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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

SUZANNE DUBOIS

Grievor

and

TREASURY BOARD
(Canadian International Development Agency)

Employer

Before: Léo-Paul Guindon, Board Member

For the Grievor: André Lortie, Professional Institute of the Public Service of Canada

For the Employer: Karl Chemsî, Counsel



Heard at Ottawa, Ontario,
February 10, 2004.

DECISION

[1] Suzanne Dubois filed a grievance against her employer dated November 1, 2001. In that grievance, she contested the decision by the Canadian International Development Agency (CIDA) to deny her the benefits provided for in Directive 47 of the "Foreign Service Directives" (FSD). Ms. Dubois requested that the annual and sick leave credits she had used during the period from October 1998 to August 1999 be reinstated.

[2] The parties admitted at the hearing that the FSDs are part of the collective agreement applicable to this case. On this point, the Introduction to the FSDs provides (Exhibit G-8):

[...]

These Directives are deemed to be part of collective agreements between the parties to the National Joint Council

[...]

[...]

[3] Ms. Dubois' bargaining agent approved the reference of this grievance to adjudication on November 28, 2002. The Board registered the reference to adjudication on December 2, 2002.

[4] At the outset of the hearing, the parties admitted that the adjudicator had jurisdiction to decide the grievance. This recourse to the grievance procedure is provided for in the Introduction to the FSD as follows:

[...]

In cases of alleged misinterpretation or misapplication arising out of these directives, the grievance procedure, for all represented employees, within the meaning of the Public Service Staff Relations Act, will be in accordance with Section 14.0 of the National Joint Council By-Laws [...]

[...]

The *National Joint Council By-Laws* state the scope and basis of the grievance redress procedure as follows:

[...]

14.1.2 All grievances presented under this grievance procedure shall be decided on the basis of the intent of the directive or policy being grieved.

14.1.3 An employee who feels aggrieved by the interpretation or application by the employer of any directive or policy which has been agreed to by the Council, and which has been approved by the appropriate executive body of the government, is entitled to present a grievance.

[...]

Paragraph 14.1.17 of the *NJC By-Laws* further states that an employee's grievance may be referred to adjudication in accordance with the provisions of the *Public Service Staff Relations Act (PSSRA)* where it has not been dealt with to the employee's satisfaction in accordance with the procedure provided for in Section 14 of the *NJC By-Laws*.

[5] FSD 47, which the grievor claims should be applied to her, reads as follows:

Part VII - Holidays, leave and personal travel

FSD 47 - Leave for post-attributable injury and illness

Introduction

Any absence caused by an injury or illness that, as determined by Health Canada, would not normally occur or is not endemic to Canada, is not chargeable to an employee's leave credits, regardless of the location of the employee at the time the absence occurs. Other absences due to illness or injury not covered by this directive are subject to the provisions of the appropriate collective agreement or applicable regulations.

Directive 47

47.01 Where Health Canada determines that an illness is not endemic to Canada, the deputy head may authorize leave for post-attributable illness.

47.02 Where Health Canada determines that an injury gives rise to circumstances not normally experienced in Canada, the deputy head may authorize leave for absences due to the injury for a period which is in excess of that which would normally be incurred in Canada.

47.03 No charge to an employee's accumulated sick leave credits shall be made when an employee is absent from duty because of a post-attributable illness not endemic to Canada, or circumstances arising from an injury that would not normally occur in Canada, regardless of the location of the employee's place of assignment at the time of absence.

[6] A memorandum of understanding stating the terms and conditions of Ms. Dubois' assignment from CIDA to the SECOR Group was signed on September 26, 1995 (Exhibit G-2). Ms. Dubois performed the duties of project manager in Cotonou, Benin, for three years starting on September 18, 1995.

[7] During her stay in Benin from 1995 to 1998, Ms. Dubois suffered a number of attacks of malaria, some quite severe. She was treated with Halfan or Artemux, as she had reacted to quinine. The report dated August 23, 1999 by Dr. Anne-Marie Caudron-Tidjani also states that, in June and July 1998, Ms. Dubois had a violent bout of food poisoning requiring emergency treatment. She remained in a highly weakened state as a result of that episode (Exhibit G-4). The parties agreed at the hearing that malaria and tuberculosis are not diseases endemic to Canada.

[8] June 30, 1998 was Ms. Dubois' final work day at her post in Benin. She returned to Canada on July 1, 1998 and resumed her work at CIDA on August 31 of that year (Exhibit E-1). Starting on October 20, 1998, Ms. Dubois was absent from work due to disability. Her attending physician, Dr. Nadine Ostiguy, had diagnosed her with adjustment disorder with depressed mood and had asked her to undergo laboratory tests since she had just arrived from Africa. The period of disability was successively extended to August 3, 1999. Dr. Ostiguy noted in her report dated June 13, 2000 the timeline of Ms. Dubois' consultations and how her disability had evolved to the consolidation phase on August 3, 1999 (Exhibit G-5).

[9] The medical report dated June 13, 2000 (Exhibit G-5) reveals that the diagnosis of adjustment disorder with depressed mood made by Dr. Ostiguy on October 20, 1998 was based on the statement of her patient, who said she was being harassed at work. Symptoms of exhaustion (crying easily; lack of concentration and energy) were not documented by the results of the tests that Ms. Dubois purportedly underwent. Only one positive result on the PPD test, showing that she was carrying Koch's bacillus, is mentioned in Dr. Ostiguy's report. All the other tests produced normal results (although not all the tests taken were stated) until April 13, 1999, when Dr. Ostiguy stopped practising and went on maternity leave. It is also stated in Exhibit G-5 that Dr. Focroulle once again diagnosed adjustment disorder with depressed mood on May 18, 1999, when Ms. Dubois said she was still being harassed by her boss. On June 17, 1999, she told Dr. Nappert that she was suffering from harassment on the job and other stressors and that she was experiencing side effects from isoniazid. The

discomfort related to the side effects ceased after the isoniazid treatment was stopped on July 25, 1999, as she told Dr. Nappert at the meeting on August 19, 1999. In November 1998, Ms. Dubois had a positive PPD test result, indicating that she was carrying Koch's bacillus (which can cause tuberculosis), which she had caught through contact with a person infected with tuberculosis during her posting in Benin. However, she was asymptomatic (Exhibit G-5). Dr. Ostiguy prescribed preventive tuberculosis treatment, which began on January 25, 1999. Ms. Dubois was informed of the related side effects and symptoms, for which she would necessarily have to consult a doctor again. No side effects were identified in follow-up visits with her attending physicians in February or April 1999, and Ms. Dubois said that she was tolerating her treatment well.

[10] The diagnosis of adjustment disorder with depressed mood was established at the start of her disability and maintained throughout the period of disability. That diagnosis was confirmed by Dr. Focroulle on May 18, 1999. At a number of places in her report, Dr. Ostiguy noted stressors that her patient had brought to her attention: harassment on the job, living with her brother who had mental health problems, her financial burden. Ms. Dubois complained of flu symptoms (February 1999) and fever (May 1999). On June 17, 1999, Ms. Dubois consulted Dr. Nappert and mentioned that she was suffering from side effects (unspecified) of isoniazid. Dr. Nappert then extended the period of disability, which was to terminate on June 20, 1999, until August 3 of that year. The grievor stopped taking isoniazid on July 25, 1999, and it appears that she has suffered no further side effects since that time. On August 19 and 27, 1999, she met with Dr. Nappert to identify the side effects that she associated with isoniazid (Exhibit G-5).

[11] Dr. Patrick Barnabé testified for Ms. Dubois at the hearing. Ms. Dubois did not request that he be considered an expert witness. Dr. Barnabé was Ms. Dubois' attending physician from 1967 to 1990. During that period, Ms. Dubois was prone to suffering from chronic anemia, and had below normal blood hemoglobin and hematocrit levels. Analysis results in her file show blood hemoglobin levels of 114 on January 19, 1987 and 116 on August 5, 1990. The normal level is between 115 and 117.

[12] In July 2000, Ms. Dubois consulted Dr. Barnabé again and asked him for his opinion on the nature of her disability during the period from October 20, 1998 to

August 3, 1999 upon her return from Benin. Dr. Barnabé studied the report prepared by Dr. Ostiguy (Exhibit G-5) and the various assessments and analyses in Ms. Dubois' file and concluded that she had been suffering from anemia when she returned from Benin.

[13] According to Dr. Barnabé, the malaria attacks and food poisoning that Ms. Dubois suffered in Benin, and described in Dr. Caudron-Tidjani's report (Exhibit G-4), had caused a state of general exhaustion at the time she returned to Canada. Malaria results in hemolysis (destruction of red blood cells), causing anemia. The results of the tests conducted on April 14, 1999 show a hemoglobin level of 122 and a hematocrit level of 0.36 (compared to a normal level of between 0.33 and 0.47). The hemoglobin level was 119 on April 9, 2003 and the hematocrit level 0.35. According to Dr. Barnabé, the test results both before and after Ms. Dubois' assignment to Benin, show that Ms. Dubois was anemic or near normal levels and pointed to a diagnosis of tendency to chronic anemia.

[14] According to Dr. Barnabé, Ms. Dubois was physically exhausted when she returned from Africa. He felt that the diagnosis made in Benin was correct with regard to the malaria attacks and that she should have been treated with quinine. Dr. Barnabé did not believe that the grievor had reacted to quinine because Halfan and Artemux, which were prescribed for her, are quinine derivatives. Upon her return to Canada, Ms. Dubois apparently had a malarial relapse and, without medical consultation, treated herself with the arsenic she had left. Dr. Barnabé said that CIDA should require medical examinations and blood tests when employees return to Canada. Ms. Dubois did not consult a physician until nearly four months after she had returned, and tests at the time of her arrival could have established the fairly or very severe state of anemia from which she was suffering at that time.

[15] In his letter of October 23, 2002, Dr. Barnabé concluded that the severe anemic condition from which Ms. Dubois was suffering at the time of her arrival was aggravated by the isoniazid treatment, which was the last straw. As a result of her stress, the anemia from which Ms. Dubois suffered affected her emotions. In his letter of October 23, 2002, Dr. Barnabé concluded his assessment of the file as follows (Exhibit G-6):

[translation]

[...]

Consequently, when I say major depression, there is definitely depression, but a depression and secondary psychological stress associated with a state of physical exhaustion due to the severe and unusual conditions of her existence in Africa. Ms. Dubois was therefore in no condition to resume her work upon her return to Canada for strictly physical reasons.

[...]

[16] In cross-examination, Dr. Barnabé said that he had based his assessment on the reports of Dr. Ostiguy and Dr. Caudron-Tidjani. He had been informed of the workplace harassment problems raised by Ms. Dubois, but not of any charges against Ms. Dubois in Benin or any problems related to the fact that she lived with her brother who had a mental health problem. He was not informed of the financial problems facing Ms. Dubois, and he did not remember whether he had been informed of the death of Ms. Dubois' mother.

[17] In response to Ms. Dubois' request for benefits under FSD 47, the employer referred the file to the Occupational Health and Safety Agency of Health Canada on April 6, 2000 (Exhibit E-2). The purpose of that action was described as follows:

[translation]

[...]

The purpose of the appointment requested for Ms. Dubois is to determine whether her absences from work (October 1998/August 1999) were caused by an injury or illness that, as determined by Health Canada, would not normally occur or is not endemic to Canada. For your information, I enclose a copy of Foreign Service Directive 47 (FSD 47).

[...]

[18] On June 21, 2000, Health Canada answered the request as follows (Exhibit E-3):

[translation]

[...]

Upon her return from Benin, Ms. Dubois underwent preventive treatment for some months for a condition resulting from exposure to an infected person overseas (such

exposure is indeed unlikely in Canada). That medical treatment received by Ms. Dubois does not normally require any absence from work.

Based on the medical information we have, we cannot say that the symptoms resulting in her absenteeism were caused by an illness referred to by FSD 47.01 and FSD 47.02.

[...]

[19] In March 2001, Dr. Barnabé sent Health Canada additional information on Ms. Dubois' case. On April 4, 2001, the employer asked Health Canada to reassess the case in light of new information (Exhibit E-5). The file was forwarded to the Medical Advisory Committee of Health Canada's Occupational Health and Safety Program, which concluded as follows (Exhibit E-6):

[translation]

[...]

The Committee thus studied Ms. Dubois' file at its meeting of September 25, 2001 and concluded "that there was no evidence of any illness, medical condition or medication-related side effects meeting the definition of FSD 47."

[...]

[20] The employer denied Ms. Dubois' benefits under FSD 47 on the basis of that conclusion by Health Canada. Ms. Dubois grieved that decision by her employer on November 1, 2001.

[21] Dr. Barnabé's letter to Health Canada dated October 23, 2002 was subsequent to Ms. Dubois' grievance, which is dated November 1, 2001 (Exhibit G-6).

[22] Ms. Dubois' grievance was put before NJC's Foreign Service Directives Committee, which reviewed the file and made the following recommendation, which is reported in the minutes of the meeting of June 25, 2002 (Exhibit G-1):

[...]

Committee recommendation

The Committee carefully examined the documentation provided, and considered the presentation made on behalf of the grievor. In the opinion of the Committee, it has not been demonstrated that the absence due to illness was post-attributable as specified in FSD 47 — Leave for Post-

Attributable Injury or Illness. Therefore, the Committee recommends that the grievance be denied.

[...]

[23] NJC's Executive Committee reviewed that recommendation at its meeting on September 5, 2002. Its decision is set out in the minutes, filed as Exhibit E-7, as follows:

The employee grieved the employer's decision to deny the benefits of FSD 47 - Leave for Post-Attributable Injury or Illness, for the period from October 1998 to August 1999. The grievor requested that the employer authorize Leave for Post-Attributable Injury and Illness and reinstate her annual and sick leave credits for the period from October 1998 to August 1999.

The Executive Committee considered and agreed with the Foreign Service Directives Committee report that the grievor had been treated within the intent of the Directive. It had not been demonstrated that the absence due to illness was post-attributable as specified in FSD 47 - Leave for Post-Attributable Injury or Illness. Therefore, the grievance was denied.

[...]

[24] Ms. Dubois filed an application with the Commission de la santé et de la sécurité du travail du Québec (CSST) on April 19, 1999 to have the health problems she had suffered as a result of her assignment to Benin considered as an occupational illness (Exhibit G-3). That application was denied on September 7, 1999, then disputed on September 20, 1999. The refusal to grant the application was upheld on administrative review, and notice to that effect was issued to Ms. Dubois on August 9, 2000 (Exhibit E-4).

[25] The *Occupational Health Evaluation Standard* in effect at the time of the grievance was filed by the employer as Exhibit E-9. It was admitted that Ms. Dubois and her dependents had not received the health evaluations described in point 19 of Appendix A of the *Occupational Health Evaluation Standard*.

ArgumentsFor the Grievor

[26] The FSDs recognize, based on the principle of comparability, that employees serving abroad should be placed in neither a more nor a less favourable situation than they would be in working in Canada. FSD 47.03 states:

47.03 No charge to an employee's accumulated sick leave credits shall be made when an employee is absent from duty because of a post-attributable illness not endemic to Canada, or circumstances arising from an injury that would not normally occur in Canada, regardless of the location of the employee's place of assignment at the time of absence.

[27] In Dr. Barnabé's assessment of the case; Ms. Dubois experienced health problems when she returned from Benin. Those health problems stemmed from the malaria attacks and severe food poisoning which she had suffered while posted and which had caused the anemia demonstrated by the various symptoms described in the medical reports filed in evidence (asthenia, fatigue, headaches, etc.).

[28] According to Dr. Barnabé, the anemia resulted from successive malaria attacks and was exacerbated by the prophylactic treatment from which Ms. Dubois had suffered side effects. Dr. Barnabé clearly stated that he presumed that Ms. Dubois had anemia on her return to Canada, when she had been weakened by the malaria attacks, and displayed a chronic tendency toward anemia both before and after her posting.

[29] According to Dr. Barnabé, if there had not been any malaria attacks, there would have been no anemia. In his view, the depression that Ms. Dubois displayed was a secondary psychological stress associated with the state of physical exhaustion resulting from her stay in Benin and rendered her incapable of resuming her work.

[30] Malaria, food poisoning and tuberculosis are not diseases endemic to Canada, and Ms. Dubois' disability was directly related to those factors. Upon her return from Benin, CIDA did not ask Ms. Dubois to undergo medical examinations, and that, in Dr. Barnabé's view, constituted gross negligence. Ms. Dubois consulted a private physician after experiencing health problems which were identified as related to a depression, whereas that state clearly stemmed from the anemia caused by the malaria attacks. The entire set of problems related to malaria, tuberculosis and food poisoning

was set out in her occupational disease application to the CSST. All those problems were outlined in Dr. Ostiguy's report as well.

[31] Ms. Dubois showed that her absence from work for the entire period from October 20, 1998 to August 3, 1999 was attributable to an illness not endemic to Canada. The benefits provided for in FSD 47 should therefore be applied to her, and the grievance accordingly allowed.

For the Employer

[32] The only question the adjudicator must consider is whether the employer correctly applied FSD 47. Under FSD 47, it is Health Canada that determines whether the health problem displayed by an employee is caused by an illness not endemic to Canada. The employer may grant leave under FSD 47 only where Health Canada determines that the absence was caused by a post-attributable illness not endemic to Canada. The directive agreed upon between the parties means that they rely on Health Canada in such cases.

[33] In response to Ms. Dubois' request that the benefits of FSD 47 be applied to her, in April 2000, the employer submitted the request to Health Canada. Upon evaluating the medical file, Health Canada rendered a negative decision. New information was then provided by Dr. Barnabé, and, on April 4, 2001, the employer asked Health Canada to reopen the file. The Advisory Committee conducted a re-examination and came to the same conclusion on October 18, 2001.

[34] The grievance should be dismissed solely on the basis that the FSDs clearly provide that the parties rely on Health Canada to decide the matter in such situations. Any review by the adjudicator of the decision rendered by Health Canada would go against that intention stated in FSD 47. Subsection 96(2) of the *PSSRA* precludes any decision on a grievance from having that effect.

[35] The adjudicator's authority is limited by subsection 96(2) of the *PSSRA*, which provides:

No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.

[36] This limitation of the adjudicator's authority was considered in *Janowitz v. Treasury Board (Department of National Defence)*, PSSRA file 166-2-14154 (1983) (QL). The same reference to the adjudicator's authority was considered in *Sandes v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRA file 166-2-12658 (1982) (QL). In this case, we must adhere to what the parties negotiated in the FSDs, which clearly provide that Health Canada determines whether leave is for a post-attributable illness not endemic to Canada. The adjudicator must not substitute his or her own assessment for that of Health Canada.

[37] Furthermore, the burden is on Ms. Dubois to demonstrate that Health Canada erred in evaluating her file. She did not show which aspect of Health Canada's evaluation was incorrect. Nor did she call Dr. Coulombe (Health Canada) as a witness in this case, whereas she was in a position to do so. She brought indirect evidence, which suggests that her period of absence was due to an illness contracted in Benin.

[38] Dr. Barnabé's testimony was not very credible, being based on suppositions, approximations and eventualities. He met with Ms. Dubois three years after she had returned from Benin. He relied on certain parts of the medical reports of Dr. Ostiguy and Dr. Caudron-Tidjani and disputed others. For example, he said he agreed with the diagnosis of malaria, but not with the treatment; he similarly agreed with the diagnosis of "dormant" tuberculosis, but not with the isoniazid treatment. He further submitted that the work of the attending physicians, both in Benin and Canada, had been botched, while admitting that the evaluation he had sent to Health Canada in March 2001 was incomplete, since a clarification should have been made on October 23, 2002.

[39] Dr. Barnabé's conclusions raise controversy over the diagnosis made by Dr. Ostiguy, which is based on the latter's own report. Furthermore, Dr. Barnabé was unaware of the stressors such as the fact that Ms. Dubois lived with her brother who had a mental health problem, her financial burden, the death of her mother and the charges against Ms. Dubois in Benin. Dr. Barnabé's conclusions are not credible, considering that Ms. Dubois worked approximately two months before consulting Dr. Ostiguy, nearly four months after returning to Canada. If her anemia had been as serious as Dr. Barnabé supposes, Ms. Dubois would have consulted a physician long before that and would have been unable to work.

[40] The employer submitted that the adjudicator must give considerable deference to the decisions rendered by the NJC's Foreign Service Directives Committee (June 25, 2002) and Executive Committee (September 5, 2002). Those two decisions came from bodies composed of both union and management representatives. Ms. Dubois' grievance was dismissed by union-management authorities, and that was not a unilateral decision by the employer. This factor was considered in *Sandes v. Treasury Board (Revenue Canada, Customs and Excise)*, *supra*.

[41] The adjudicator cannot allow the grievance in this case in the absence of any bad faith on the part of the employer and/or Health Canada. Their good faith is necessarily apparent from the fact that the employer and Health Canada agreed, at Ms. Dubois' request, to re-evaluate the case and the new information submitted by Dr. Barnabé.

[42] The employer accordingly asks that the grievance be dismissed.

Reasons for Decision

[43] As stated in the introduction to the Foreign Service Directives (Exhibit G-8), the FSDs are developed in consultation with the employer's representatives and those of the bargaining agents within the NJC. As stated in paragraph 39.05(a), the FSDs are deemed to be part of the collective agreement, and the parties so admitted at the hearing.

[44] According to the Introduction to the FSDs, the grievance settlement procedure described in Section 14 of the *NJC By-Laws* is the procedure applicable in cases of misinterpretation or misapplication of the FSDs. Thus, an employee who believes that his or her rights have been encroached by the employer's interpretation or application of a directive has a right to file a grievance under paragraph 14.1.3 of the *NJC By-Laws*.

[45] Furthermore, under paragraph 14.1.2 of the *NJC By-Laws*, grievances presented under that procedure must be decided on the basis of the intent of the directive being grieved.

[46] The *NJC By-Laws* state that, where the grievance has not been settled to the employee's satisfaction, it may be referred to adjudication in accordance with the provisions of the *PSSRA*.

[47] In this case, Ms. Dubois grieved the employer's decision to deny her benefits under FSD 47. She submitted that her absence for the entire period from October 20, 1998 to August 3, 1999 was caused by an illness covered by FSD 47. She thus disputes the decision by Health Canada, which reached a conclusion to the contrary on June 21, 2000. A review by the Medical Advisory Committee of Health Canada's Occupational Health and Safety Program re-evaluated the application and, on September 25, 2001, concluded as follows:

[translation]

[...] *that there was no evidence of any illness, medical condition or medication-related side effects meeting the definition of FSD 47.*

[...]

[48] As the parties admitted at the hearing, the employer refused not to charge Ms. Dubois' absences for the period from October 1998 to August 1999 to leave credits earned by Ms. Dubois. I must decide whether that decision by the employer was made in a manner consistent with the stipulations and intent of FSD 47. I must also assess whether Health Canada made the aforementioned two decisions based on the correct application of the intent of those directives. I cannot restrict the review of the grievance solely to the question whether the employer acted correctly on Health Canada's decision, which would have the effect of limiting the grievance solely to the question of execution of Health Canada's decision (as argued by the employer). The grievance procedure outlined in the Introduction to the FSDs concerns all the aspects of the directive involved in its interpretation and application. The determination that the absence was caused by a post-attributable illness not endemic to Canada is at the source of the right conferred on the employee, as is the application made thereof by the employer in charging or not charging that absence to the leave credits earned by that employee. I must therefore consider each of these factors at issue in this case. I cannot, without distorting the right to grievance redress, restrict it solely to the question of application. The decision in *Sandes v. Treasury Board (Revenue Canada, Customs and Excise)*, *supra*, which concerned the travel directive, cannot apply to this case.

[49] The medical evaluations and reports prepared by Dr. Caudron-Tidjani and Dr. Ostiguy show that Ms. Dubois suffered a number of malaria attacks and violent food poisoning during her stay in Benin. Furthermore, it was not disputed that

Ms. Dubois is now a Koch's bacillus carrier, as a result of contact at her post with persons suffering from tuberculosis, as demonstrated by the test results contained in Dr. Ostiguy's report. The parties admitted at the hearing that malaria and tuberculosis are illnesses not endemic to Canada.

[50] I must therefore determine whether the period of absence from work was due to malaria or tuberculosis in this case. The chronology of events as presented to me at the hearing will enable me to determine this question. On my assessment of the chronology of events, I distinguish two consecutive periods of absenteeism: the first from October 20, 1998 to June 16, 1999, as a result of adjustment disorder with depressed mood, and the second from June 17 to August 3, 1999, during which there were also the secondary effects of the isoniazid treatment.

[51] I could readily conclude that, upon her return to Canada on July 1, 1998, and when she returned to work on August 31 of that year, Ms. Dubois might have displayed signs of exhaustion or weakness that might have been symptomatic of a chronic state of anemia or anemia exacerbated by successive malaria attacks followed by a bout of severe food poisoning. That conclusion can only be confirmed by blood analysis demonstrating below normal hemoglobin and/or hematocrit levels on those dates. The results of the tests to which Dr. Barnabé referred in his testimony were dated January 1978, August 1990, April 14, 1999 and April 9, 2003. None of the blood test results supports the diagnosis of anemia, which might have resulted from malaria attacks and food poisoning, at the time Ms. Dubois returned to work.

[52] The fact that Ms. Dubois was able to work from August 31 to October 20, 1998 shows that she was able to perform her duties during that period, although it is reasonable to believe that she may have remained in a weakened state upon returning from Benin. Dr. Barnabé's hypothesis that Ms. Dubois suffered from anemia which prevented her from performing her duties during that period therefore cannot be accepted.

[53] Dr. Ostiguy's diagnosis of adjustment disorder with depressed mood on October 20, 1998 was based on the statement by her patient, who said she was being harassed at work. The symptoms of exhaustion (crying easily; lack of concentration and energy) are not substantiated by the results of tests undergone by Ms. Dubois. Only a positive PPD test result, showing that she was a Koch's bacillus carrier, was mentioned in Dr. Ostiguy's report. All the other tests produced normal results

(although not all the tests administered were specified) until April 13, 1999, when Dr. Ostiguy stopped practising in order to go on maternity leave.

[54] Dr. Focroulle once again diagnosed adjustment disorder with depressed mood on May 18, 1999, when Ms. Dubois said she was still being harassed by her boss. On June 17, 1999, she told Dr. Nappert that she was experiencing harassment on the job and other stressors and that she was suffering from the side effects of isoniazid. The discomfort linked to those secondary effects ceased after the isoniazid treatment was stopped on July 25, 1999, as she told Dr. Nappert at the meeting on August 19, 1999.

[55] I note that the cause of Ms. Dubois' absence from work from October 20, 1998 to June 16, 1999 was based solely on a diagnosis of adjustment disorder with depressed mood, according to Dr. Ostiguy's report (Exhibit G-5). The anemia (or physical exhaustion) hypothesis advanced by Dr. Barnabé in his testimony was the only factor advanced to link Ms. Dubois' absence to an illness not endemic to Canada (malaria; tuberculosis). The burden of showing that the period of absence was linked to an illness not endemic to Canada was on the grievor, and, in the absence of her testimony, I must rely on the medical reports and certificates in the file and on Dr. Barnabé's testimony.

[56] The conclusion, made by Dr. Barnabé in his letter of October 23, 2002, that the employee had suffered from major depression associated with a state of physical exhaustion due to the severe and unusual conditions of the post in Benin does not mention the existence or impact of the various psychological stressors that Ms. Dubois reported to Drs. Ostiguy, Focroulle and Nappert. In cross-examination, Dr. Barnabé said that he was unaware of those various "stressors" or related factual details. His conclusion that Ms. Dubois was in no condition to resume her work upon her return to Canada for strictly physical reasons can only be accepted if one disregards the various "stressors" she faced when she returned to Canada and during her period of work and her disability. The "psychological" nature of adjustment disorder with depressed mood thus cannot be ruled out and must be linked to the so-called "stressors" which she faced in Canada. Ms. Dubois did not convince me by this evidence that her absence during the period to June 16, 1999 was related to an illness not endemic to Canada, to which she had been exposed at her post in Benin.

[57] For the aforementioned reasons, Ms. Dubois could not benefit from FSD 47 for her absence from October 20, 1998 to June 16, 1999. Accordingly, for that period,

Health Canada's decisions and the employer's application thereof were consistent with FSD 47, and Ms. Dubois' absence was correctly charged to earned leave credits.

[58] With respect to the period from June 17 to July 25, 1999, Ms. Dubois demonstrated that she had in fact suffered from side effects caused by the isoniazid treatment, a prophylactic treatment for Koch's bacillus, with which Ms. Dubois had been infected through contact with a person infected with tuberculosis when she was in Benin.

[59] The first decision rendered by Health Canada, on June 21, 2000, refers to the preventive treatment "for a condition resulting from exposure to an infected person overseas". I may conclude the whole of the evidence that Health Canada was referring to the isoniazid treatment for Koch's bacillus, which was contracted through exposure to a person infected with tuberculosis. In stating that "such exposure is indeed quite unlikely in Canada", Health Canada admitted that tuberculosis is an illness not endemic to Canada. The medical treatment Ms. Dubois received for a condition resulting from exposure to a person overseas infected by an illness that is not endemic to Canada appears to meet the first criterion stated in the introduction to FSD 47, that is to say that the injury or illness is determined to be not endemic to Canada.

[60] The second criterion on which Health Canada ruled in its decision of June 21, 2000 concerns the symptoms causing Ms. Dubois' absenteeism. Although Health Canada admitted in its decision that Ms. Dubois had suffered from a "condition resulting" in an illness not endemic to Canada, its conclusion nevertheless states that it cannot "... say that the symptoms that caused her absenteeism were attributable to an illness as specified by FSD 47.01 and FSD 47.02." The Medical Advisory Committee of Health Canada's Occupational Health and Safety Program re-evaluated Ms. Dubois' request and concluded "that there is no evidence of any illness, medical condition or medication-related side effects meeting the definition of FSD 47."

[61] The evidence presented at the hearing shows that Ms. Dubois suffered from side effects of the isoniazid preventive treatment. Dr. Ostiguy's report (Exhibit G-5) clearly states that Dr. Nappert had considered that factor in extending the work stoppage, which was to end on June 20, 1999, until August 3, 1999. Health Canada appears to have taken it for granted that isoniazid preventive treatment does not "normally" result in any absence from work, without considering that that factor, in addition to those related to the psychological stressors, formed the basis of Dr. Nappert's decision

to extend the period of disability. Dr. Barnabé testified that the isoniazid treatment had exacerbated the state of health of Ms. Dubois, who had remained weakened by the health problems she had faced while posted.

[62] In refusing to consider that the side effects of the isoniazid treatment had the effect of extending Ms. Dubois' period of absence from work, Health Canada did not decide in a manner consistent with the intent of the directive covering absences caused by an illness not endemic to Canada. The absences related to the side effects of the treatment that Ms. Dubois underwent for the condition (Koch's bacillus) which she contracted while posted in Benin through exposure to a person infected with tuberculosis are consistent with the notion of "any absence caused by an illness not endemic to Canada" set out in FSD 47.

[63] For that period, I find that Ms. Dubois demonstrated that the side effects of isoniazid extended her period of disability (the end of which was scheduled for June 20, 1999) until August 3, 1999. Although the side effects Ms. Dubois suffered from June 17 to August 3, 1999 may indeed have aggravated her adjustment disorder with depressed mood, the side effects of the drug were nevertheless directly related to an illness not endemic to Canada (tuberculosis) with which Ms. Dubois came into contact while posted in Benin.

[64] For that period of absence from June 17 to August 3, 1999, Ms. Dubois was entitled to benefits under FSD 47.03, and the absence days for that period are not chargeable to Ms. Dubois' leave credits. I order the employer to make every appropriate correction accordingly.

[65] The grievance is accordingly allowed in part, Ms. Dubois being entitled to the benefits under FSD 47 solely for the period from June 17 to August 3, 1999.

**Léo-Paul Guindon,
Board Member**

OTTAWA, July 21, 2004.