Date: 20010910

File: 166-32-29635

Citation: 2001 PSSRB 91

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

STEPHANIE REID

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Before: Guy Giguère, Deputy Chairperson

For the Grievor: Martin Ranger, Professional Institute of the Public Service of Canada

For the Employer: Carole Bidal, Counsel, and André Garneau, Counsel

Heard at Ottawa, Ontario,
July 6 and October 30 and 31, 2000 and February 26 to March 1, 2001

[1] On August 21, 1998, Dr. Stephanie Reid, a veterinarian, grieved the failure of her employer to abide by the agreement reached on October 21, 1997 with respect to her "salary (TOS) full salary paid – other reasons for the following 9-12 months as per the TB harassment policy during the harassment investigation".

[2] In a letter dated December 21, 1998, Dr. Brian Evans, Executive Director, Animal Products Directorate, denied Dr. Reid's grievance at the second level of the grievance process. He explained that she had been placed on full pay as a condition of her expected return to work from a leave of absence and until suitable arrangements would be made for her reintegration. He indicated that this arrangement was not as a result of her harassment complaint but as an interim measure pending her return to full-time work in the near future, and to accommodate her situation as *Sun Life of Canada* was ceasing her disability compensation. In a letter dated January 11, 2000, Dr. André Gravel, Vice-President, Programs, denied Dr. Reid's grievance at the final level of the grievance process. He further added to the explanation given by the employer at the second level that, in February 1998, Health Canada evaluated that Dr. Reid was fit to work only three half days and could eventually progress to full-time and therefore the employer deemed it appropriate to compensate her accordingly.

[3] At the outset of the hearing on July 6, 2000, Mr. Garneau requested an adjournment since the parties were presently trying to negotiate a global settlement of the different files concerning Dr. Reid. Mr. Ranger objected to an adjournment as he submitted that it was a manoeuvre by the employer to gain time. Mr. Garneau submitted that the employer was attempting in good faith to settle these different files and was now ready to go to mediation, an avenue which the employer had objected to in the past. The adjournment was granted as both parties had expressed their willingness to try to resolve these different issues through mediation. I indicated to the parties that the Board would appoint a mediator in this file to help the parties resolve the issues unless their negotiations were successful. Meanwhile, the instant case would be scheduled for an adjudication hearing in October 2000 in the event the negotiations or mediation were unsuccessful.

[4] This case resumed on October 30, 2000, as the parties were unable to settle the disputes. Ms. Bidal was now representing the employer instead of Mr. Garneau. She submitted, as a preliminary issue, that the grievance was not adjudicable under subsection 92.(1) of the *Public Service Staff Relations Act* (*PSSRA*) as it does not concern

the interpretation or application of the collective agreement. Both representatives had witnesses testify on this preliminary issue. Dr. Brian Evans heard Dr. Reid's grievance at the second level. He testified that he did not recall if Dr. Reid had raised then that cutting her pay was disciplinary. In cross-examination, he added that it was certainly possible that she raised this, as she was very emotional. Lynn Cassie, a senior staff relations advisor at the Canadian food Inspection Agency (CFIA), testified that she was present at the final level of the grievance process and that Dr. Reid said that reducing retroactively her pay was punitive and retaliatory. Dr. Reid testified that at both the second and third levels, she stated clearly that she believed that her cut in pay was punitive and retaliatory.

[5] Ms. Bidal argued that Dr. Reid's grievance is based on an alleged agreement and does not concern the interpretation or application of the collective agreement. She added that this alleged agreement could possibly be based on the Treasury Board policy on harassment and that agreement would not be adjudicable under the *PSSRA*. Ms. Bidal also submitted that the grievor was trying to introduce a new issue by introducing as evidence that this was a disguised disciplinary measure. The introduction of this new ground is contrary to the decision of the Federal Court of Appeal in *James Francis Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109.

[6] Mr. Ranger submitted that this is a pay grievance even if the grievance itself does not mention clause 17.14 of the collective agreement. In her grievance, Dr. Reid referred to "(TSO) [taken on strength], full salary paid – other reasons" and therefore clause 17.14 is the only clause of the collective agreement dealing with an employee being paid while not being on duty. Mr. Ranger argued also that Dr. Reid had stated at the second and final levels of the grievance process that reducing retroactively her pay was punitive and retaliatory. Therefore, Mr. Ranger submitted that *Burchill* (*supra*) would not apply in this case.

[7] I informed the representatives that I would take note of the objections and reserve my decision, therefore proceeding with the hearing.

Summary of Evidence

[8] On December 19, 1994, Dr. Reid was involved in a motor vehicle accident that left her seriously injured. She returned to work at the Veterinary Biologies and Biotechnology Section (VBBS) after several weeks of absence. It was a difficult period

as she was undergoing treatment for her injuries and, at the same time, felt her supervisor, Dr. B.S. Samagh, was harassing her. Her health situation became worse, she was unable to perform her work and she was put on long-term disability in October 1995. On June 24, 1997, Dr. Reid lodged a formal complaint of harassment against Dr. Samagh and the Department of Agriculture and Agri-Food Canada. Dr. Reid indicated that because of her disability and health condition she had been unable to pursue the harassment aspect of her case until June of 1997.

[9] On July 15, 1997, the Deputy Minister of Agriculture and Agri-Food Canada informed Dr. Reid that her harassment complaint had been referred to the CFIA as both Dr. Samagh and herself were now employees of the CFIA. On July 17, 1997, Dr. J. Lloyd-Jones, a medical doctor at Health Canada, wrote back to Robin Winter, Human Resources Advisor, CFIA (Exhibit G-7), further to her referral of June 25, 1997 to assess Dr. Reid on her ability to return to work. Dr. Lloyd-Jones wrote that there were some complicating factors affecting Dr. Reid's return to work involving grievances and the union. As Dr. Reid's condition was aggravated by stress, her job and work environment would therefore be an issue. Dr. Lloyd-Jones indicated that in order to assess when Dr. Reid could return to modified work, she would have to obtain further information from Dr. Reid's physician.

[10] On August 27, 1997, Andy Zajchowski and Michel Paquette, of the Professional Institute of the Public Service of Canada (PIPSC), wrote to Dr. Art Olson, President of the CFIA (Exhibit E-6), concerning Dr. Reid's harassment complaint and her return to work. They explained that a return to the same work area would be very stressful for Dr. Reid and would constitute further victimization, and they requested deployment to a different work area. On September 12, 1997, Dr. Olson wrote back to Messrs. Zajchowski and Paquette (Exhibit G-12) in response to their letter of August 27,1997. He indicated in his letter that "[O]nce it has been determined by the appropriate medical officials that Dr. Reid is fit to return to work and a return date established, every effort will be made to ensure a smooth reintegration and consideration will be given to possible reassignment within the organization."

[11] On September 5, 1997, Dr. Reid's physician, Dr. G.J. Leonard, wrote to Dr. Lloyd-Jones (Exhibit G-11) indicating that Dr. Reid was fit to return to a "trial of employment", but that it would be preferable if "she not return to her previous work area in view of the harassment complaint underway". He also indicated that Dr. Reid

"must be considered somewhat vulnerable to relapse at this time, if her stressors become excessive once again."

[12] On October 2, 1997, Dr. Dorian Deshauer, a psychiatrist that Dr. Reid had consulted, also wrote to Dr. Lloyd-Jones (Exhibit G-13) and concurred with Dr. Leonard that Dr. Reid was highly vulnerable to relapse. To avoid this, he recommended that Dr. Reid not be returned to her previous position but rather to a new employment place. In his diagnosis, Dr. Deshauer identified as high stressors at the workplace the alleged harassment and discrimination as well as the ongoing investigations.

[13] Dr. Lloyd-Jones had referred Dr. Reid for a consultation with Dr. Brown, a psychiatrist. On October 7, 1997, Dr. Brown wrote back to her (Exhibit G-55) recommending that it would be more appropriate that Dr. Reid deal with the harassment issue before she returned to work. It was Dr. Brown's opinion that if Dr. Reid "were to return to her previous position, given that it is the source of her grievances, she would regress rapidly."

[14] On October 9, 1997, Dr. Lloyd-Jones wrote back to Kathleen Carpenter, a Human Resources Advisor at CFIA, (Exhibit G-22) indicating concern for Dr. Reid's medical state as she would regress rapidly if she were to return to her previous position. Therefore, Dr. Lloyd-Jones felt that "it would be appropriate to resolve her grievance issues first before returning to work, even to an alternate position. It might be possible for her to work at home during the grievance investigation, if proper ergonomics could be ensured."

[15] On October 16, 1997, Janna Palacek, a labour relations officer with the CFIA, attended a brainstorming meeting with colleagues of CFIA to discuss Dr. Reid's reintegration. At the meeting, it was decided that Dr. Reid would be reinstated imminently and that the focus would be on French training because it fulfilled all the requirements of Dr. Lloyd-Jones recommendations (Exhibit G-22) for Dr. Reid's return to work.

[16] Mr. Zajchowski testified that, on October 21, 1997, after a hearing he was attending at the Public Service Staff Relations Board (PSSRB)[T] he was approached by

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[T] *Canadian Food Inspection Agency* and *Public Service Alliance of Canada* (Board file 140-32-14).01

Ms. Palacek. She presented him with an offer to assist Dr. Reid's return to work. The employer recognized that Dr. Reid could not be returned to her substantive position during the harassment investigation. It would take some time before a suitable work assignment could be found. Ms. Palacek referred to a period of at least nine months. During this period, Dr. Reid would be given some background training and would go on French language training. This would also give Dr. Reid time to deal with the harassment investigation. Mr. Zajchowski testified that the offer was that Dr. Reid be put on approximately nine months of leave with pay in accordance with clause 17.14 of the collective agreement ("Other Leave with Pay"). In cross-examination, Mr. Zajchowski testified that an employee cannot be on language training, background training or carrying out any duties and be on leave with pay. He explained that Dr. Reid's status had to be regularized otherwise she would not have any source of income as her disability insurance was being terminated on October 22, 1997. He did not discuss Dr. Reid's health with Ms. Palacek.

[17] Ms. Palacek testified that Mr. Zajchowski raised a question of leave with pay but it was not an option that she could offer as it was not in her mandate. She added that it could be construed by Mr. Zajchowski that Dr. Reid would be on leave with pay since the intention was to give Dr. Reid time that she needed for the harassment investigation, adjudication hearing, etc. Ms. Palacek kept records of her conversations on Dr. Reid's situation (Exhibit E-8). She wrote that, on October 21, 1997, she submitted to Mr. Zajchowski the language training as a feasible option to resolve the problem. He responded that he would pass the offer on to Dr. Reid. Later that day, Mr. Zajchowski called her back as Dr. Reid had some questions.

[18] Mr. Zajchowski's notes on the file have been destroyed but Dr. Reid took some notes down (Exhibit G-14) of her conversation of October 21 with him. In a letter to Steve Hindle, the President of the PIPSC, dated November 10, 1997, (Exhibit G-17) Dr. Reid recalled CFIA's offer as Mr. Zajchowski had relayed it to her on October 21, 1997. This letter captures the gist of her notes of this telephone conversation. Dr. Reid wrote:

...

> *The Department offer agreed to, as related to me by phone, Oct. 21 by Mr. Zajchowski was:*

> *1. Re-instated with the Department, back on full salary as of October 22, 1997 – Leave with pay for 9 months "for other reasons".*
>
> *2. French Language Training for 9 months possibly beginning as early as Dec. 1, 1997. French audio and capability assessment tests to be set up for November as soon as possible.*
>
> *3. CFIA to bring me up to speed with the workplace – the Agency, new developments, their process and procedures over that time. This would include reading material sent home to me and possibly some time spent (training) at a District Office.*
>
> *4. After the above 9-12 months, I would have a new assignment/new job, either another work area in the Agency or possibly Health Canada. Management needed the time to pursue other work options for me. Management had first suggested ADRI lab, then both sides agreed that this would be entirely inappropriate as Dr. Samagh is now stationed at ADRI.*
>
> *5. With prompting from Union representative, they also stated that they are committed to resolving the past grievances on reclassification and job description content and to deal with the retroactivity (January 1, 1994) of these grievances, including salary compensation.*
>
> *<u>Mr. Zajchowski related to me that the Department representatives put on the table the following premises/principles for this offer to me:</u>*
>
> *1. They recognize the difficulty of putting me back in the same office and environment given the harassment complaint and the investigation. They agreed to separate me from the workplace during the harassment investigation.*
>
> *2. They need time to work out alternatives – work options, therefore, French Language Training for 9 months would effectively buy time for the Department and provide training for employee.*
>
> *3. Spirit of cooperation and commitment to resolve situation was the basis for discussion.*

...

[19] On October 22, 1997, Dr. Reid signed a "Terms of Reference" (Exhibit G-15) whereby Lynne Brown, of Correctional Service Canada, would undertake an investigation of the harassment complaint filed by Dr. Reid.

[20] On October 22, 1997, Ms. Palacek telephoned Mr. Paquette and left a voice-mail message responding to some questions from Dr. Reid, indicating that it could take one to three weeks to have a language diagnosis test scheduled and then it could take one to four months before a place could be found at the Language Training Centre. Meanwhile, Dr. Reid could be brought up to speed on the changes in her section and would be allowed time to deal with her harassment complaint and adjudication issues. There would be a document prepared outlining what Ms. Palacek proposed, which would be required to be signed before initiating anything to put Dr. Reid back on strength as of October 22, 1997.

[21] On October 23, 1997, Mr. Paquette called Ms. Palacek back agreeing with what she had proposed and requested that she send him a "Memorandum of Understanding" (MOU); Ms. Palacek replied that she would send a MOU. Ms. Palacek testified that she considered Mr. Paquette's call an acceptance of the employer's offer.

[22] On October 23, 1997, Ms. Palacek sent out an e-mail (Exhibit E-10) to colleagues in labour relations at the CFIA, attaching a draft MOU she had prepared (Exhibit E-9), which set out the terms and conditions relating to Dr. Reid's return to work. The MOU read as follows:

> ***MEMORANDUM OF UNDERSTANDING***
>
> *Between:*
>
> *CANADIAN FOOD INSPECTION AGENCY*
>
> *and*
>
> *DR. STEPHANIE REID*
>
> *and*
>
> *PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA*
>
> *This Memorandum of Understanding sets out the terms and conditions relating to Dr. Stephanie Reid's return to work following her two period* [sic] *of sick leave without pay. This Memorandum of Understanding addresses only*

those issues outlined below and is not intended to replace any other terms and conditions related to an employee's return following such an absence.

It is hereby understood by all parties that:

1. Upon signature of this Memorandum of Understanding by the Professional Institute of the Public Service of Canada (PIPSC) representative, Dr. Reid's ("the employee") and the Canadian Food Inspection Agency's (CFIA) representative, the Agency will take the steps necessary to place Dr. Reid back on strength as of Wednesday, October 22, 1997.

2. Furthermore that the Agency will contact Official Languages to schedule a diagnostics test and language training as soon as possible and that Dr. Reid will attend this test and the training as scheduled.

3. Finally, that the Agency will, prior to and during the French language training, provide the employee with such information as is required to update her on the new conditions, policies and procedures at her worksite.

SIGNED BY:

______________	____________________	____________________
Peter Seguin *Director of* *Labour Relations* *CFIA*	*Dr. Stephanie Reid*	*Mr. Michel Paquette* *Service Officer* *PIPSC*
DATE:	*DATE:*	*DATE:*

[23] In her e-mail, Ms. Palacek asked for comments with respect to the MOU and explained that "[T]he solution reached is French language training which will ensure that Ms. Reid does not return to work until her complaints and grievances are dealt with and which complies with Health Canada's recommendation that she not be returned to her worksite until that time." Dr. Gaston Roy, a colleague of Ms. Palacek, replied on October 23, 1997 (Exhibit E-11) indicating that the MOU should include what Dr. Reid would be doing before the beginning of the language training, such as working from home and visiting the Ottawa Animal Health District Office to familiarize herself with veterinary work at a district level. Another colleague at CFIA, Kathleen Carpenter, responded on October 24, 1997 (Exhibit E-12) that Dr. Reid had to successfully pass the language diagnosis test. Ms. Palacek then prepared a final version of the MOU

(Exhibit E-13) reflecting those comments and indicating that if Dr. Reid failed to pass the diagnosis test, the parties would have to meet to discuss other available options.

[24] Janelle Sadler started on November 3, 1997 as Manager of Staff Relations at the CFIA. In her first week in this position, she was informed that Dr. Reid had been on disability coverage until October 22, 1997. Her understanding, as reflected in her notes (Exhibit E-14), was that Dr. Lloyd-Jones (Exhibit G-7) recommended that Dr. Reid not be returned to her substantive position but that she was fit to work in another position. Her notes indicated in the left-hand column "27/10/97 No MOU etc. Kathleen to handle - telework". When questioned about this, Ms. Sadler explained that the MOU that had been drafted by Ms. Palacek (Exhibit E-13) had not been used "because we were looking at other types of reintegration".

[25] A meeting was held on November 19, 1997 between Dr. Reid, Mr. Paquette, Ms. Sadler, Ms. Palacek and Dr. G. Gifford, Acting Associate Director of the VBBS where Dr. Reid used to work. Ms. Sadler had a document (Exhibit E-15) prepared for the meeting outlining different options for Dr. Reid's reintegration. The options listed and discussed were (1) her return to her substantive position at the VBBS, reporting to Dr. Gifford; (2) deployment to Health Canada's Bureau of Veterinary Drugs (BVD); (3) language training; (4) assignment with Kemptville College, (5) assignment with the Canadian Veterinary Medical Association (CVMA); (6) private practice; and (7) assignment to CFIA district offices.

[26] Dr. Reid testified that Ms. Sadler stated at the meeting that there was no obligation under the Treasury Board's policy on harassment (Exhibit G-4) for the employer to remove her from the workplace (Exhibit G-18). Ms. Sadler testified that, at the meeting, Mr. Paquette was representing Dr. Reid as fit to return to work with the only limitation being that she could not come back to her substantive position. Ms. Sadler explained that the meeting concluded with all options being retained with the exception of returning Dr. Reid to the VBBS.

[27] A subsequent meeting was held on December 3, 1997 (Exhibit E-16). Present at the meeting were Dr. Reid, Mr. Paquette, Dr. Gifford, A. Sullivan and Ms. Sadler. Ms. Sadler informed Dr. Reid that she had failed the language test but that she could appeal the results. Dr. Reid indicated that the BVD at Health Canada would then be her first choice (Exhibit G-18). Other options were discussed - assignment to CFIA

district offices; assignment to Kemptville College; CVMA as well as a return to private practice.

[28] On December 14, 1997, Dr. Reid wrote to Dr. Gifford (Exhibit G-20) expressing her frustration with the change in the terms of the employer's offer. She explained that she was requesting an assignment or deployment somewhere other than her substantive position at the VBBS and that her preference would be an assignment at the BVD. She wrote:

...

> *The basic principle offered originally by the Department spoke in terms of a temporary assignment for 6-9 months until permanent arrangements could be made. This would be a transition, to buy time, while the harassment investigation was in progress and to resolve longstanding grievances from the workplace.*

...

[29] A work assignment at the BVD did not work out but an assignment for Dr. Reid with CVMA was arranged. A draft letter of agreement (Exhibit G-23a) was sent to Dr. Reid's representative on February 4, 1998, indicating that Dr. Reid's assignment would start on February 9, 1998. Mr. Paquette informed Ms. Sadler that Dr. Reid's health had deteriorated as a result of the ice storm in January 1998 when her home was without power for 11 days. Ms. Sadler explained that Health Canada was asked to reassess Dr. Reid.

[30] Audrey Sullivan, a Labour Relations Advisor at CFIA, wrote to Dr. Lloyd-Jones on February 6, 1998 (Exhibit E-17) indicating that the employer and Dr. Reid had come to a preliminary agreement on a reintegration assignment. She asked Dr. Lloyd-Jones for a reassessment of Dr. Reid's fitness for work prior to this reintegration

[31] On February 24, 1998, Dr. Lloyd-Jones wrote back to Ms. Sullivan (Exhibit G-22) indicating that:

> ...*Unfortunately, she did suffer a set-back in her medical condition in January, when she had no power in her home for 11 days during the ice storm. She is gradually recovering from this and is restarting therapeutic activities which were cancelled in January. Once her harassment investigation meetings have been completed (estimated early to mid-March) she should be available to work.*

> *The return-to-work conditions outlined in my letter to Robin Winter dated April 23, 1997 are still valid. This includes a graduated return to work starting at 3 ½ days per week and gradually increasing to full-time over 3 months….*

...

[32] Ms. Sadler testified that she understood that Dr. Lloyd-Jones' recommendation was that Dr. Reid was not fit to work full-time but that she could start working three and one-half days per week and gradually increase to full-time over a three-month period.

[33] On February 25, 1998, Ms. Sullivan advised Mr. Paquette that Dr. Reid's pay would be decreased to three and one-half days per week as a result of Health Canada's recent assessment. Ms. Sadler explained that later, on close reading and after reviewing Dr. Lloyd-Jones' recommendation of March 23, 1997 (Exhibit G-22), it was found that Dr. Reid was assessed to be fit to work for only three half days per week. Ms. Sadler explained that it was decided to keep Dr. Reid as a full-time employee but recover one day and a half of leave without pay. This was more than the actual hours of work but would maintain Dr. Reid's full-time benefits such as a day and a quarter of sick leave per month, annual leave, etc.

[34] Dr. Reid objected to her pay being cut and she wrote to the employer indicating her objection on February 27, 1998 when she sent back her comments on the draft letter of agreement (Exhibit G-23b). The employer maintained its position on the pay cut and modified accordingly a clause in the proposed letter of agreement (Exhibit G-23c) which was sent out on March 5, 1998 to Mr. Paquette. This new clause read as follows:

…

> *At the outset of her assignment Dr. Reid will work 3.5 days per week, with a gradual increase to full-time over three months. A portion of this time may be spent working at home (ie. Initially 3 half-days at the CVMA office and the remainder at home). CFIA will be responsible for payment of Dr. Reid's salary and benefits in accordance with the number of days worked.*

…

[35] On March 6, 1998, Dr. Reid wrote to Messrs. Paquette and Zajchowski (Exhibit G-26) complaining that the employer was cutting her pay now that a satisfactory workplace had been found.

[36] Dr. Reid testified that in mid-March she hired a cleaning lady, bought new clothes, shoes and glasses in preparation for her work assignment at CVMA. She spent about $4,000 on the basis that she would continue to receive full salary during this assignment.

[37] On March 23, 1998, Mr. Paquette wrote to Dr. Olson, the president of the CFIA (Exhibit G-25). Mr. Paquette explained that a verbal commitment had been made to reinstate Dr. Reid with full pay as of October 22 for a period of nine months, and that many options had been discussed and were now being finalized with an assignment to the CVMA. He pointed out that the employer was now proposing in the letter of agreement that Dr. Reid be paid only for the days she would work contrary to the October 1997 agreement. He added that the CFIA had already gone ahead and modified Dr. Reid's pay.

[38] On March 24, 1998, Mr. Paquette wrote to Ms. Sadler (Exhibit G-24) indicating that, as discussed, Dr. Reid was prepared to sign the proposed letter of agreement to ensure her reintegration into the workplace as soon as possible but since she did not agree with the compensation mentioned, she would sign without prejudice to whatever recourse she might choose to challenge this.

[39] On April 7, 1998, Dr. Reid signed the letter of agreement covering the conditions and terms of her assignment with the CVMA as she had started her assignment that day (Exhibit G-23d).

[40] Dr. Reid testified that the employer threatened that if she did not sign the letter of agreement she would be deemed to have abandoned her position. She believed that Ms. Saddler made this threat. Ms. Saddler testified that she never made these comments and that she never authorized her staff to make such comments.

[41] On April 20, 1998, Rod Ballantyne, Acting Vice-President, Human Resources, CFIA, replied on behalf of Dr. Olson to Mr. Paquette's letter of March 23, 1998 (Exhibit G-27). He wrote that the understanding between the CFIA and Dr. Reid in October 1997 was that she would be placed on full pay as a condition of her expected return to

work and until suitable arrangements could be made for her reintegration. He specified that he was unaware of any arrangement which would have provided Dr. Reid with a nine-month leave with pay. He added that Mr. Paquette was advised on February 25, 1998 that a decision had been made to decrease Dr. Reid's full-time pay to three and one-half days per week based on Health Canada's assessment. He concluded by saying that he did not feel that the CFIA had treated Dr. Reid unfairly, and he expected that she would return to full-time pay within three months.

[42] Dr. Reid testified that she thought that the employer was just threatening to cut her pay as she was still continuing to receive her full pay. Her pay stub of April 29, 1998 was entered in evidence (Exhibit G-28), which showed no cuts in pay. She testified that she found out that her pay had been cut when she received her pay statement of May 13, 1998 (Exhibit G-29). It showed that, starting March 5, 1998, her weekly pay had been cut in the amount of $347.55, which represented one day and a half of work. Dr. Reid testified that March 5, 1998 was the day after the Federal Court rendered its decision on her job description grievance.[T] The employer never explained to her why it had chosen March 5th, and Dr. Reid believes that this date was picked for retaliatory reasons because the employer was upset by the Federal Court decision.

[43] On June 29, 1998, Dr. Reid wrote to Dr. Olson (Exhibit G-35) that on October 20, 1997 a meeting took place with her union representative and the employer whereby it was agreed that she would be returned to full salary (TOS) as of October 22, 1997, that she was not required to work in her previous work unit and that efforts would be made to find her suitable employment elsewhere while the harassment investigation was going on. She pointed out in her letter that "I was off work pending finding a suitable location of work from October 22, 1997 to April 7, 1998 and that I was being paid full salary at the time. I was being paid under the terms of the harassment policy and the agreement of October 20, 1997."

[44] On June 30, 1998, Dr. Reid wrote to Mr. Ballantyne (Exhibit E-2) indicating that the meeting of October 20, 1997 "addressed the Policy on Harassment, and CFIA representatives agreed to re-instate my full salary (TOS) and make arrangements for me to work at a location other than the work unit where the harassment had occurred and the harassment investigation was taking place." She also wrote that her pay was reduced retroactively to March 5, 1998, which did not relate in any way to the date she

[T] *Reid v. Canada (Agriculture and Agri-Food)* [1998] FCJ No. 285 QL.

began to work at CVMA but was the day after her case against the CFIA was successful in the Federal Court. She complained that except for a chair that Dr. Gifford delivered to her workplace when she started at CVMA, she had received no ergonomic furniture.

[45] On July 24, 1998, W.G. Teeter, Acting Vice-President, Human Resources, CFIA, responded to Dr. Reid's letters of June 29 and 30, 1998. He wrote (Exhibit G-2):

...

> *The understanding between the Agency and your representatives in October 1997 was that you would be placed on full pay as a condition of your expected return to work and until suitable arrangements could be made for your reintegration. It was never our intention to provide you with full time Leave With Pay on an indefinite basis. This was to be an interim measure with the expectation that you would return to work shortly thereafter....*

...

> *FULL PAY & BENEFITS:*
> *As I have stated above, you were provided with Leave With Pay from October 22, 1997 as an interim measure until such time as you were able to redintegrate* [sic] *into the workplace. This was not done as a result of your harassment complaint nor a Harassment Policy, but as a short term bridge from the cessation of your disability insurance benefits until you were able to reintegrate back to work.*

...

[46] On August 21, 1998, Dr. Reid grieved CFIA's handling of her harassment complaint. She testified that Ms. Brown, the investigator assigned to her harassment complaint, was hired by the employer, and on April 27, 1998, she had to withdraw from the investigation. While she had completed the intake phase, she was unable to proceed with the remainder of the investigation. Dr. Reid testified that this was a deliberate attempt by the employer to derail the whole investigation of her harassment complaint.

[47] On August 21, 1998, Dr. Reid also grieved the lack of ergonomic office equipment at CVMA. Dr. Reid testified that with the pressures of an adjudication hearing scheduled in August 1998 and because of the lack of ergonomic furniture at CVMA for her use, she became sick and August 24, 1998 was her last day of work at

CVMA (Exhibit G-44). Since then, she has been on certified sick leave and to date is on long-term disability receiving benefits from *Sun Life of Canada* (Exhibit G-53).

[48] On August 28, 1998, Ms. Sadler wrote to Mr. Paquette (Exhibit G-39) indicating that all furniture and ergonomic equipment had now been ordered and should be either on hand or would be received shortly. It arrived for installation on September 18, 1998. Dr. Reid testified that the delays in getting the required ergonomic equipment affected her health and her ability to recover from long-term disability and contributed to her current disability claim. Dr. Reid wrote to Ms. Sadler on October 30, 1998 (Exhibit G-40) indicating that this constituted discrimination based on her disability and was continued harassment. A complaint was later filed by Dr. Reid (Exhibit G-48) and is before the Canadian Human Rights Commission.

Arguments

For the Grievor

[49] Mr. Ranger submitted that the evidence has established that starting on October 22, 1997, Dr. Reid began to receive a full salary, as she was taken back on strength, pursuant to clause 17.14 of the collective agreement ("Other Leave With Pay") for a period of nine to 12 months while the harassment investigation proceeded. Mr. Ranger submitted that disregarding Health Canada's recommendation was the employer's way of disguising discipline with respect to Dr. Reid.

[50] Ms. Palacek's October 23, 1997 e-mail (Exhibit E-10) confirms that the employer knew that Dr. Reid was not to return to work until the harassment investigation was completed. Dr. Lloyd-Jones' recommendation on Dr. Reid's return to work has always been that the harassment investigation should be dealt with before she returned to work (Exhibit G-22). It was therefore odd to hear Ms. Sadler and Dr. Gifford testify that their goal was to return Dr. Reid to work

[51] As Dr. Reid testified, following the Federal Court decision on March 4, 1998, the handling of her file greatly changed. Dr. Reid was under pressure to return to work and was told that she would be deemed to have abandoned her position if she did not return. Mr. Ranger also submitted that the most important element of the disguised discipline was the fact that on May 13, 1998 the employer, without advising Dr. Reid,

retroactively reduced her salary to March 5, 1998, the day after her victory in Federal Court. To proceed with this wage reduction was retaliatory, punitive and disciplinary.

[52] Dr. Reid testified that in order to prepare to return to work she invested several thousands of dollars; these expenses were made based on expectations to receive a full-time salary. Mr. Ranger argued that *Molbak* (Board file 166-2-26472) on promissory estoppel is applicable to the present case. The employer promised to put Dr. Reid back on full pay; she relied on this and incurred expenses. On May 13, 1998, the employer reneged on its promise without warning Dr. Reid. Mr. Paquette was notified on February 5, 1998 that Dr. Reid's salary would be cut to three and one-half days but Dr. Reid's view was that the employer was not carrying through its threat to cut her pay. Mr. Ranger argued that if the employer knew that it was going to cut her pay on February 5, 1998, then why did it wait until May 13, 1998 to implement the cut?

[53] Mr. Ranger argued that the employer showed bad faith when it hired the investigator that was responsible for Dr. Reid's harassment complaint. This showed the employer's bad faith and as a result of this, the harassment investigation has been at a standstill since April 1998.

[54] On the issue of the ergonomic furniture, the employer explained that it was its priority but delays were caused by factors outside of its control. Mr. Ranger indicated that while some of those factors were not within the employer's control, it is disturbing that at the same time the employer asked Dr. Reid to increase her work hours without the proper ergonomic furniture. The employer did not supply the recommended ergonomic furniture which guaranteed that Dr. Reid's return to work would be a failure. This was punitive and was another disguised disciplinary measure.

[55] Mr. Ranger concluded by requesting that the employer implement the agreement of October 22 and pay, with interest, Dr. Reid full salary from March 5, 1998 to the date the harassment investigation will be completed.

For the Employer

[56] Ms. Bidal submitted that the true issue of this grievance is that the adjudicator is being asked to implement an agreement which is not adjudicable under section 92 of the *PSSRA*, and that the issue of disguised discipline was not raised before this hearing. In the alternative, if it is found that this grievance deals with the

interpretation or application of clause 17.14 ("Leave With Pay") of the collective agreement, the employer submitted that the employer had full discretion to grant or refuse leave and the Board should not intervene as the employer acted reasonably. There was no leave request presented; the employer was therefore not considering a request for leave with pay but setting the terms and conditions of employment, which is within its right under the *Financial Administration Act* (*FAA*). Assuming that a request for leave could be implied, the grievor did not qualify pursuant to clause 17.14 as Dr. Reid advised the employer that she was not fit to work in February 1998. Dr. Reid should have applied for sick leave, which is covered by Article 16 of the collective agreement.

[57] Late in the summer of 1997, representations were made that Dr. Reid was able and fit to return to work. The employer did consider that it had a duty to accommodate Dr. Reid in her harassment complaint as her long-term disability coverage was ending on October 22, 1997. Pursuant to the Treasury Board policy, Dr. Reid could have been returned to her old position as the policy only requires physical separation from the alleged harasser. But in consideration of Dr. Reid's request and Health Canada's report, the employer looked for alternate solutions.

[58] On October 9, 1997, the employer received Dr. Lloyd-Jones' assessment. The other assessments (Drs. Leonard, Deshauer and Brown) were not sent to the employer, as they were confidential. The employer knew of *Sun Life*'s evaluation of Dr. Reid's fitness to work which resulted in her long-term disability coverage ending on October 22, 1997. The grievor's representatives were making representations that she was fit to work. Therefore, it was not unreasonable for the employer to assume that Dr. Reid was fit to work.

[59] Ms. Bidal argued that it is significant that Dr. Reid claims the employer offered other leave with pay only once, at the meeting between Mr. Zajchowski and Ms. Palacek. This was not Ms. Palacek's mandate and her notes make no mention of it. There were no notes by Mr. Zajchowski and Dr. Reid's notes of her phone conversation with Mr. Zajchowski are hearsay and contain some inaccuracies. All testimonies coincide that Dr. Reid was put back on strength, her pay was reactivated as of October 22, 1997, she would start language training as soon as possible and in the meantime would be brought up to speed.

[60] Ms. Bidal submitted that, as Mr. Zajchowski testified, an employee cannot be on language training or carry out any duties and be on other leave with pay. It was not discussed at the October 21, 1997 what would happen if Dr. Reid failed the language test as Ms. Palacek did not know that this could happen. But the understanding implied that Dr. Reid would be reintegrated as she was fit to work and other options would be explored if French testing was negative.

[61] Ms. Bidal stated that even if leave with pay was used before French training would commence, there could not have been any understanding that Dr. Reid would receive leave with pay for an extended period because she was to return to her duties.

[62] Ms. Bidal argued that between October 22, 1997 and May 1998, the employer made every possible effort to communicate to the grievor that she was not to expect leave with pay. Further, she was to reintegrate the workplace as soon as possible and assume duties immediately in one form or the other. When it became clear that reintegration would not happen as agreed, the employer immediately set up new terms and conditions.

[63] Insofar as the issue of promissory estoppel is concerned, the employer agrees that *Molbak* (*supra*) is the correct test and therefore two questions have to be answered: (1) whether representations were made, and (2) was there detrimental reliance. For the reasons mentioned previously, there was no presentation from the employer that Dr. Reid would be on leave with pay for nine to 12 months. In the alternative, if it is found that representations were made, the employer submits that the grievor has failed to prove any detrimental reliance. Buying clothes, shoes and hiring a cleaning lady are not long-term financial commitments that would warrant a finding of detrimental reliance. The grievor was warned in February 1998 and in later correspondence that her pay would be cut to three and one-half days. Had it not been for the employer paying her for three and one-half days, the grievor would have been in a worse situation since she was fit to work only three half days per week.

[64] Ms. Bidal disputed the allegations of disguised discipline by the grievor. She stated that the issue of this hearing pertains to the decision to either refuse or withdraw as of March 5, 1998 leave with pay. The grievor is alleging that the employer came to its decision as a result of the Federal Court decision of March 4, 1998. All other allegations of disguised discipline should or could have been dealt with in another grievance.

[65] Ms. Bidal submitted that the employer made a decision in good faith based on new elements. The situation in February 1998 was very different than that that was present in October 1997. The ice storm had had an impact on Dr. Reid's health as Dr. Lloyd-Jones' report indicated. The employer acted in good faith by paying Dr. Reid three and one-half days instead of three half days per week while she was reporting at CVMA, and kept her on full-time status which maintained her full-time benefits.

[66] With respect to the lack of ergonomic furniture, Dr. Reid's condition had worsened before she returned to work. Dr. Gifford personally delivered an ergonomic chair and stool on the day Dr. Reid started to work at CVMA. This grievance is about a decision not to allow leave with pay; it is not about a lack of ergonomic furniture which is the subject of a separate grievance. It is simply a decision to cut pay.

[67] Finally, Ms. Bidal argued that the grievor's request in terms of quantum, that she receive her full salary with interest due until the harassment investigation is concluded, is patently unreasonable. Dr. Reid, as of August 1998, was back on long-term disability. What Mr. Ranger is asking is that Dr. Reid be compensated twice.

[68] For all these reasons, Ms. Bidal submitted that the grievance should be dismissed.

[69] In support of her arguments, Ms. Bidal relied on the following: *Delle Palme* (Board file 166-2-128); *Simard* (Board file 166-2-5223); *Black* (Board files 166-2-17248 and 166-2-17249); *Grignon* (Board file 166-2-27602); *Bouchard* (Board file 166-2-28640) and *Ellement* (Board file 166-2-27688*).*

Reasons for Decision

Nature of Agreement of October 1997

[70] Ms. Bidal submitted that this grievance is based on an alleged agreement and does not concern the interpretation or application of the collective agreement. The first question to be determined is whether or not this grievance is adjudicable under subsection 92.(1) of the *PSSRA*. In order to answer this question, the nature of the agreement of October 1997 has first to be established.

[71] The initial offer of October 21, 1997 was that Dr. Reid would be reintegrated into the workforce imminently but because of the harassment complaint, the employer

recognized that she could not return to her substantive position. Therefore, a working assignment had to be found and this would take some time (at least nine months). During this period Dr. Reid would go on French language training.

[72] On October 22, 1997, Ms. Palacek phoned Mr. Paquette to provide answers to Dr. Reid's questions. She told him that it could be a few weeks before a language diagnosis test could be scheduled and it could take from one to four months before a place could be found at the language training centre. Meanwhile, Dr. Reid would be brought up to speed on the changes at CFIA and would be allowed time to deal with her harassment complaint and adjudication issues.

[73] This modified offer now provided for Dr. Reid to receive background training before the language training started. On October 23, 1997, Mr. Paquette called Ms. Palacek agreeing with what she proposed. Ms. Palacek testified that she considered this call an acceptance of the employer's offer. Ms. Palacek then prepared a draft MOU (Exhibit E-9), where she specified that the MOU was restricted to the issues outlined in it and was not intended to replace any other terms and conditions related to an employee's return to work. It was clearly the intent of the employer that the collective agreement would be the reference to the terms and conditions of Dr. Reid's return to the workplace in the absence of a specific agreed term.

[74] The employer's offer was that Dr. Reid would be taken back on strength. Before French language training started, she would undergo a French diagnostic test and receive some background training but she would not be carrying duties full time. Later, when arrangements had been made, she would go on French language training full-time. Before and during French language training, she would be given time for the harassment investigation and adjudication issues. Not only clause 17.14 of the collective agreement would apply here, but also other clauses of the collective agreement related to these different situations. I therefore find that this grievance is adjudicable under subsection 92.(1) of the *PSSRA* as it concerns the application and interpretation of the collective agreement.

[75] This said, I do not find, as Mr. Ranger submitted, that there was an agreement that Dr. Reid would be taken back on strength, pursuant to clause 17.14 of the collective agreement ("Other Leave with Pay") for a period of nine to 12 months.

[76] Mr. Ranger explained that clause 17.14 is the only clause of the collective agreement dealing with an employee being paid while not on duty.

[77] Clause 17.14 reads as follows:

> *17.14* ***Other Leave With Pay***
>
> *At its discretion, the Employer may grant leave with pay for purposes other than those specified in this Agreement, including military or civil defence training, emergencies affecting the community or place of work, and when circumstances not directly attributable to the employee prevent his reporting for duty.*

[78] Ms. Palacek testified that Mr. Zajchowski raised a question about leave with pay but it was not an option that she could offer as it was not in her mandate. Ms. Palacek also testified that it could be construed by Mr. Zajchowski that Dr. Reid would be on leave with pay since the intention of the employer was that Dr. Reid would be given time for the harassment investigation, adjudication, etc. Dr. Reid took notes of the telephone conversation that she had with Mr. Zajchowski indicating that the employer's offer was to put her on leave with pay for nine months for other reasons, and that she would go on French language training and be brought up to speed on CFIA process and procedures during this period. Mr. Zajchowski testified that an employee cannot be on French language training or receive background training and also be on leave with pay. It might have been what was said by Mr. Zajchowski to Dr. Reid, but Ms. Palacek's explanation is more plausible and is consistent with the collective agreement.

[79] It could not be the intention of the parties that Dr. Reid be placed on full-time leave with pay for a period of nine to 12 months, as it was agreed that she would do some background training and then go on French language training. The clauses of the collective agreement related to these different situations would apply here and not only clause 17.14 as submitted by Mr. Ranger. Considering all of the above, I find that the employer did not violate any provision of the collective agreement with respect to Dr. Reid.

Disciplinary Allegation

[80] Ms. Bidal submitted that the grievor was trying to introduce a new ground - disguised disciplinary measure - and this was contrary to the *Burchill* decision (*supra*).

Mr. Ranger submitted that this issue had been raised at the second and final levels of the grievance process. It was found in *Burchill* that "it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action…" Assuming that the requirements of *Burchill* do not apply in this case, I cannot conclude from the evidence before me that the employer, through various means, imposed disguised disciplinary measures on Dr. Reid.

[81] Mr. Ranger submitted that the employer acted in bad faith by disregarding Dr. Lloyd-Jones' recommendation that Dr. Reid not be returned to work. According to Mr. Ranger, by so doing the employer was imposing a disguised form of discipline.

[82] I reviewed all the evidence related to this submission and did not find that it showed bad faith on the part of the employer or disguised discipline. Dr. Reid and her representatives presented Dr. Reid as fit to work, as long as it was not in her substantive position. This was the tone of the letter of Messrs. Zajchowski and Paquette to Dr. Olson on August 27, 1997. These representations were also made at meetings with CFIA. At a meeting at CFIA in November 1997, Dr. Reid and her representatives discussed all options for her reintegration, all of which involved Dr. Reid working except for French language training. Mr. Paquette presented Dr. Reid as fit to return to work with the only limitation being that she could not return to her substantive position; Dr. Reid was present at the meeting and did not indicate otherwise. A subsequent meeting was held on December 3, 1997, where Ms. Sadler informed Dr. Reid that she had failed the language tests; therefore, the only option left was that she would return to work. Dr. Reid indicated that her first choice would then be the BVD and at no time did she indicate that she was not fit to work. This also was the tone of Dr. Reid's letter of December 14, 1997 to Dr. Gifford. It was not until February 1998, when the employer sent out a draft letter of agreement for Dr. Reid's assignment at CVMA, that Mr. Paquette indicated that Dr. Reid was not fit to work as a result of the ice storm.

[83] Until that time, it was not unreasonable for the employer to assume that Dr. Reid was fit to work. The employer received only Dr. Lloyd-Jones' assessment, as the others were confidential. It knew of *Sun Life's* assessment of Dr. Reid's fitness to work and received representations that she was fit to work.

[84] Mr. Ranger submitted that the most important element of disguised discipline was that on May 13, 1998, without advising Dr. Reid, the employer retroactively reduced Dr. Reid's salary to March 5, 1998, the day after the Federal Court decision.

[85] It was agreed at the December 3, 1997 meeting that French language training was not an option and that a working assignment had to be found. Telework or background training was not discussed and therefore Dr. Reid would not be carrying any duties from that time until an assignment would be found. It was not discussed but had already been agreed that she could take time for the harassment investigation and adjudication issues.

[86] The last condition of clause 17.14 applied to Dr. Reid's situation as "circumstances not directly attributable to the employee prevent his (her) reporting for duty". Until a working assignment was found, she could not report to duty. There was no leave request presented but it was implied after the December 3, 1997 meeting.

[87] On February 4, 1998, the employer advised Mr. Paquette that Dr. Reid could start her assignment at CVMA on February 9, 1998 and sent out a draft letter of agreement to this effect. But then, Dr. Reid was not fit to return to work as a result of the ice storm. Dr. Lloyd-Jones' assessment of February 24, 1998 was that after the harassment investigation meetings had been completed (estimated early to mid-March) Dr. Reid could return to work gradually. After receiving Dr. Lloyd-Jones' new assessment, the employer advised Mr. Paquette on February 25, 1998, that Dr. Reid's pay would be cut. On February 27, 1998 Dr. Reid sent to the employer her comments on the draft letter of agreement in which she indicated her objections to the cut in her pay. The employer maintained its position and indicated so in the draft letter of agreement sent out on March 5, 1998. This was the day after the Federal Court decision on her job description grievance. This fact, in itself, does not imply bad faith on the part of the employer. I find the employer's action was consistent with the position it had taken on February 25, 1998.

[88] On March 24, 1998 Mr. Paquette wrote to Ms. Sadler that Dr. Reid would sign the proposed letter of agreement without prejudice, as she did not agree with her pay cut. The employer maintained the proposed clause on Dr. Reid's pay cut. Dr. Reid signed the letter of agreement and started her assignment on April 7, 1998.

[89] It was not until May 13, 1998 that her pay was cut retroactively to March 5, 1998. This was a long delay and the employer should have taken action before. But I cannot conclude from this that the employer was cutting Dr. Reid's pay for retaliatory reasons. The evidence is that the employer could cut Dr. Reid's pay even more as she was fit to work only three half days per week.

[90] The arguments of Mr. Ranger have not convinced me that cutting Dr. Reid's pay retroactively was a disguised disciplinary measure. The preponderance of evidence points out that this was coincidental. I find that the employer acted reasonably and within the discretion of clause 17.14 in cutting Dr. Reid's pay.

[91] Mr. Ranger submitted that the delay in the delivery of the ergonomic furniture and the hiring of the investigator responsible for the harassment complaint showed the employer's bad faith and was disguised discipline. I cannot conclude from the evidence before me that this is the case. These are the subject of separate grievances, whereas these issues will be the main topic and additional evidence could be produced and be further analyzed.

Promissory Estoppel

[92] Mr. Ranger submitted that promissory estoppel was applicable to the instant case as Dr. Reid relied on the employer's promise of full pay and incurred expenses for her return to work.

[93] As both counsels agreed, *Molbak* (*supra*) is the correct test to apply here. The representations from the employer of February 25 and March 5, 1998 were to the effect that her pay would be cut. On March 6, 1998, Dr. Reid wrote to Messrs. Paquette and Zajchowski complaining that the employer was cutting her pay. In mid-March, Dr. Reid spent several thousand dollars in preparation for her assignment at CVMA. The evidence points out that Dr. Reid incurred these expenses on her own assumptions, as there were no representations from the employer that she would receive full salary.

[94] I therefore find no promissory estoppel as no representations were made by the employer that she would continue to receive full pay. Even if representations had been made, the nature of the expenses incurred by Dr. Reid would not warrant a finding of detrimental reliance.

[95] For all the above reasons, the grievance is dismissed.

Guy Giguère,
Deputy Chairperson

OTTAWA, September 10, 2001.