

Examination-in-Chief and Cross-Examination of the Grievor

15. On March 12, 1996 Ms. Preto advised Pierre Gravelle, Deputy Minister, Revenue Canada and Ruby Howard, Assistant Deputy Minister, Revenue Canada that the PSC was closing its file. Ms. Preto stated that "the complainant has indicated to us non acceptance of a Memorandum of Agreement which, in light of the investigation Findings, we consider to represent a reasonable settlement to the complaint".

Exhibit E-1, Tab 10

16. The Employer continued its efforts to return the Grievor to work and to settle all outstanding issues with her.

Examination-in-Chief and Cross-Examination of Barbara Cattelan, Florence Fava, Tom Hamilton, John King and the Grievor

17. Following the issuance of the Preto Report the following positions were offered to the Grievor:

(1) the Grievor's Substantive Position ***(Exhibit E-1, Tab 13);***

(2) a permanent CR-3 General Services Clerk in Hamilton ***(Exhibit E-1, Tab 13);***

(3) the Grievor's Substantive Position on a part-time basis ***(Exhibit E-1, Tab 16);***

(4) a term assignment in the St. Catharines Tax Services Office - December 16, 1996 to June 15, 1997 ***(Exhibit E-1, Tab 22);***

(5) the Grievor's Substantive Position ***(Exhibit E-1, Tab 22);***

(6) *a permanent CR-3 Cashier position in Niagara Falls* ***(Exhibit E-1), Tab 4A);***

(7) *the Grievor's Substantive Position* ***(Exhibit E-1, Tab 13);***

(8) *a 6 month assignment in the Barrie Point of Service Office of the Toronto North Tax Services Office effective January 13, 1997* ***(Exhibit E-1, Tab 25).***

The Grievor's Evidence Regarding the Positions Offered by the Employer

18. The Grievor testified she never requested or considered a position in Hamilton; it was never "on the table".

Examination-in-Chief of the Grievor
"Will-Say" of Richard Pachowski

19. In her letter of June 21, 1996 Ms. Howard advised the Grievor that her request to return to her Substantive Position on a part-time basis was approved. On February 14, 1997 Ms. Howard wrote to the Grievor referring to her desire to return to her Substantive Position.

Exhibit E-1, Tabs 16 and 29

20. The Grievor testified that she never wished to return to her Substantive Position on any basis (full or part-time). Tom Hamilton and John King, both union representatives for the Grievor, testified that they never requested or indicated on the Grievor's behalf that she wished to return to her Substantive Position.

21. It is noteworthy that Ms. Howard's letters (referred to in paragraph 19 above) were not responded to by the Grievor, Mr. Hamilton or Mr. King to correct the misapprehension the Employer had that the Grievor would return to her Substantive Position.

22. The Grievor's and Mr. Hamilton's evidence regarding Ms. Howard's letter of June 21, 1996 is contradicted by the testimony of Ms. Cattelan and Ms. Fava. Notes of a meeting (made by Barbara Cattelan) held on May 31, 1996 between Mr. Hamilton, Ms. Shuttleworth, Ms. Cattelan, Ms. Fava and Ruby Howard indicate, that at least in Ms. Cattelan's understanding, the Grievor would be returning to her Substantive Position. The notes also reflect that the discussion included the possibility of part-time hours. That Ms. Howard refers to this issue in her letter of June 21, 1996 supports the Employer's Evidence in this regard.

Exhibits E-1, Tab 16 and E-2, re "May 31, 1996"

23. The Grievor also testified that she never requested a position in St. Catharines. Barbara Cattelan and Florence Fava testified to the contrary. Ms. Cattelan's notes of a meeting with Tom Hamilton and Ms. Fava on October 7, 1996 reflect her understanding that Tom Hamilton advised the Employer that the Grievor would like to work in St. Catharines and that to the best of his knowledge, the Grievor would accept an assignment there. In addition, the material faxed to Mr. Hamilton on October 18, 1996 from Ms. Fava is consistent with such evidence.

Exhibit E-1, Tab 29B
Exhibit E-3

24. The Grievor also testified that her husband's transfer opportunity to Niagara Falls ended sometime between November 1995 and January 12, 1996 (the date that Ms. Howard signed the MOA offering the Grievor a position in Niagara Falls). Since her interest in Niagara Falls was dependent on her husband's transfer to Niagara Falls, it is illogical that the Grievor, in her letter of January 17, 1996 to Anna Preto, in reference to paragraph 6, raises a number of concerns about the CR-3 position and then states "One last point my husband has still not received his transfer .....". The Grievor did not state that her husband's approved transfer had recently lapsed.

25. There is yet another inconsistency in the Grievor's testimony. In her letter of May 15, 1995 to Anna Preto she stated (on page 3) in the middle of the first full paragraph) that:
"I wish to clarify what was said to her (Ms. Reid), that Barrie was chosen because my husbands (sic) workplace accommodated him with a transfer to Niagara, which he had to turn down ....".

Exhibit E-7

26. The Grievor testified her husband's transfer opportunity for Niagara Falls ended between November 1995 and January 12, 1996. However, in Exhibit E-7, the Grievor writes that the transfer opportunity was gone by May 15, 1995.

27. The Grievor testified her interest in Niagara Falls was dependent on and due to her husband having an approved transfer. However, in August 1996, the Grievor was prepared to take a six-month term position with Immigration in Niagara Falls even though her husband did not have a transfer to Niagara Falls. She testified that she was even prepared to stay in a motel in Niagara Falls while her husband stayed in Tottenham. In Cross-Examination she agreed she would take these steps for Immigration but not Revenue Canada.

28. It is also noteworthy that in the Memorandum of Agreement prepared by Tom Hamilton, the Grievor requested a position in Niagara Falls. This request is inconsistent with the evidence that a move to Niagara Falls was dependent on Mr. Pachowski's transfer. The evidence before the Board was that Mr. Pachowski only had one approved transfer to Niagara Falls and it "expired" sometime before January 12, 1996 or much earlier depending on which version of the Grievor's testimony is correct.

Exhibit E-1, Tab 46

The Grievor's Return to Work

29. The Grievor accepted the position in Barrie (referred to in paragraph 17(8) above) and at her request reported to work in this position for the first time on January 27, 1997. The Grievor did not return to work after this day and on January 28, 1997 filed a harassment complaint against Pat Kendle, the Grievor's Supervisor in the Barrie office.

Exhibit E-1, Tab 27
Examination-in-Chief and Cross-Examination of the Grievor

30. The specifics of the Grievor's complaint of harassment against Ms. Kendle were:

> *"- She was forced to wear a Visitor's tag all day. She was the only person wearing a Visitor's tag even after she had been introduced to the staff.*
>
> *- Kendle, throughout the day, made humiliating and disturbing comments to her e.g. she did not want to disrupt her staff by telling them that Pachowski was coming; the staff felt that she (Pachowski) was a threat and that she (Kendle) could not work under the conditions that had been created by Pachowski's assignment. Further Kendle whispered about her to the other staff members.*
>
> *- She was not given any work to do all day which left her feeling unwanted and unproductive."*

Exhibit E-1, Tab 37, page 3 "Allegations"

31. The Grievor's harassment complaint against Kendle was determined to be unfounded and the Grievor filed a complaint with the PSC. The PSC declined to investigate the Grievor's complaint.

Exhibit E-1, Tabs 50 and 51

Proposed Memorandum of Agreement -- September 18, 1997

32. Mr. Hamilton testified that this Memorandum of Agreement ("MOA") was prepared as a "last-ditch effort" in response to Ms. Howard's letter of August 18, 1997. Clearly he took the e-mail seriously. In fact he testified that Barbara Cattelan advised him within a day or two of his sending the MOA to Barbara Cattelan (i.e. September 19 or 20, 1997) that Ruby said "it was a no-go" and she wanted to proceed with the termination. Mr. Hamilton advised the Grievor.

Exhibit E-1, Tab 46

33. The Grievor testified the purpose of the MOA was "to return to work, not be terminated". So she knew or at least she thought she was going to be terminated and she did not want to be fired. The Grievor clearly appreciated the risk of termination.

Cross-Examination of the Grievor

34. The Grievor testified that after the Employer rejected the MOA, she figured it was too late to return to her Substantive Position since the Employer was proceeding with the termination. The Grievor did not contact the Employer to advise that she would like to return to her Substantive Position. In fact she testified repeatedly that she had no intention of returning to her Substantive Position and she felt she had a right not to return.

Examination-in-Chief and Cross-Examination of the Grievor

35. This evidence of the Grievor is contradictory. Once Mr. Hamilton advised her that the Employer was proceeding with the termination, either she thought it was too late to then indicate she would return to her Substantive Position and she would be terminated or she never thought the Employer would terminate her or she had no intention to return.

36. The Employer submits that it is very clear from the evidence that the Grievor either had no intention of returning to work at all for Revenue Canada or that she felt she could dictate to the Employer what position she wanted, where it would be and what the scheduled hours of work would be.

37. Employees' Representatives often appear before this Board arguing for a second chance after an incident of misconduct. Clearly Stott's harassment was misconduct. It does not logically follow that every type of harassment regardless of the nature, extent or factual circumstances of the situation are irrelevant and that the complaint and respondent not only can never work in the same office, together but can never work where they might run into each other.

38. In August 1997 the Grievor testified that she knew Stott had been counselled but in her view counselling "a year or two or after that was too late". The Grievor testified she would not have returned to her Substantive Position even had Ms. Howard answered the questions she raised in her letter of August 29, 1997. The Grievor also testified a Letter of Apology from Ms. Stott would have been appreciated but she conceded she never advised Ms. Howard of this and in any event it would have been "too little, too late".

Cross-Examination of the Grievor

39. It is axiomatic that every employee is entitled to work in a harassment-free environment. However, this right is not an entitlement to dictate to the Employer the employee's terms and conditions of employment. It is not an entitlement to another position of the employee's choosing.

40. Clearly, the Employer has an obligation to address harassment in the workplace and to ensure zero tolerance. Employees found to have harassed other employees must be disciplined by the Employer. However, the measure and mode of the discipline is a matter fully within the Employer's discretion subject to the recognized principles of determining discipline.

41. John King testified a return to PIA was only a possibility if it would be guaranteed that there would be no contact whatsoever by the Grievor with Stott & Cook. This position by the Grievor clearly goes well beyond the scope of the Employer's responsibilities and the Grievor's rights.

Cross-Examination of John King

42. The Employer determined that Ms. Stott was to be given a written reprimand. This reprimand, although prepared, was never given to Ms. Stott by local management. The Employer became aware of this when discussions were ongoing concerning the Grievor's return to her Substantive Position. The Employer immediately took steps to have Stott's manager, Bonnie Glancy, counsel Ms. Stott.

Examination-in-Chief and Cross-Examination of Barbara Cattelan

Employer's Errors

43. The Employer acknowledges that it made the following errors in its handling of the Grievor's case:

(1) the investigations into complaints against the Stott, Lowe and Cook were flawed;

(2) inappropriate information was given to Laraine Spencer (i.e. "Grievor unable to work directly with management");

(3) the Employer failed to respond to the Grievor's letter of August 21, 1997 having determined that the additional questions raised in the Grievor's letter were inappropriate and yet another attempt to raise obstacles;

(4) the Final Level Grievance Reply was sent to the Grievor's CEUDA representative but apparently not to the Grievor directly.

44. The Employer submits that none of its errors are fatal or detrimental to the soundness of the Employer's action to terminate the Grievor. The Employer submits that the Grievor acted unreasonably and continuously placed conditions and obstacles in the way of the Employer in its efforts to return her to work.

Termination for Cause

45. The Employer consistently attempted to resolve matters with the Grievor and willingly worked with the Grievor's representatives; consecutively and concurrently Richard Pachowski, Tom Hamilton and John King.

46. Paragraph 11(2)(g) of the F.A.A. authorizes a non-disciplinary termination of an employee for cause when that employee does not meet the requirements of their position. The Employer must ensure that its actions respects the following principles of fairness:

- "the duty to act in good faith;

- the duty to fully inform the employee of what is required from him or her;

- the duty to inform the employee that she or he is not meeting the requirements of the position, and to inform him or her of the nature of the deficiency and what the consequences will be if she or he continues to fail in meeting the requirements of the position;

- the duty to provide the employee with the opportunity to make the necessary adjustments to meet requirements;

- the duty to assist the employee in making these adjustments; and

- the duty to explore alternative solutions before demoting the employee or terminating his or her employment."

Exhibit E-1, Tab A

47. The Grievor did not report for work when directed to do so by the Employer. Clearly it was a requirement of the Grievor's Substantive Position that she report to work.

48. The evidence clearly demonstrates that the Employer acted in good faith during the mediation efforts before the issuance of the Preto Report, during the mediation efforts following the issuance of the Preto Report and again following the closing of their file by the PSC.

49. The Grievor was informed that she was to return to work or be subject to termination. The Grievor testified both that she knew she would be terminated, that she did not expect to be terminated and that she had a right not to return to her Substantive Position because of the harassment.

50. In her letter of August 18, 1997 Ms. Howard directed the Grievor to return to work approximately two weeks later on September 2, 1997. In her response of August 21, 1997 the Grievor advised Ms. Howard that "this environment" was not acceptable.

Exhibit E-1, Tabs 44 and 45

51. The Employer made extensive efforts to accommodate the Grievor in another position and in her Substantive Position but none were acceptable to the Grievor. As stated by Deputy Chairperson, Joseph W. Potter in Hutchinson (166-2-28535) "the employee also bears a duty to assist in securing an appropriate accommodation".

52. The Grievor disobeyed the direct order given to her by Ms. Howard on August 18, 1997 and did not report for work. The cardinal principle in labour law of "obey now, grieve later" applies; the Grievor had no valid reason to not follow the order of Ms. Howard. The Grievor did not put forward any evidence indicating that she had any safety concerns in returning to her Substantive Position.

53. The decision of Deputy Chairperson, Muriel Korngold-Wexler in Stephen Kwan (166-2-27120) is directly on point (on page 28): "Mr. Kwan should have reported to work and he would have had the right to continue with his complaints from a stronger position. He would have maintained his employment".

54. The Employer submits on all the facts of this case and in accordance with the law the termination of the Grievor's employment was fully warranted and the Grievance should be denied.

For the Grievor

REBUTTAL ARGUMENT OF THE BARGAINING AGENT

The following is a submission in reply to the Employer's written arguments of June 22, 1999. It is in chronological order, and any numbers to the left relate to the Employer's numbered arguments.

3. The "Stott" complaint dealt with planned humiliations in front of others. The employee had transferred in from another department only nine months earlier.

The grievor explained that she had previously gone to Mr. Palmer, her supervisor, but he would say: "We're used to her", and do nothing. After she filed "G-4" on January 12th, Mr. Palmer, with whom she had good relations, stopped speaking to her.

On January 14th she went to see a doctor, and wound up on sick leave and D.I. while taking therapy.

In her nine months' work at Terminal Two, Pearson, there were no complaints against her work, yet from the first the employer went through the motions but without much genuineness.

6. *In "G-6" the grievor was notified that some of her complaints were upheld (smoking and Stott). It said one occasion was improper, but did not say which one or how improper it was.*

It also said that corrective measures would be taken. This was false.

The grievor was confronted with the falseness of the "corrective measures" on July 14, 1994, when approached in Terminal Three by a smirking Sylvia Cook. Cook, as a friend of Respondent Stott, had been recruited by Departmental Investigator Hart as a helpful source of additional negative comments against the grievor. Cook had certainly caught the mood, and fresh from the exercise with Stott and Hart, she found it necessary to approach the grievor in mock friendship. Cook was loud and sarcastic, despite being aware that Pachowski was on sick leave. "G-7" - corrective measures, indeed.

To my knowledge a complaint was filed, but not investigated. The department said simply that it had lost it.

9. *The two-month temporary assignment was until the incumbent, D. Rand, returned. The grievor was off ill, and her sick leave continued. D. Rand was on temporary secondment to Barrie, and was later given that job, partly because she had worked on secondment in Barrie so long.*

For most of this period the department simply told the grievor there were no jobs in Barrie. How could there not be a job for the grievor in Barrie if there was one on Front Street?

The grievor knew that the department was not being straightforward, and asked the P.S.C. to look into bias in the harassment investigation.

The grievor had a chance to transfer to Niagara Falls to a permanent position. She had relatives there and her husband had at that time the chance to transfer through Canada Post to Niagara Falls. The department, however, gave the appropriate nudge to the local Customs Manager, L. Spencer, and the job fell through. In "G-10", December 20, 1994, Spencer wrote: "There are no positions in Niagara Falls that would ensure that you would not have direct contact with a management representative." Some time would pass before it was known that management in Toronto had at just the right time contacted Spencer and falsely informed her that: (1) the grievor had filed a complaint against management; and (2) the grievor could not have any contact with a management representative. Because of these actions the grievor could not trust the department. The idea behind Spencer's letter is that the grievor should forget about Niagara Falls.

In "E-6" G. Reid wrote to A. Preto of the P.S.C. The letter gives an inaccurate description of a purported restructuring. For example: "The staff with whom Mrs. Pachowski had been working will no longer be in Terminal Two." M. Stott was and still is working in the same office, as was admitted at the hearing. Both the grievor and A. Preto were aware that this was wrong. Reid also assured Preto that: "Much effort has gone into changing the working atmosphere in Terminal Two". Well, if we are talking about the working atmosphere relevant to the Complainant, Linda Pachowski, A. Preto reported six months later that nothing whatever had been done. G. Reid went on to state the purpose of the exercise, page 2: "Therefore, to ensure that Ms. Pachowski can return to work now, without having any contact with employees with whom she did not feel comfortable . . ." One cannot blame Ms. Pachowski too much for thinking this sort of fresh start was good when she sees it in writing from the Director.

"E-6" goes on to smooth the Niagara Falls situation. In yet a third version of events, lo and behold, there was a misunderstanding: it was not really a SCY-2 that the grievor was offered at all; it was really a SCY-3 by mistake. If this were true, there would have been no need for Toronto to intervene with Spencer, and no need for Spencer's comments. The grievor, in her evidence, recalled the original version. She would be given, and would take a SCY-2 opening in Niagara Falls. That ended with Spencer's letter. The SCY-2 was at a later date reclassified to SCY-3. Had the department not intervened, the grievor would have eventually become a SCY-3, as the incumbent of the position.

In "G-11", April 19, 1995, the grievor's preference was Barrie. Section 4 requested an apology for Niagara Falls. After Niagara Falls no indeterminate position was offered to any place she could go. Per section 5, "G-11", the department's Human Resources people now understood that she wished an indeterminate position within commuting distance. Henceforth, attempts would be for temporary assignment or outside commuting distance, with the one exception being a demotion to CR-3, as well as going from a day worker to shift and weekend worker, and reporting to L. Spencer, who wrote "G-10", and as well, it was a job being relocated. To this she said "no". In "G-11" Linda Pachowski put down six cities; the employer did not agree with any.

In "G-12", paragraph 5, May 1, the department talked of Barrie, but did not mention the Rand secondment. In a complex explanation the employer ended by rejecting Barrie on behalf of the grievor for the reason that: "The department is not convinced that she [Linda] would be able to have the fresh start we are "striving for". Giving Linda a fresh start was so precious to the Director that she had to cancel the grievor's number one preference to Barrie. Was the department telling the truth when it said: "We are striving for a fresh start"? If not, let us not blame the grievor for the belief that this was what was supposed to happen.

The employer countered in "G-13", May 1, 1995, with Toronto Tax Offices, which, as the grievor testified, were all out of commuting distance from the Pachowski home in Tottenham, and had the added disadvantage of being in the bailiwick of those responsible for the Hart investigation and for the misinformation to L. Spencer in Niagara Falls. The Director, G. Reid, did offer a letter of apology (paragraph 5) for the way Niagara Falls was handled, but this would do nothing to make the grievor whole. Furthermore, the P.S.C. investigation was not over, and the "G-13" offer was dependent on smothering the P.S.C. investigation into Hart (see page 2, section 2). Would the

employer's good will, if any, outlast the cancellation of the P.S.C. investigation? It is a serious consideration.

In "G-14" the employer reiterated its May 1st position. It had already explained on May 1st, "G-12", that most of the Pachowski/Preto suggestions were set aside since (page 2, paragraph 8) in a small office "her presence would be seen as a threat to them; would be counterproductive to everyone concerned". If that be the criteria, would not Terminal Two be counterproductive? It is the insincerity of it.

Once again, in "G-4" there was no mention of Rand's CR-3 secondment from Front Street to Barrie. Rand had been expected to return to Front Street in December, 1994, but was now extended.

G. Reid's letter, "G-14" ended: "The department has already demonstrated its concern to find the employee a work environment free of harassment - by extensive research to accommodate the employee's requests". Toronto Tax offices were never a request, and were already outside commuting area, of which fact the employer had already been informed. No request had been accommodated. It is a false statement.

In "E-7" (page 2) the grievor explains how she was dropped for the SCY-2 in Niagara Falls, after Spencer got a signal from Toronto. The Zimmerman Road (SCY-2) was later made a SCY-3. The grievor pointed out that she had worked strictly for management at Pearson and, significantly, had no problems with the manager. She asked why she could not work with a manager in Niagara Falls.

The grievor was right about this; the employer's position does not make sense. "E-7" ends with the grievor requesting the investigation continue.

13. *"G-7" shows that in November, 1995, Richard Pachowski was in Tottenham. He said they moved there in September, 1995.*

Tab 1 - The Preto report blasted the department for its one-sided investigation of the Pachowski complaint. On page 9, paragraph 21, Richard Pachowski. shows concern for the narrow transfer window in his own job. The department was confused by the fact that the Pachowskis wished to live in the same town and, therefore, needed a transfer for Richard Pachowski. This is a clear and written example, proving the employer was fully informed of this.

On page 10, paragraph 23, is an example of the department's now habitual practice of insisting on putting knowingly false statements in the correspondence record. In this example, however, someone else other than the grievor had knowledge of the case (A. Preto) and immediately informed the employer the statement should be removed. The employer insisted that it stay; to wit: "The employee's preference is not to have to relocate outside Toronto." It is, of course, completely false, and even at this point there is nothing to support it. G. Reid (paragraph 24) says: "was adamant".

At page 12, paragraph 28: The grievor explained that her substantive position did not represent a fresh start. She had no reassurance. If she was going to relocate, she wished it to be a place she wished to go, rather than being ordered to go as a penalty for having been harassed.

In the report's findings (page 17, paragraph 5) Stott's and Cook's additional comments admittedly "bore no relevance to issues raised by the complainant".

Page 22, paragraph 9, refers to a medical report on her returning to her substantive position: "The situation is clearly antagonistic, and would indicate further regression." This is strong advice not to return to the substantive position for health reasons.

Page 23, in the final paragraph, explains some of the misinformation given to Niagara Falls. A footnote reminds us that the grievor's appraisals meet all requirements.

At page 25, paragraph 10, Stott was found to be still at the Terminal Two Administration Office. Cook was in Terminal Two as well; this, despite G. Reid's false assurance to the contrary, six months earlier.

Page 25, paragraph 10, regarding Stott, confirms that: "could not see any evidence of any action having been taken by Mr. Palmer or anything else."

Up to this point the employer had falsely maintained that it had taken action (G. Reid). The grievor had understood otherwise, and wished the investigation to proceed.

At page 26, paragraph (f): The findings give four examples of the department falsely informing people in the department that the grievor's complaint was against management and was unfounded.

Page 28: The Treasury Board Harassment Policy makes it mandatory to (5) monitor the situation on a regular basis until there is satisfaction that corrective measures have been implemented. Since there was no evidence of any action, there was not any monitoring to the point of satisfaction. Nothing was done.

Page 29: The complaint was founded, and the investigation was biased.

Page 31: Hart "completely disregarded matters entirely pertinent - but which would have represented adverse findings for the respondents or management."

Paragraph 2: Regarding the additional and irrelevant comments the department solicited from Stott and Cook: "highly subjective and judgmental in nature and consist of a series of denigrating comments". The complainant had no chance to respond to any of these comments. If she had trusted the department at this stage, it would have been irrational.

Page 32 (f): "To add to their list of criticisms and judgmental statements regarding the complainant which was clearly Ms. Cook's main activity as a witness."

Page 35: "Hart didn't inquire into the extent or severity of inappropriate behaviour towards the complainant." Hart was the department's investigator. There was, therefore, no basis for assuming the complainant could go back to her substantive position at the Administration Office in Terminal Two with Stott.

Page 36: The Niagara Falls situation, which involved the department fabricating and passing on false information in a timely manner for the purpose of preventing the grievor from being hired, was described as "continuing harassment" and "a particularly nasty version of broken telephone".

A. Preto also described how the department drew people in who did not need to know, to the grievor's detriment: "More and more people became tangentially involved . . . people who were not directly involved in the case to begin with, some of whom were really not clear on what went on - but who formed an opinion - and proceeded to pass misinformation which caused others to make decisions, which had a detrimental effect on the reputation, career-- of the complainant."

"It would appear that management, in spite of its assurances, had ultimately done nothing about the founded complaint?" The grievor was treated falsely and her trust in the department's management and human resources management reflected that.

Page 37: Regarding Niagara Falls: The report mentioned "the insidious nature of these kinds of distortions", and that "given the above references, it comes as no surprise that any possibility of a deployment to Niagara Falls quickly evaporated."
"An unusually long procession of people have become involved in this scenario - a good number of these people were misinformed about the case."

Page 38: "Distortions appear in complainant summary sheets which were used to brief senior management on the matter."

The employer says it has no dispute with the facts of Preto's report, but has never so much as apologized, even to this day. It continued on using its bureaucratic weight to remove the source of irritation, as Hart had done.

The report ended by noting that a straightforward situation "has grown into something infinitely more complex and difficult for the department and complainant to unravel at this time."

Following the report, Richard Pachowski made several phone calls to the department which were recorded without comment - in Tab 2 by B. Cattelan. In Tab 3, page 4, it is said that his wife could not return to the airport.

Tab 4 is a Memorandum of Understanding prepared by the grievor and A. Preto, providing in paragraph seven for a fresh start in an indeterminate position. She had had an indeterminate position, and the report, for many reasons, recommends a fresh start.

Two weeks later, January 12, 1996, it responded with Tab 4A, paragraph 7, which offered her a demotion (CR-3) Counter Clerk, shift work, position in Niagara Falls. The grievor's husband reapplied for transfer to Niagara Falls more than once, but the opportunity for Niagara Falls had come and gone.

The grievor responded (Tab 5) that she was very pleased and hopeful, but had checked and learned that the Counter Clerk jobs were being moved out. She did not want to move, to move again. The grievor also mentioned that her husband did not receive transfer approval. "I would like it very much of a meeting could be set up with a

representative from the department, someone from Human Resources, yourself, my representative and I." "This way all the issues could be put on the table and there would be less going back and forth." Tab 5 was faxed to the employer the 19th of January. The meeting never took place.

Two weeks later, February 1, 1996, she wrote to F. Fava, asking for a response to her letter and phone messages.

The grievor and her husband met at their initiative, with F. Fava and R. Banks, on February 1st, and reiterated her concern with the Counter Clerk positions being moved out.

In Tab 7 the CR-3 job was confirmed as "not considered surplus". It did not say that it was not surplus, and it did not say anything about the grievor's question of relocation.

There was also the problem of her husband getting another transfer opportunity.

In Tab 9, February 21, 1996, the grievor clarified that on February 1 she had not requested St. Catherine's (see R. Howard, Tab 8) but did not want the CR-3 because those jobs were being moved to other towns, and because she would be under L. Spencer. She also stated that no offer was made to go to the Keaton Warehouse. She still preferred a job in Niagara Falls, but "agreed to St. Catherine's when mentioned, to make things easier, not to change my request to Niagara."

In Tab 12 (April 15, 1996) the grievor wrote again to R. Howard, asking for her response to Tab 9, two months earlier.

R. Howard responded (April 17, 1996) in Tab 13 that the grievor had three options: (1) return to substantive; (2) accept a CR-3 in Hamilton; (3) resign. Failure to accept would result in termination under 11(2)(g). Neither of the grievor's letters were acknowledged or responded to.

The grievor did not report, and no penalty was assessed.

R. Howard wrote again (Tab 16).

In "E-2", B. Cattelan's notes of May 14th on Richard Pachowski: "yesterday still pushing for outside Toronto". On May 31st, page 66, Cattelan wrote: "Ruby expressed concern with Linda going back to P.I.A. - going back to P.I.A. is a no win situation."

The evidence shows that Howard, Preto and the grievor dismiss the idea of going back to her substantive position as a no win unacceptable idea. Both Tom Hamilton and John King state they never told the department that Linda wanted to go back to Pearson. B. Cattelan stated that she did not remember who it was that said she should return to the airport. The grievor certainly did not wish it. Yet, on April 17th and June 21st she was told to go there, and told repeatedly thereafter. She did not report on July 22nd, and no penalty was assessed. The grievor believed that she had every right to another position.

In Tab 17, B. Cattelan explains the complaint against Cook is not on.

During this time (Tab 18, August 20) Tom Hamilton and Al Schmidt set up a six-month assignment for the grievor in Immigration, Niagara Falls. Linda indicated she would accept.

It was not to be, as the grievor explained in Tab 19. She wanted "a fresh start, preferably in another department where, hopefully, no one would have been poisoned against me." She went on to explain that Immigration, Niagara Falls, had been signalled by Revenue Canada, Human Resources, Toronto, and Immigration cancelled the offer: "They have ruined my career chances", she ended. Yes indeed, they had again.

B. Cattelan explained in "E-3" that she had told Mr. Schmidt of Immigration that Linda Pachowski no longer had confidence in Revenue Canada, and "the department had mishandled a harassment complaint".

On October 18th, F. Fava faxed to Tom Hamilton a question of a temporary assignment to St. Catherine's: "Please advise if your client would be interested." This underscores the tentative, at best, nature of "E-3", where Tom Hamilton is presented as surmising "to the best of his knowledge" about St. Catherine's. If St. Catherine's was settled in "E-3", it would not still be a question by Tab 19, A. Tom Hamilton asked about Barrie, but was discouraged.

Tom Hamilton testified that he informed the department that a term would be no good.

23. *My notes do not show B. Cattelan saying that the grievor told her she wanted to go to St. Catherine's, and F. Fava said she did not recall St. Catherine's.*

B. Cattelan was busy on October 23, 1996, documenting a valuable bit of gossip from Trudy Krake. The grievor, not completely trusting the employer's information, had gone to check out the job situation in St. Catherine's. Keake called Cattelan to report that "the Pachowskis were hanging around the hallway - asking to speak with a union rep.".

It is interesting to note that they asked the union representative "if there was a permanent position in St. Catherine's". "No." Richard Pachowski was then asked to speak to management, and replied: "We don't trust them." He then relented and asked Krake the same question: "if there was a permanent position."

The Pachowskis' concern for a permanent position, as recorded in Cattelan's notes in "E-4" support T. Hamilton's statement that the job had to be permanent. Indeed, this goes back to Preto's involvement. It was always an indeterminate position that was requested.

In Tab 21, Stewart writes: "I can assure you the department is not aware of how they [Immigration] learned of the harassment complaints." Except, that in "E-3" Cattelan explained that she told Immigration of the harassment complaint.

In Tab 22, December 5, 1996, the grievor was offered a temporary assignment in St. Catherine's. The letter was worded in the same false language: "regarding your request for alternate employment in St. Catherine's." The grievor had written, specifically pointing out that she never requested it. The grievor and her husband had gone to St. Catherine's to check to see if, in fact, there was a permanent job there, and

Cattelan knew this from Krake's phone call, which is recorded in "E-4". There was no point to this offer.

Should she decline the offer, she must go to her substantive position or be fired under 11(2)(g). When Tab 22 was written, it was known that she would not move to St. Catherine's for a temporary position, and would not go to Terminal Two. In regard to the letter, B. Cattelan testified: "I never spoke with her and I would have been surprised if she did report."

The grievor did not report, and was not disciplined.

In "G-1", December 11th, which equals Tab 23, John King emphasized that St. Catherine's would be fine if it was permanent, because "a temporary position would result further stress because of the lack of stability and uncertainty, the possibility of having to relocate again". J. King stated she would accept a demotion, CR-3, to facilitate Barrie so she would not have to move.

He concluded: "If the department's initial investigation were conducted properly, and if those in authority had acted in a timely and responsible manner, the hardship endured over the last three years could have been prevented."

Further to "G-1", on December 18, J. King spotted a SCY-2 deployment to Barrie, and mentioned that it should go to Linda Pachowski, who had been on LWOP for three years. Rose Panzerino replied that it was a CR-4, to which John King suggested creating a new position so she could deploy.

But the department did not deploy her; it temped her at the CR-3 level in Barrie. John King confirmed that he did not get the offer until after he opposed the deployment of L. Vershoor.

The grievor reported to her temporary job in Barrie on January 27, 1997. We now know that there was not even a term position; they simply cobbled funds together to cover salary for six months. There was no job, and no position; therefore there was really no point to the assignment. Secondly, we know that the department did not want Linda Pachowski in Barrie. They had given a number of reasons why Barrie would not be good. They had slyly never mentioned the Rand secondment, and even this temporary assignment only came about because John King had noticed a deployment to Barrie in a job Linda could do. In these circumstances it is not surprising that Barrie did not work out. When Linda got there she found nothing to do, no one expected her, and the boss within earshot would say things like: "I can't work under these conditions." It must be clarified that this temporary assignment had no future, as there was no position (see B. Cattelan testimony). It in no way addressed Linda Pachowski's situation, which demanded an indeterminate position for an indeterminate employee. B. Cattelan recalled Linda Pachowski's concern for a permanent job.

Tab 29, February 14, 1997, ordered the grievor to report on March 3, 1997, or she would be terminated under 11(2)(g). The letter stated that John King advised "that you are requesting to return to your substantive position". Mr. King denied that. It is certain that the grievor never requested it, and that J. King never thought she had requested it.

The grievor did not report, and was not disciplined.

Considerable correspondence (Tab 31 to 36) took place between the parties during the two and one-half months following (Tab 29), but the letter of February 14th, threatening dismissal, receives no mention. Both sides acted in their correspondence as if Tab 29 was a nullity, as they went about dealing with more trivial matters.

B. Cattelan confirmed that the grievor had always been consistent in that she did not want to go back to Terminal Two, and there were no consequences to the February 14th letter.

"G-2" confirms on July 3 that there were two CR-3 vacancies in Barrie. An April 12, 1997, e-mail confirms that D. Rand has been in Barrie on secondment since 1994, and Lisa Ramirez on loan from Toronto North since August, 1996: "On paper, both have indeterminate positions in the city [Toronto]. This is a fact that Richard Pachowski understood when he refused to swallow the official line on Barrie, as Cattelan's notes of Krake's call confirm. He stated that they were still moving clerks into Barrie. He was right, but the department never mentioned that they were still moving clerks into Barrie. It found it easier to deceive the Pachowskis by leading them to believe that they were moving clerks out in a restructuring.

The grievor had offered to take a CR-3 demotion to Barrie, and even at this point they could have accommodated her. Both Ramirez and Rand had substantive positions in Toronto. They got CR-3 jobs in Barrie. Despite these available opportunities, the department would not move Linda Pachowski to Barrie, even though the harassment complaint was founded, and her complaint against the department's biased investigation was founded (or perhaps because of this), and even though a medical report advised against her returning, and A. Preto of the P.S.C. advised against returning, and even though Ruby Howard herself ("E-2") referred to the grievor returning to Terminal Two as "a no win situation". The department insisted that she return, and fired her for not doing so. All the while the department went its easy way in Barrie, seconding a CR-3 from Toronto, while diverting the Pachowskis with misleading information about Barrie, their number one preference.

Tab 38 records Joyce Mclean calling B. Cattelan, in that the grievor had complained against the department in an E.A.P. meeting; that the department had given false information to the Manager in Niagara Falls.

Cattelan pointed out "that the department was always in support of E.A.P."

The casual collecting of information from far and wide, showing the grievor in a negative light, or making her look like a "nut", was essentially a below-the-horizon continuation of the work that Hart had begun by collecting additional comments.

The P.S.C. had, of course, taken a dim view of this.

On August 18th, 1997, the grievor was sent a letter similar to Tab 29, on February 14, 1997, ordering her to report to her substantive position, or be terminated under 11(2)(g). The grievor acted as if it was another Tab 29 letter; she did not report and was terminated. She testified that she did not think that she would be fired, and the record of exhibits is clear that she did not abandon her position. In support, B. Cattelan states that "she knew that Linda wouldn't report"; and that "I acknowledge that a fresh start is a continuing point of discussion, and Toronto Airport is not a fresh start."

The grievor further stated that she believed she had the right to a harassment-free work place and fresh start based on the discussions that had gone on, and the Preto report. She had been threatened before in April and December of the previous year, and in February of the current one, and nothing had come of it, not even a small attempt at discipline. She did not believe the statement: "Employees involved in your complaint have been counselled", because the Preto report had shown that such actions had not taken place, despite the department having said the contrary.

The grievor wrote on August 21 (Tab 45), and said she expected an answer. In Tab 45 she pointed out that two of the employees in her original complaint were still in the office. She asked when they had been counselled. It would have been no great effort to answer.

The grievor was concerned about working with Yvon Squires, President of the CEUDA Local. The complaint she refers to was a section 23 complaint for violation of section 10(2), failure to represent. The complaint went to a hearing before the Board, and a mediated settlement resulted. This was a legitimate concern.

The department had quietly dropped all mention of settlement terms it had previously agreed to, and the grievor in Tab 45 reminded them of this. It was she who had gone off sick, a victim of harassment, and it was she whose career was further complicated by the department's failure to properly investigate, resulting in a protracted investigation by the P.S.C.

The department could have answered these understandable points, but chose not to. It also chose not to tell the grievor that it was not answering. Previously time limits meant nothing, but this time she was fired while awaiting an answer.

Tab 45 ends with: "I look forward to returning to work - this environment is not acceptable." Some straight reassurance that everything was okay after three years was necessary. The grievor said that if she had believed her employment was at an end, and received reassurance, she would have returned. The grievor did not want Stott fired. If she had said - sorry, it won't happen again - that would have shown some understanding.

There was no answer, no call, no letter of warning prior to being fired. The only discussion surrounded Tab 46, which was drawn up by Tom Hamilton in discussion with the grievor. Tom Hamilton described the problem from the grievor's view as needing an indeterminate job, and from the employer's view as needing to be able to deploy into any job at any location. He discussed the concept with B. Cattelan, who wished him "good luck, if you can get it", and "we're more than willing to look at anything you put in writing". Tom Hamilton recalls there was about a week between that discussion with B. Cattelan and Tab 46, which is dated September 17, 1997. B. Cattelan did not say it was all over, or too late.

On September 18th Tom Hamilton faxed B. Cattelan a new Memorandum of Understanding under cover of "further to our telephone conversation", paragraph six of which provided that the grievor be deployed to a similar position, with salary protection, if necessary, in Barrie or the Niagara Peninsula (excluding Taxation).

The grievor did not wish Taxation in Niagara Falls because that was where L. Spencer was a manager, who had been involved in cancelling out a transfer after having been fed false information about the grievor by Taxation management in Toronto. After the Preto report she had been offered a demotion to CR-3 under L. Spencer, wherein she would give up being a day worker to become a shift/weekend worker. In addition, the grievor had learned that such jobs were being relocated, and never got a straight answer from the department on that. Barb Cattelan phoned Tom Hamilton back and said she had talked to Ruby, who said "no", they "would terminate". Essentially, the deadline had been extended until Ruby said "no". The letter of August 21, and the Memorandum of Understanding are proof that the grievor did not intend to abandon her position, and the employer knew that she had not.

In Tab 47, the termination letter, R. Howard states: (1) "You have previously been advised that failure to report for work as directed would result in termination"; (2) "as noted you have chosen not to comply"; (3) "specifically, you did not report for work September 2 at 9:00 a.m. as instructed."

These three elements, taken together, form the disciplinary reason for termination. When Barb C. was asked if she was fired because she "defied you", she replied: "She didn't comply. Correct." The conscious act of choosing to disobey and not report is highlighted in Tab 47. The specific, deliberate behaviour of the grievor is relied on. Such a termination is an undisguised disciplinary discharge per 11(2)(f) of the F.A.A. It is not, as Tab 47 states, via 11(2)(g). there is no authority under 11(2)(g) to dismiss an employee for a disciplinary reason. Hence, it follows that Tab 47 should be quashed, and the grievor fully reinstated. The grievor committed the same act four times: in April and December 1996, and in February and August 1997. The first three times she was disciplined not in the slightest, yet discipline is progressive. This act should have attracted, at most, an initial small penalty. The grievor was lulled into a false sense of security.

Tab 47 discusses the August 21st letter: "You chose to raise questions which could have been posed on your return to your position, rather than complying with my direction to return."

Why does R. Howard say this in the dismissal letter, when it is too late for the grievor to benefit from this insight? Surely the department should have let the grievor know ahead of time. the grievor did not know she would be fired. If past practice is any guide, she would not have been fired. The employer was aware of this past situation too, and chose purposely to withhold this information until it was too late. It thus acted in bad faith.

Section 11(2)(g) provides for termination or demotion: "for reasons other than breaches of discipline or misconduct". There is no evidence of incompetence or incapacity. The record indicates she met all requirements, and was good at her job. The department itself certainly did not believe she was incapacitated; it ordered her back to work. It fired her because it said she chose not to report. The grievor thought she had a right to a fresh start, and she did not report to the workplace of her substantive position. She had reasons: she had been harassed, there had been a biased departmental investigation, sharply adverse to her, while boosting the harassers and their friends, followed by a lengthy P.S.C. investigation and report which condemned the departmental investigation. This criticism must have been unwelcome to the department. It entered into a power struggle with the harassed employee. The

department had "cried wolf" before, and nothing had happened. In the end it did the same thing, ordering the grievor to return to her substantive position, and terminated her without warning or acknowledgement of her August 21 letter. That was, as before, bad faith, and it was discipline.

The employer has no authority to terminate someone under 11(2)(g) for breaches of discipline or misconduct; it can only proceed for reasons other than breaches of discipline or misconduct. "Brown & Beatty", in "Nature of Disciplinary Sanctions", discusses this different in 7:4210:

> *The view has been expressed that discipline is to be distinguished from non-disciplinary action by the reasons for and purpose of the action. On this view, the essential reason justifying disciplinary action is misconduct and the purpose is to punish. Other arbitrators have suggested that the term "discipline" is generally referable to "that type of action by an employer which constitutes its response to behaviour which is of a culpable nature and which may be amenable to correction through the institution of some kind of disciplinary penalty".*

Further on:

> *It follows from what arbitrators conceive to be the essence of disciplinary sanctions, that a written warning, which forms part of the grievor's employment record, which is intended to induce her to alter her behaviour and which may have a prejudicial effect on her position in future grievance proceedings will likely be regarded as disciplinary in nature.*

By any standard, the reasons for termination were for discipline or misconduct, yet the department claimed authority to terminate under 11(2)(g). This was not a misprint, for the department would benefit by using 11(2)(g) instead of 11(2)(f). It would not argue the case as a disciplinary discharge and avoid the repercussions of the progressive discipline rule. Just as the department sought to gain an advantage by not addressing the grievor's August 21 objections until the discharge letter, so it also chose 11(2)(g). The termination letter is fundamentally flawed, and should be nullified.

Mitigation

The grievor believed and acted, especially after the Preto report, as if the department was to help her get a permanent job somewhere. The department did from time to time discuss this possibility, up until September 18th, 1997, with her representatives, although the only time they met with her was when she and her husband showed up unannounced at the department's doorstep. The grievor was never granted the meeting she requested (February 21). Nor was there any meeting or contact with the grievor just prior to, or at the time of the discharge. The department acted in such a way as to change her belief in a fresh start. Letter of April (Tab 13), June (Tab 16), and December, 1996 and February (Tab 29) were refused on the sole ground that she believed she had the right to a fresh start or at least something else. They did nothing to clarify the department's belief that it could order her to her substantive position.

The grievor herself made some mistakes. She was slow in realizing the "real politick" of the department. She had the erroneous belief that the Treasury Board Harassment Policy meant something, and did not know that the real harassment policy means that the harassed get nothing and are persona non grata. The department proved these points by its discharge. This is not the situation of a harassed person wanting a new job; she was harassed, and was also attacked by a biased harassment investigation (the very procedure that had been set up to protect her). The department was roundly condemned for its misdeeds in the Preto report, which recommended the grievor be given another job. The department created this mess, and then had the grievor pay the price.

Basically, the department snuck up on the grievor by not responding to her August 21st letter, even though F. Fava testified that, as a professional staff relations officer, the letter of August 21st would normally have been replied to.

This was not done because the grievor was lulled by similar actions in the past, to believe she would not be fired, and the department delayed answering her August 21st letter to maintain her in that belief.

We request that the grievance be upheld, which includes reinstatement with full pay and benefits to January 21, 1995.

***NOTE**: We request that jurisdiction be retained if the parties are unable to agree on compensation.*

All of which is respectfully submitted.

FURTHER COMMENT

31. *The grievor was never interviewed.*

32. *When Ruby said "no", the date was around September 19th. That is the date B. Cattelan, T. Hamilton and the grievor realized she was being terminated.*

33. *The grievor did not appreciate the risk of termination.*

38. *In fact, the grievor said she would have returned with reassurance, if the alternative was loss of employment.*

40.-42.*The letter of August 21st asks an innocent question about this: "when"? It was not answered, and there is no evidence that anything happened.*

41. *John King said the opposite. He denied recommending or advising her return.*

52. *"The grievor disobeyed the direct order given to her by Ms. Howard, August 18, 1997, and did not report to work." We agree.*

CASES

The two cases mentioned are both 11(2)(g) cases based on health and safety concerns. Kwan (166-2-27120) had concerns about asbestos, among other things, but gave very little evidence or explanation, and refused to consider returning to work at adjudication (page 23).

Similarly, Hutchinson (166-2-28535), who suffered from environmental sensitivity and reportedly "brain fog", would report to work and then repeatedly withdraw under the Canada Labour Code. She, like Kwan, did not participate in a search for another job. This is in stark contrast to Linda Pachowski, who was constantly phoning, reminding, writing, requesting to meet and taking initiatives. Two of these initiatives were blocked by the department of Revenue Canada, Toronto, passing negative and false information, so that she was no longer wanted.

The Pachowski case is not like Hutchinson. Pachowski reasonably thought, from all she heard and read, from the Preto report onward, that she had a right not to report to Terminal Two without some settlement, and that she had a right to a fresh start. The department certainly participated in this, and Tom Hamilton continued to negotiate until September 19th.

The department said that it counselled those involved in the grievor's complaint, but would not say "when". It had paid lip service to this before but the Preto report found that they had not done it. So, just saying it a second time is not worth much. The employer knows what remorse means. They like to see an employee full of remorse, but they have not shown any themselves. This is not just something for Stott - to give an assurance that she understands and that it will not happen again - but for the department on its own behalf to take responsibility for, and show remorse for the harm it did in its own biased investigation.

Instead, the department continued on documenting her, even using the E.A.P. for information. It blocked an opportunity at Immigration with negative information, and undermined a transfer to Niagara Falls with false information. There are four examples of false communications to various parts of the department, all adverse to the grievor-- Tab 1, page 26(f). A. Preto had asked the department to leave out a statement about the grievor wanting to stay in Toronto, but they insisted on it. It was a false statement for which, to this day, there is no basis. Later, they insisted on a similar statement twice, that Tom Hamilton and John King had advised that she wanted to return to Terminal Two. Both men denied it. It is a strain to try to believe the department truly thought that she wanted to return to Terminal Two, particularly given Cattelan's testimony that the grievor was consistent in not wanting to go back. In short, this is a mess created and continued by the department, and it has shown neither remorse nor an ability to step back and take the measure of its habits.

In Kahn-Tineta Horn (T-3033-92) the Court considered the difference between abandonment and discipline, though the difference was more acute then, since abandonment was not under 11(2)(g), but Section 27 of the P.S.E.A. At page 17:

> *I note that in this case there was no evidence of or reference to any previous dissatisfaction with the respondent's work - abandonment of a position by such an employee would surely be unexpected.*

And further on page 17:

> *Where the adjudicator has before her or him a grievance that alleges that termination of employment is in reality a discharge for reasons of discipline, the adjudicator must determine whether that allegation reflects reality.*

Page 18:

> *In a case such as this, it is not sufficient for the adjudicator to consider whether the statutory conditions for a declaration of abandonment appear to have been met, and if that is the case, to desist from further inquiry, it is incumbent upon her or him to consider whether that appearance accords with reality by assessing the basis upon which the action was taken, considering the evidence that is adduced.*

Page 15:

> *Determination of what constitutes "disciplinary action" in a given case was, in my view, intended by Parliament to be a matter for determination by those appointed as adjudicators.*

Further:

> *It is the sort of question that lies within the core of the Board's concerns with labour management relations in the Public Service.*

In the final reply, Tab 52, it is said that the grievor abandoned her position. Perhaps it was said in support of 11(2)(g). The union's position per the grievance is that it was disguised discipline, and in deciding that, the adjudicator need only assess the basis on which the action was taken to see whether appearance accords with reality. Of course, an adjudicator is not bound by am employer's characterization of its own action.

Reply

EMPLOYER'S WRITTEN ARGUMENTS IN REPLY

RESPONSES TO GRIEVOR'S REBUTTAL ARGUMENTS

1. *Page* [20], *paragraphs* [6 and 7]

The Grievor filed a complaint of harassment, dated July 15, 1994, against Sylvia Cook.

Exhibit G-7

There is no evidence before the Board that the Employer lost the complaint. Contrary to the Grievor's assertions, the complaint was investigated and dismissed.

Preto Report, page 3 paragraphs 1 and 3; page 4, paragraph 6

2. *Page* [21], [last] *paragraph*

The Grievor argues that the locations in the Employer's offer of May 1, 1995 (Exhibit G-13) "were all out of commuting distance from the Pachowski home in Tottenham". However, the evidence before the Board is that the Pachowskis only moved to Tottenham in September 1995. This fact is referred to at page 4, paragraph 13 of the Grievor's Arguments.

3. *Page* [24], [last] *paragraph*

In her letter of January 17, 1996 (Exhibit E-1, Tab 5), the Grievor raises concerns regarding the elimination of the cashier positions in Niagara Falls. The Employer answered this concern in Exhibit E-1, Tab 7 confirming that the CR-3 position was "not considered surplus". The Grievor takes issue (at page [25], *paragraph* [2] *of the Grievor's Arguments) that the Employer "did not say it was not surplus". The Employer submits this is yet another example where no matter what the Employee said or did, the Grievor would find fault with the Employer.*

4. *Page* [25], *paragraphs* [8 and 9]

The Grievor asserts that "no penalty was assessed" when she did not report in response to Ms. Howard's letters of April 17, 1996, and June 21, 1996 (Exhibits E-1, Tabs 13 and 16). The clear evidence before the Board was that the Employer continued to work with the representative (be it Tom Hamilton, John King or Richard Pachowski) of the Grievor to attempt to resolve the issues.

5. *Page* [33], [5th] *paragraph and page* [26], [last] *paragraph*

Barbara Cattelan testified before the Board that when Mr. Schmidt from Immigration called her for a reference he already knew of the harassment complaint. Ms. Cattelan further testified she advised Immigration only that the "Department" had mishandled the complaint and the Grievor had lost trust. In addition, she told Mr. Schmidt that the Department would pay Immigration for the Grievor's salary for six months. Ms. Cattelan's notes (Exhibit E-3) do not state that she told Immigration of the harassment complaint.

6. *Page* [26], [last] *paragraph and page* [27], *paragraphs* [1 and 2]

The Grievor was not terminated pursuant to Section 11 (2)(g) of the Financial Administrative Act because yet again the Employer was contacted by her representative John King. The Employer again attempted to resolve the issues.

7. *Page* [29], *paragraphs* [5 and 6]

The Grievor testified that she knew her employment was at risk and that even if Stott wrote a letter of apology "it was too little, too late".

8. *Page* [30], *paragraph* 5

Tom Hamilton testified that Barbara Cattelan advised him that the MOU was a "no-go" and Ms. Howard would be proceeding with the termination. Mr. Hamilton testified he advised the Grievor of this. The Grievor agreed in her testimony that

Mr. Hamilton had advised her yet she still chose not to indicate to her Employer that she was willing to return to work. In fact, she testified she was not willing to return to work at PIA and repeatedly testified she had a right not to because of her harassment complaint.

9. Page [32], *paragraph 38*

The Grievor did not testify she "would have returned with reassurance...". The Grievor testified that even if she had been advised (in August or September 1997) that Stott had then been counselled, that was not sufficient.

Disciplinary Termination

The Employer submits that the termination of the employment of the Grievor was not disciplinary, disguised or not.

Section 11(2)(g) provides the authority for the non-disciplinary termination of employments. The evidence clearly demonstrates that the Grievor did not meet all the requirements of his position. As Ms. Cattelan testified, attendance at the workplace was a requirement of the Grievor's position.

The Grievor deliberately chose not to attend at the workplace. There is no evidence that there were any disciplinary motives on the part of the Employer. In fact the evidence of the Employer's extensive efforts to resolve the issues between the parties, even after repeated warnings of action under section 11(2)(g) of the FAA, demonstrates the Employer's good faith.

Counsel for the Grievor referred to the decision of the Federal Court Trial Division in Horn v. Canada (1994) 22 Admin. L.R. (2d) 95. As counsel noted at page 20 of his submissions ("Further Comment") the Horn case considered the issue of abandonment under the Public Service Employment Act.

The Horn case is also distinguishable from this case in that in Horn the Grievor had been on authorized education leave and was terminated after not reporting to work for one week following the end of her education leave. In addition, in Horn the Grievor had her counsel notify the Employer that she could not return to work because she was "trapped" in an area in the Mohawk community that the Canadian Armed Forces had enclosed with razor wire.

In Horn, the Grievor also communicated with the Employer to request additional paid leave using leave credits available to her.

Finally, of critical importance, there was evidence that the Employer had been considering taking disciplinary action against the Grievor for her activities in the Mohawk community and those activities had taken place just prior to the expiry of the Grievor's authorized education leave.

None of these facts or any analogous facts are present in this case. What is present is clear evidence that the Grievor would not and did not return to work. In addition, none of the Employer's efforts to return the Grievor to work were acceptable to the Grievor.

In the alternative, should the Board find that the termination of the employment of the Grievor was disguised discipline, a finding which the Employer submits is not supported by the evidence, then the discipline of termination was warranted based on the principle of "obey now, grieve later".

Corrective Action Requested

With respect, the Board's authority to reinstate the Grievor is limited to reinstating her to her substantive position. This is the position that the Grievor testified that she never wanted to return to and that she had a right not to return to because of the manner in which her harassment complaints were investigated.

Both Mr. Hamilton and Mr. King repeatedly testified that the Grievor could not, would not and need not return to her substantive position.

Even when asked by her counsel at the hearing whether she would return to her substantive position, the Grievor hesitated before answering in the affirmative.

The Employer submits that the termination of the employment of the Grievor was proper and done in good faith. The Grievor refused to report for work and her refusal was not due to any circumstances beyond her control. The Employer's failure to properly investigate the Grievor's harassment complaints some three years earlier, did not justify the Grievor's refusal to return to work and did not give the Grievor carte blanche to dictate to the Employer how, when and where she would return to work.

In the alternative, should the Board order the reinstatement of the Grievor, the Employer submits that it should be without any back pay and benefits since the Grievor had been on leave without pay for an extensive period prior to the termination of her employment. The Grievor's own actions in thwarting the Employer's attempt to return her to work, any work, were the reason for her leave status.

Reasons for Decision

The grievor began her employment with the Coast Guard in 1988; she then moved to Terminal 2 of Pearson International Airport in April 1993. She left the position nine months later, on January 14, 1994, claiming illness and personal harassment. The grievor has not been back to work since. The Department investigated the harassment claim, and found a portion of it to be justified. However, the PSC did a further investigation and found "...The department has simply failed to conduct a proper investigation into the original complaints...." (see T-1, page 38). Following the release of the PSC report, its author tried to mediate a settlement. These efforts resulted in the Department offering the grievor a CR-03 position in Niagara Falls, with salary protection. The grievor rejected this offer, and the PSC wrote to the Department on March 12, 1996 (see T-10), saying:

...

The complainant has indicated non acceptance of a Memorandum of Agreement *which, in light of the investigation* Findings, *we consider to represent a reasonable settlement to the complaint.*

Accordingly, we have closed our file in this matter and have so advised the complainant.

...

At that point, the PSC stepped out of the picture, but the Department continued to try to resolve the matter.

On April 17, 1996, the Department offered the grievor a job in Hamilton or her old job back (see T-13). She was told at that time that failure to accept the options put forward would result in termination of her employment There was some dispute as to whether the grievor, or her bargaining agent representative, actually requested Hamilton as a preferred site, but in any event she did not accept the offer. The Department had given the grievor a specific date on which to report, failing which her employment would be terminated.

The grievor did not accept the alternatives presented to her, but before termination action was undertaken, her bargaining agent representative, Tom Hamilton, is alleged to have intervened and called management indicating Mrs. Pachowski wished to return to her substantive position (refer to T-16, letter from Ms. Howard to Mrs. Pachowski dated June 21, 1996, as well as Exhibit E-2, notes of the meetings in May 1996 with Mr. Hamilton, Ms. Fava and Ms. Cattelan).

Mrs. Pachowski stated that she never indicated to Mr. Hamilton that she wished to return to her substantive position; yet there is no evidence whatsoever that she contacted management to dispute this statement allegedly made by her bargaining agent representative, and contained in the June 21 letter. If she, in fact, did not wish to return to her substantive position, she should have written back to Ms. Howard and said as much, but she did not.

Based on the evidence produced, I find it was reasonable for management to assume that, as of June 21, 1996, Mrs. Pachowski wished to return to her substantive position at Terminal 2, and she was instructed to do so, with a reporting date of July 22, 1996.

Mrs. Pachowski did not report to Terminal 2 on July 22, 1996 as required, and the Department did not terminate her employment. In fact, the next time the Department wrote to Mrs. Pachowski, according to the evidence, was on December 5, 1996 (see T-22). This letter offered her a six-month position in St. Catharines, or a return to her substantive position. Failure to report by December 16 would result in termination of employment. This letter was written after Mr. Hamilton intervened on Mrs. Pachowski's behalf and asked that she be relocated to St. Catharines, Ontario. There was no dispute between the parties that Mrs. Pachowski had requested this location, but she testified she had always wanted a permanent position.

In any event, the evidence showed the Pachowskis travelled to St. Catharines to speak to some people there in order to better understand what the work involved.

Following this discussion, Mrs. Pachowski decided she did not wish to relocate to St. Catharines, unless offered a permanent position, nor did she wish to report to Terminal 2. She did not report on December 16 as required, nor was her employment terminated as the letter stated it would be. However, the lack of administrative action by the Department this time was understandable, I believe, because the evidence indicates Mr. John King became involved as Mrs. Pachowski's bargaining agent representative (see T-20, T-23, T-24 and Exhibit G-1), and intervened on her behalf.

This intervention led to the Department offering Mrs. Pachowski a six-month assignment in Barrie, which she accepted. She reported for work for one day, but felt she was not well received and did not return. She filed a harassment complaint with respect to the actions of her supervisor for her one day of work, but a subsequent investigation found no evidence to support her claim.

When the job opportunity at Barrie did not work out as hoped, the evidence indicates that Mr. King contacted management to say that the grievor wished to return to her substantive position at Terminal 2 (see T-29).

On February 14, 1997, the Department wrote to Mrs. Pachowski indicating they understood she wished to return to her substantive position and she was instructed to do so by February 21, 1997. Mrs. Pachowski was also told termination of her employment would result if she failed to report.

While there was some dispute as to whether or not Mrs. Pachowski had indeed made this request, there was no evidence produced to indicate she wrote back to the Department to dispute this claim. If she was adamant in not wanting to return to her substantive position, she should have written a reply to this letter telling the Department as much. There is no evidence she did so; therefore, I find it was reasonable for management to conclude, as of February 14, 1997, that the grievor wanted to return to her substantive position.

Mrs. Pachowski did not report as required on February 21, 1997, nor was her employment terminated. In fact, other than some administrative correspondence relating to her one day of work in Barrie and other letters relating to her claim of harassment while there, the Department appears to have done nothing about her failure to report to work. The Department waited some six months before writing to Mrs. Pachowski again, on August 18, 1997, with respect to her requirement to report to work (see T-44).

The August 18, 1997 letter again instructs Mrs. Pachowski to report for work at Terminal 2 in her substantive position by September 2, 1997, or her employment would be terminated.

Again, she failed to report for work, as instructed, but this time the Department took the action it said it would take and terminated her employment. What, if anything, makes this action supportable when past statements by the Department saying they would terminate her employment if she did not report were not acted upon?

The evidence here indicates that Mrs. Pachowski contacted Mr. Hamilton after she received the August 18 letter and Mr. Hamilton spoke to Ms. Cattelan about it. In fact, he asked for a copy of the letter and received it. The evidence indicates he took the letter very seriously, and said as much to Mrs. Pachowski.

Therefore, regardless of what had or had not transpired up to that point in time with respect to previous statements that failure to report would result in termination of the grievor's employment, I am satisfied that both Mrs. Pachowski and Mr. Hamilton knew this latest statement was serious. The Department may have weakened its position by failing to follow through on previous correspondence when it had said failure to report would result in termination. I find this is particularly so in relation to the February 14, 1997 letter, where the Department instructed the grievor to report to Terminal 2 by February 21 or face termination of her employment (see T-29). For some inexplicable reason, the Department waited six months before sending the grievor another letter, with essentially the same message, namely to report to Terminal 2 or face termination. It appears that departmental officials were getting increasingly frustrated with the lack of success in having the grievor return to work. Notwithstanding this weakened position, Mr. Hamilton said he took the August 18 letter seriously and so advised the grievor.

By all accounts, this time the Department was serious in finally following through with its stated intentions if the grievor failed to report to work. She was aware of this; yet she failed to report for work.

Instead of reporting to Terminal 2 as instructed, Mrs. Pachowski and Mr. Hamilton crafted a proposed settlement, which was sent to the Department on September 18, 1997. The Department did not accept the proposal and verbally advised Mr. Hamilton of this fact. It would have been better had the Department replied in writing stating why the proposal was unacceptable, but I find ultimately nothing of significance turns on the failure of the Department to do so. It would simply have been a better and more professional personnel practice to respond in writing when Mr. Hamilton and Mrs. Pachowski had taken the time to write to them.

In any event, there is no question that Mr. Hamilton told Mrs. Pachowski the Department had rejected the settlement proposal, and still Mrs. Pachowski chose not to return to work. She testified she believed it was too late to return to her substantive position at Pearson International Airport, but the Department had not issued a termination notice when it indicated its refusal of the settlement offer. She chose not to return, and in doing so placed herself in jeopardy of having her employment

terminated. She stated, in cross-examination, that at that point in time she had no intention of reporting to Pearson Airport.

In *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)* (1995), 125 D.L.R. (4th) 577; (1995) 2 S.C.R. 1095, L'Heureux-Dubé J. wrote, on behalf of the Court (at page 581):

...

> *As a general rule, an arbitrator reviewing a decision by the Company to dismiss an employee should uphold the dismissal where he is satisfied that the Company had just and sufficient cause for dismissing the employee at the time that it did so. On the other hand, the arbitrator should annul the dismissal where he finds that the Company did not have just and sufficient cause for dismissing the employee at the time that it did so....*

This decision does not say that subsequent-event evidence is always to be ignored but, in the instant case, I believe this general guideline is applicable. The only subsequent-event evidence I heard was that Mrs. Pachowski would now be willing to return to Pearson Airport. However, she also said that, at the time the Department terminated her employment, she had no intention of returning to her substantive position.

Therefore, I find that the Department put the grievor on notice that she must report to work or risk termination of her employment; the notice to do so was not illegal, immoral, or unsafe; the grievor was aware of the consequences of failing to obey the notice; the grievor received independent advice from her bargaining agent representative with regard to the seriousness of the notice; the grievor chose to ignore the notice even after learning that the proposed settlement she and her bargaining agent advisor had crafted was rejected; the grievor knew, or ought to have known, that even after the proposed settlement was rejected, she could have obeyed the instruction to return to work but she chose not to; finally, there was no other factor which I was made aware of that the Department should have considered before terminating the grievor's employment.

I was not presented with any mitigating factor which, I believe, would be sufficient to warrant my intervening in the action taken.

Given all of the above, I find that the employer's action in terminating the grievor's employment was justified and the grievance is therefore denied.

Joseph W. Potter,
Deputy Chairperson

OTTAWA, September 9, 1999.