Date: 20040928

Files: 166-32-32344
166-32-32345
166-32-32346

Citation: 2004 PSSRB 143

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DR. BEATRICE RINKE AND DR. ROBERT VANDERWOUDE

Grievors

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Before: Paul Love, Board Member

For the Grievors: Evan Heidinger, Professional Institute of the Public Service of Canada

For the Employer: Neil McGraw

Heard at Vancouver, B.C.,
June 22 -25, 2004.

[1] The grievors, Dr. Beatrice Rinke (Board File 166-32-32345) and Dr. Robert Vanderwoude (Board File No. 166-32-32346), have filed grievances claiming that their resignations from employment as veterinarians with the Canadian Food Inspection Agency (CFIA) were forced or coerced and, in essence, that they were constructively dismissed. Dr. Rinke also filed a grievance with regard to the calculation of severance pay (Board File 166-32-32344).

[2] In the grievance presented in Board File No. 166-32-32345, Dr. Rinke alleges:

> *As a result of CFIA management's refusal to find me alternative employment beyond sending me back to an abattoir where I suffered a severe injury as determined by the Workers Compensation Review Board of B.C. and management's action to force the resignation of my spouse I am being forced to resign from the CFIA based on Jim Sigurdson's acceptance of my spouse's resignation on May 14, 2002. I am also being forced to resign without full disclosure of all information related to the effect of resignations of my spouse and myself on our family. As I have noted in my letter of resignation (which has not been accepted), the resignation was forced and is tantamount to a constructed wrongful dismissal.*
>
> *I therefore grieve.*

[3] In the grievance presented in Board File No. 166-32-32346, Dr. Vanderwoude alleges:

> *As a result of CFIA management's refusal to accommodate my spouse, as well as their refusal to extend my leave without pay in order for us to return to B.C. as a family, I have resigned from the employ of the CFIA, effective 01 May 2002. This was accepted by James Sigurdson on May 14, 200 (sic). I was also forced to resign without full disclosure of all information related to the effects of resignations on my spouse and myself on our family. As I have noted in my letter of resignation, the resignation was forced and is tantamount to a constructed wrongful dismissal.*

[4] On September 14, 2002, in Board File No. 166-32-32344, Dr. Rinke filed a grievance with the following details:

> *Further to my grievance of June 9, 2002, I have received a letter from Ms. Miller-Kurchaba regarding my severance payment and superannuation options. This report contains serious errors. I have outlined these errors in a letter addressed to Ms Miller-Kurchaba, dated Saturday, August 24,*

> *2002. This is a pay and benefits grievance. I wish to be present at all hearings. These actions by management constitute a financial penalty and are directly related to management's wrongful dismissal actions against myself and my family. Therefore this grievance is an addendum to my grievance of June 9, 2002*
>
> *I therefore grieve.*

[5] Dr. Rinke requested the following corrective action in her grievance in Board File No. 166-32-32344:

> *In addition to the corrective actions requested in my grievance of June 9, 2002 I also require the corrective actions that are outlined in my letter to Ms Miller Kurchaba, dated Saturday, August 24, 2002.*

[6] In a letter to the Board dated June 16, 2004, the employer raised a jurisdictional issue:

> *The employer intends to challenge the jurisdiction of the Board in that this matter is an attempt to refer to adjudication a non-adjudicable matter, namely the resignation of Drs. Rinke and Vanderwoude. While they are both alleging constructive dismissal, this Board has been very clear in the past that a resignation under the Public Service Employment Act bars this Board from hearing a reference to adjudication that deals with a resignation. In this case, the resignations were made in accordance with the Canadian Food Inspection Agency Act and the same principle applies. Unless a party can demonstrate that the resignation is disguised discipline, which has not been alleged, the Board has no jurisdiction under section 92 of the Public Service Staff Relations Act.*
>
> *Secondly, in reference to Dr. Rinke's reference to adjudication number 166-32-32344, the employer wishes to underline the objection it has made throughout the grievance process, that this grievance is untimely. The crux of Dr. Rinke's grievance relates to the types and periods of leave granted between August of 1989 and January of 2001. For example, Dr. Rinke requests changes to her period of maternity leave and leave for the care and nurturing of pre-school aged children between August 21, 1989 and March 25, 1990 and August 19, 1991 to January 3, 1995, as well as leave without pay for relocation of spouse from August 21, 2000 to January 1, 2001.*

[7] After hearing oral submissions from the parties at the outset of the case on the employer's jurisdictional objection, I determined that the evidence on the merits and

the jurisdictional issues were significantly intertwined. I determined to reserve my ruling on the jurisdictional issue until the hearing of evidence was concluded. I advised the parties that I would address the jurisdictional issues first in my reasons for decision.

[8] In submissions following the close of evidence, the employer also submitted that the board had no jurisdiction to decide the merits of this case, as it was in substance a human rights complaint and the board only has jurisdiction to decide human rights matters where the Canadian Human Rights Commission (CHRC) has referred the matter to the Board pursuant to section 41(1)(a) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*) for the parties to exhaust the grievance procedures.

[9] After hearing the testimony, reviewing the documents filed as exhibits, the arguments of counsel, and the authorities filed, I am satisfied that this is in substance a complaint concerning discrimination against the grievors on the basis of family status, marital status and on the basis of Dr. Rinke's disability, and I am without jurisdiction to hear this case because there is another administrative procedure available to the grievors under the *Canadian Human Rights Act.* Further, I am not satisfied that this is a case where the employer disciplined the grievors, or that resignations of the grievors were coerced or forced by the employer. I am satisfied that this is a case of resignation, which the Board has no jurisdiction to review under section 92 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35. My factual findings and my reasons for these conclusions are set out below.

Non-Attendance by Dr. Rinke

[10] Dr. Rinke did not appear at the hearing of this matter. She provided a written authorization for her husband, Dr Vanderwoude, to appear on her behalf (Exhibit 1). Through Dr. Vanderwoude, and representative Mr. Heidinger, she filed a report from Dr. Daigen, a psychologist (Exhibit 2), explaining her absence. The suggestion in the report is that Dr. Rinke has been psychologically traumatized by the CFIA's treatment of her over a protracted period, and she is not able to give evidence. Dr. Daigen wrote his opinion without conducting a complete psychological assessment, based on an interview of Dr. Rinke for a period of 1-¼ hours on June 11, 2004, in the presence of Dr. Vanderwoude.

[11] I admitted the report for the purpose of explaining Dr. Rinke's absence. It is extraordinary in a resignation case that the party who resigned and is seeking to resile from the consequences of a resignation, including termination of employment status, would not be present to give evidence concerning the facts. Dr. Daigen concluded:

> *[...] If she was unable to speak of these events to me, in the supportive setting of my office, it is certain that she will be unable to do so in the adversarial setting of the Public Service Staff Relations Board hearing. I hope that she will not be penalized for her failure to appear, given that this failure is symptomatic of a severe posttraumatic condition that apparently developed as a result of her employment at CFIA. It is unlikely that Dr. Rinke would be able to tolerate the exposure to trauma-related material that would occur at the Board hearing, and she may therefore need a representative to appear on her behalf.*

[12] With respect to Dr. Daigen's report, it is not a question of penalizing the employee for her failure to appear, but a question of what weight can be attributed to Dr. Vanderwoude's assertions of and documents, in the absence of the grievor who ordinarily would have attended the hearing and testified in chief and under cross-examination on the facts and claims presented in her grievance.

[13] Mr. Heidinger did not seek an adjournment of the process. This hearing proceeded on the basis of hearing Dr. Vanderwoude's testimony for the grievors, Ms. Jo Ann Miller-Kurchaba's testimony for the employer, and documentary evidence filed by both parties during the course of witness testimony. For a period of time, Dr. Vanderwoude was a bargaining agent representative and assisted Dr. Rinke in her various problems with the CFIA and in a matter which went to the Workers' Compensation Board (WCB). The grievor bears the burden of demonstrating that her resignation was not a genuine resignation or that the employer coerced her resignation. Dr. Rinke's non-attendance presents a significant barrier to meeting the burden of proof.

[14] Dr. Rinke's absence poses significant problems in evaluating evidence concerning her history with the CFIA and her resignation from the CFIA. It is my view that little weight should be placed on the oral and documentary evidence in Dr. Rinke's grievance. The evidence tendered by the bargaining agent was, in large part, hearsay evidence, put in by Dr. Vanderwoude. Some of the evidence, particularly letters written by Dr. Rinke's lawyer which purport to set out facts, is in the nature of "double

hearsay". The issues raised in Dr. Rinke's grievances are controversial and while the rules of evidence are relaxed in an adjudication proceeding, it would be an error to give full weight to the hearsay assertions for the purpose of determining controversial facts.

Background

[15] This matter relates in part to a history of relations between Dr. Rinke and the CFIA and its predecessor department that goes back at least twelve years. Drs. Rinke and Vanderwoude were employed in the meat hygiene section of Agriculture Canada, and then the CFIA.

[16] Dr. Vanderwoude is a qualified veterinarian. He joined Agriculture Canada in 1984 and worked in a variety of meat inspection environments in British Columbia, Alberta and Saskatchewan. In 1997, he won a promotion to the VM-02 level. Dr. Vanderwoude has experience as an Acting VM-03 in the Fraser Valley.

[17] Dr. Rinke joined Agriculture Canada in 1988 in a VM-01 position. Dr. Vanderwoude advised that Dr. Rinke, his wife, is a qualified veterinarian. He further advised that she had her own clinic prior to joining the CFIA. He said that:

> *In 1988 she was successful or had the misfortune of joining Agriculture Canada, and for the next 12 years worked in meat inspection in British Columbia.*

[18] Dr. Rinke and Dr. Vanderwoude met through their work, became a couple and married. The evidence before me indicates that they are the only married couple in the CFIA in the VM-02 classification. Dr. Rinke started with the CFIA in 1988; I have set out her leave history in a chart at paragraph 200 of this decision.

[19] Dr. Vanderwoude described the programs with Agriculture Canada, and now the CFIA, which employ veterinarians. The majority of the veterinarians with the CFIA work in abattoirs conducting ante-mortem and post-mortem inspection of animals destined for slaughter for human consumption and export from Canada. This meat inspection program is known as the meat hygiene program.

[20] A very small number of veterinarians work in managerial positions acting on the operations side, or as program specialists, in management, or in food safety

enhancement. A very small number of veterinarians work in animal health, which Dr. Vanderwoude described as:

> *Working in nice professional surroundings, going to farms, quite nice.*

The small number of positions in animal health within the agency are prized positions. These are relatively difficult to obtain for the vast majority of veterinarians employed in the meat hygiene program.

[21] Dr. Vanderwoude says that he was forced to move from British Columbia to Ontario in 2000 and that the CFIA forced his resignation in 2002. I do not accept his evidence on either of these points for the reasons set out in this decision.

[22] In July of 2000, Dr. Vanderwoude accepted a contract position with the Ontario Ministry of Agriculture, now the Ministry of Agriculture and Foods (OMAFRA), which commenced in September of 2000. He is currently in a full-time or indeterminate position as Manager of Policy and Audit Services; he oversees program aspects for 200 abattoirs and the activities of 120 veterinarians appointed under the *Meat Inspection Act of Ontario* and the *Livestock Community Sales Act, Ontario.* In his evidence, he referred to this as a "plum job", which I take to mean a job that is attractive to him. I note that in his present job in Ontario, Dr. Vanderwoude is not required to work in an abattoir or a meat packing plant on a daily basis.

[23] Dr. Vanderwoude said that Dr. Rinke was forced in September of 2000 to relocate to Ontario with no prospects of a job and sell belongings and her house. In my view, the correct facts are that on August 21, 2000, the employer was advised by Dr. Rinke of her intent to take a relocation of spouse leave without pay, effective August 21, 2000. Dr. Rinke left the province and moved to Ontario with Dr. Vanderwoude, where she found work with OMAFRA by January of 2001. This position was more attractive to her than working as a veterinarian with the CFIA in British Columbia in a slaughterhouse environment.

[24] From Dr. Vanderwoude's perspective, Dr. Rinke's problems with the CFIA started when she obtained her first VM-02 position in February of 1989. At that time, Dr. Rinke and Dr. Vanderwoude were living in North Delta, within the Greater Vancouver Regional District. Dr. Rinke was posted to a plant in Aldergrove, British

Columbia (the Aldergrove plant)[1]. Dr. Vanderwoude said that Dr. Rinke had applied for a different position and had hoped to be posted at a plant in Surrey. The Aldergrove plant was 37 kilometres away from Dr. Vanderwoude and Dr. Rinke's home in North Delta.

[25] Dr. Rinke was apparently concerned about the work environment at the Aldergrove plant and about the fact that the Aldergrove plant was old and inefficient and would likely be shut down at some point in the future.

[26] Dr. Rinke filed a grievance concerning her posting to the Aldergrove plant on January 18, 1991. The grievance was framed as a grievance relating to Agriculture Canada's refusal to pay relocation expenses when she won a VM-02 competition in February of 1989, was promoted from VM-01 to VM-02 and was posted to a plant in Aldergrove rather than the plant in Surrey.

[27] This grievance was adjudicated in *Rinke v. Treasury Board*, Board File No. 166-2-22122 (1992), filed as an exhibit in these proceedings (Exhibit 7). It is apparent from a review of that decision that Dr. Rinke believed that she was going to be posted to Sunrise Poultry Plant (Establishment 314) in Surrey (p. 3), although the job posting did not specify a location (p. 7), and the posting was not for a particular position, but was to cover the general Vancouver regional area (p. 8). The employer filled the vacant staff position at the Sunrise Poultry Plant by the lateral transfer of another VM-02 staff member. The Board specifically found that Dr. Rinke had not requested to be appointed to the Aldergrove plant, which was some distance (approximately 42 kilometres) away from her dream home[2]. The distance was significant, given traffic and commuting difficulties. The case also dealt with an interpretation of the language of the relocation policy, relating to distances between an employee's former residence and new work location.

[28] This grievance was said by the bargaining agent to be the foundation for the CFIA's course of ill treatment towards Dr. Rinke. I have set out the facts of the first grievance, which are salient. These facts also highlight what appears to be a difference

[1] In accordance with Board policy, for the purpose of protecting the privacy of a non-party I have not identified the nature of the establishment at which Dr. Rinke carried out her VM-02 duties.

[2] These were the words used by Dr. Vanderwoude in his testimony in the earlier decision in *Board File No. 166-2-22122* (p. 12), and used by Dr. Vanderwoude in his testimony before me.

between how Dr. Rinke and Dr. Vanderwoude perceive the foundation of Dr. Rinke's problems with the CFIA, and what I find as the facts based on the evidence before me.

[29] In reviewing the evidence before me, I am satisfied that Dr. Rinke believed that she was applying for a position at Sunrise Poultry Plant when she responded to the VM-02 posting. The true facts, however, are that Dr. Rinke applied for a general posting within the Vancouver region, which included Aldergrove. It is also apparent that she did not request a posting to the Aldergrove plant and did not wish to work at the Aldergrove plant. I note that there is no evidence before me that Dr. Rinke sought formal recourse from the decision to post her at the Aldergrove plant other than to seek relocation pay.

[30] Dr. Rinke won her grievance relating to relocation pay in July of 1992 (Board Decision No. 166-2-22122). She received compensation as a result of the decision. The sum of $15,987 was ultimately paid to Dr. Rinke on January 22, 1993, for the employer's decision to post her at the Aldergrove plant. I note that between August 21, 1989, and February 18, 1990, Dr. Rinke was on maternity leave. Dr. Rinke was on a care and nurturing leave between February 19, 1990, and March 25, 1990. She returned to duty between March 26, 1990, and August 18, 1991. Thereafter she was on a care and nurturing leave commencing on August 19, 1991.

[31] On or about February 16, 1993, Dr. Rinke was declared surplus effective October 18, 1993, at the end of her care and nurturing leave. This was apparently because a number of the meat packing facilities were amalgamated into complexes, and veterinarians were assigned multi-plant inspection responsibilities (Exhibit 9). Dr. Vanderwoude was assigned the inspection authority for the Aldergrove plant, in addition to his responsibility at Britco Export Packers Ltd. Dr. Vanderwoude says that the decision could have been made another way. That decision, however, is for management to make, as it has the power to organize the workforce, and the employee affected by the decision has rights under the Work Force Adjustment Directive.

[32] It is Dr. Vanderwoude's view that Dr. Rinke was singled out and declared surplus for her choice to pursue the relocation pay grievance. While certainly the CFIA's decision to declare Dr. Rinke surplus occurred, chronologically speaking, after Dr. Rinke won her grievance and was paid her relocation pay, I am not satisfied that the bargaining agent has established any causal connection between the two events.

[33] According to Dr. Vanderwoude's testimony, Dr. Rinke extended her care and nurturing leave to avoid taking surplus status while she was waiting for an opportunity to return to work. There is correspondence before me (Exhibit 11) which indicates that Dr. Rinke applied for an extension of leave in April or May of 1993 and on May 4, 1993, and was granted an extension of leave until August 19, 1996.

[34] According to Dr. Vanderwoude's testimony:

> *Dr. Rinke managed to avoid being surplus by extending her care and nurturing leave. In desperation she managed to extend her leave.*

[35] The CFIA made offers of work to Dr. Rinke. Dr. Rinke eventually accepted work at Sunrise, and then at a Vancouver area abattoir[3]. She returned to work on January 4, 1995, and worked until May 26, 1996. Dr. Rinke was then on an illness leave without pay from May 27, 1996, to June 25, 1997. She returned to work for the period from June 26, 1997, to October 12, 1997. She was off work briefly from October 13, 1997, to October 20, 1997, and then worked until December 13, 1998, when she took illness leave without pay.

Disclosure of Information to bargaining agent for Vacation Scheduling Purposes

[36] Dr. Vanderwoude raised an issue of how the CFIA dealt with vacation leave, alleging that it was evidence of bad faith on the part of the CFIA towards Dr. Rinke. The suggestion before me was that the CFIA orchestrated a change in the method of calculating vacation leave, in order to ensure that Dr. Vanderwoude and Dr. Rinke would not be able to vacation together. Dr. Vanderwoude says that he and Dr. Rinke were singled out by the employer's disclosure of personal information about Dr. Rinke's various leaves and start date, in support of a bargaining agent initiative to review the method of determining vacation scheduling. The bargaining agent said that Dr. Vanderwoude and Dr. Rinke were the only two veterinarians employed in B.C. who were married or cohabiting, that they were prejudiced by the proposed vacation leave schedule, and that at the end of the day they would never be able to take vacations at the same time. The bargaining agent said, in referring to Dr. Rinke and

[3] In accordance with Board policy, for the purpose of protecting the privacy of a non-party, I have not identified the name of the establishment at which Dr. Rinke carried out her VM-02 duties.

Dr. Vanderwoude, "In their mind it was an example of ill-treatment focussed on them particularly and part of a chain of evidence".

[37] If the employees were permitted to schedule vacations on the basis of actual continuous service, as opposed to by seniority date, this might possibly have adversely affected Dr. Rinke, who remained an employee, but was not in continuous service because of her leaves. Dr. Vanderwoude filed a grievance relating to the implementation of a new Meat Hygiene Veterinarian Leave Allocation Policy. He was successful in that grievance.

[38] Dr. Rinke complained to the Privacy Commissioner about the unauthorized release of her personal information to her bargaining agent. The full text of that complaint is not before me. The results of the Privacy Commissioner's investigations are set out in a letter to Dr. Rinke dated March 3, 1998 (Exhibit 13):

> *Our investigation has shown that in February of 1996, with the approval of the local Director of Operations, Dr. D. Finnan, one of the local human resources personnel officers developed a list containing your continuous service start date and that of your fellow veterinarians and provided this list to Dr. O. Germaine. This was done following a request from Dr. Germaine, who is the Secretary Treasurer for the local PIPS union. This list was developed by using information taken from the Human Resources Information System (HRIS) data base and only the veterinarians' continuous start dates were disclosed.*
>
> *... Departmental representatives explained that as a result of a decision negotiated by a union-management committee, management authorized the union executive of the veterinarian sub-group to develop criteria that would be used for the purpose of determining leave priority. In the past, the seniority list had been used for this purpose, however, more recently Dr. Germaine, as the representative of the union executive, asked for the continuous service start dates of the veterinarians in order to explore with union members the possibility of establishing new criteria for determining leave priority. The requested information was provided by management in this instance in order to foster and maintain a cooperative relationship with the union.*

[39] The Privacy Commissioner found that the disclosure of the continuous service start date to the bargaining agent was not a use consistent with the purpose for which the personal information was initially collected and found that Agriculture and Agri-Food Canada improperly disclosed Dr. Rinke's personal information.

[40] The Privacy Commissioner found that the employer should not have released the information. The Privacy Commissioner also found that the employer released the information as a result of the request by the bargaining agent for information necessary to resolve a vacation scheduling issue of concern to its members. The Privacy Commissioner also found that no further action needed to be taken, given that the department agreed not to disclose employees' personal information without their written consent and had given instructions on this point to the applicable regional office.

[41] I note that there was some very general testimony from Dr. Vanderwoude that the employer had some disputes with Dr. Rinke about her performance, denying her leave to attend an anniversary celebration for her mother when her mother was terminally ill, nit-picking on expense claims, and alleging that Dr. Rinke had problems with other inspectors. Dr. Vanderwoude said that this caused Dr. Rinke to take a care and nurturing leave. This information was of a very general nature and was in the nature of hearsay evidence.

Inhumane Kill allegations

[42] Dr. Vanderwoude testified that on September 26, 1997, a situation developed at a Vancouver area abattoir. The skilled person who was involved in stunning the hogs went on vacation and then ceased working due to a workplace injury. The replacement worker was not skilled. Hogs were not being killed in a humane manner. Some of the hogs had their throats cut or were put into a scald tank (filled with almost boiling water), when the hog was not insensible to pain. Dr. Vanderwoude claimed that he witnessed some of these problems at the Vancouver area abattoir on September 2, September 27, October 6 and October 9, 1997. Dr Vanderwoude said that he drafted a detailed report regarding the violations and left the report for Dr. Rinke, "as she was coming back to the plant".

[43] I note that Dr. Vanderwoude's testimony of his being in the Vancouver area abattoir does not correspond with the "audit results" in Exhibit 44, which sets out periods when Dr. Rinke was on duty. Exhibit 44 shows that Dr. Rinke was on duty from June 26, 1997, to October 12, 1997. Exhibit 44 then shows that Dr. Rinke was on an illness leave without pay from October 13, 1997, to October 20, 1997, and then she was on duty from October 21, 1997, to December 13, 1998. Dr. Vanderwoude's testimony does not correspond with the letter written by Dr. Rinke's counsel on

January 9, 1998 (Exhibit 15). In Exhibit 15, counsel relates the September events as if Dr. Rinke witnessed these events. The factual issue of what happened during September to November 1997 is argued to be critical to the development of Dr. Rinke's disability. Based on the testimony before me, it is difficult to separate what Dr. Vanderwoude had the opportunity to observe himself from what Dr. Vanderwoude was relating as hearsay evidence. I have regretfully come to the conclusion that many of the events related by Dr. Vanderwoude during this critical time period were in fact events not witnessed by him, but related to him by Dr. Rinke in his capacity as her husband or bargaining agent representative.

[44] When Dr. Rinke came back to the Vancouver area abattoir, she witnessed hogs being subjected to inhumane treatment during the slaughter process on October 6 and 7. There was a confrontation between Dr. Rinke and the plant manager in November of 1997. Dr. Rinke was pulled from the plant by the CFIA, and directed to work at another establishment. The CFIA launched a harassment complaint against the plant manager on behalf of Dr. Rinke and retained a third party to investigate the complaint. The record of correspondence before me indicates that the employer filed the harassment complaint and the harassment investigation was triggered by Dr. Rinke, who expressed a fear of working alone in the plant (Exhibit 50). The CFIA official suggested that Dr. Rinke get EAP counselling for her fear of the plant manager, but also arranged for Dr. Rinke's removal from the plant, and for an investigation.

[45] The correspondence also indicates that Dr. Rinke wished the CFIA to take action to stop the inhumane kill, but not to shut down the plant, and she was concerned that the actions of the CFIA had compromised her ability to work at the plant. Dr. Rinke was opposed to a harassment investigation.

[46] Dr. Rinke returned to the Vancouver area abattoir at some point during 1998. The precise date is not before me, but I surmise that it was at some point after January 9, 1998, as her counsel demanded her reinstatement to the Vancouver area abattoir by January 13, 1998 (Exhibit 15). She went on a prolonged stress leave on or about December 14, 1998. Before going on stress leave, Dr. Rinke wrote a memo to the CFIA dated December 9, 1998 (Exhibit 16). In that memo, she made a number of complaints about the CFIA and her workplace at the Vancouver area abattoir. In the absence of hearing Dr. Rinke's oral testimony on this point, with cross-examination, it would, in my view, be dangerous to place much weight on the allegations in her memo. It is

apparent, from Dr. Vanderwoude's evidence that Dr. Rinke was in a state of extreme stress during this time period. Dr. Vanderwoude testified that "he witnessed her decline" and that he was "covering shifts" for her at the Vancouver area abattoir, at no cost to the CFIA. The memo appears to have been written by a person in a state of extreme stress, and it is lengthy and rambling.

[47] Dr. Vanderwoude testified, and I accept, that Dr. Rinke went off onto an unpaid sick leave, and this posed a significant financial hardship for the family, as "one of the salaries disappeared" and Dr. Rinke was not capable of working.

[48] After this time, Dr. Rinke pursued employment opportunities with the CFIA outside of meat hygiene. On May 11, 1999, Dr. Rinke applied in a selection process for a food specialist position. She was placed on an eligibility list on July 19, 1999, for acting, term and indeterminate positions as a food specialist. The list was valid until July 14, 2000.

[49] She worked pursuant to an assignment agreement made in November of 1999 for a period of some months as a food specialist dealing with consumer complaints. The assignment agreement (Exhibit 20) provided that Dr. Rinke was assigned to the Food Inspection Unit in Burnaby, B.C., for the period of November 15, 1999, to March 17, 2000. During the course of the assignment, she was to retain her substantive position and VM-02 classification at the Vancouver area abattoir, and the Mainland Interior Region of the CFIA paid her her wages. At the end of the temporary assignment, she was to return to her position at the Vancouver area abattoir.

[50] Dr. Rinke commuted a substantial distance from her home in Chilliwack to the workplace in Burnaby during the course of time covered by the assignment agreement.

[51] In November of 1999, Dr. Rinke applied in a competition to select a District Veterinarian in the Osoyoos District of the Lower Mainland Region. This was an animal health opportunity. Dr. Rinke was not successful in that application. Dr. Vanderwoude believes that she was unfairly treated. Dr. Rinke, however, did not seek recourse from the CFIA's staffing decision.

[52] Dr. Vanderwoude also applied in the Osoyoos competition for the animal health position. Dr. Vanderwoude said "the hope was that if one of them got the position,

there would be a chance to lateral transfer back to Surrey, if the position in Surrey became available". Dr. Vanderwoude was not successful in that selection process.

[53] On or about March 8, 2000, Dr. Rinke sought to extend her assignment in food safety. This prompted a written instruction from Sheila Fagnan by e-mail for Dr. Rinke to contact the schedule coordinator to resume work at the Vancouver area abattoir (Exhibit 23). In an e-mail of March 9, 2000, after canvassing her preferences to work within the CFIA in a number of non-meat-hygiene positions, Dr. Rinke indicated that she did not want to work in a meat hygiene environment:

> *[...] I am at crossroads in my career, and meat inspection is not the direction I wish to pursue. I have served my time and paid the price both financially and in mind, body, and soul. The memories will haunt me forever ... and that is a gross understatement!!!!*
>
> *[...] I do not wish to return to the inhumane, vulgar, stressladen, unsanitary, dangerous, dead end hell hole which masquerades as meat plant inspection!*

[54] In March 2000, there appear to have been some discussions about work placements for Dr. Rinke between the CFIA and Dr. Rinke, as the assignment agreement was coming to an end. No one with first-hand knowledge of these discussions was called as a witness. Dr. Vanderwoude testified that Dr. Rinke was upset by these discussions.

[55] Dr. Vanderwoude claims that his wife was apprehensive all the time, in a state of terror, always fearful, and was totally avoiding anything to do with slaughterhouses.

[56] Suffice it to say that Dr. Rinke did not wish to return to work in a slaughterhouse environment. She did not report for work at the Vancouver area abattoir. She remained off work from March of 2000, until she obtained work in Ontario in January of 2001. Dr. Rinke apparently used up any accumulated vacation and sick leave time.

[57] She applied for other work within the CFIA in British Columbia, but was unsuccessful. In particular, Dr. Rinke was notified on May 24, 2000, that she was unsuccessful in her application for a food specialist position in Kelowna. She was also notified (Exhibit 27) that she had the right to challenge the decision of the selection

board and that the period of recourse was from May 25, 2000, to June 13, 2000. She did not challenge the selection decision made by the CFIA in the proper forum.

[58] Filed as an exhibit before me (Exhibit 73) was a letter from Dr. Newton to Sheila Fagnan, dated March 23, 2000, which reads as follows:

> *I have been Dr. Rinke's family physician for 6 years. I attended her during the time that she was employed in her former position at the slaughterhouse. I have been pleased to observe the beneficial effects to her overall health that have occurred since she left that position for her current job posting at the CFIA.*
>
> *I strongly advised her against going back to her former place of work on medical grounds. The circumstances surrounding the problems experienced in the past are, I believe, still at issue and I would advise most strongly that alternative work be found for her and that she not return to her former place of work.*
>
> *Should you have any questions, please contact me at the above address.*

[59] There is a dispute over whether Dr. Vanderwoude delivered this letter to the CFIA. Dr. Vanderwoude's evidence on delivery of this document to the CFIA was curious and convoluted. There was testimony on this point on July 22 and July 23, 2004, during his examination-in chief, and on July 24, 2004, during cross-examination. It was a document that was of obvious importance to his claim that the CFIA "refused or neglected" to accommodate Dr. Rinke as a person disabled from working in a meat packing environment.

[60] At one point in his testimony, Dr. Vanderwoude appeared to be claiming that the CFIA had meetings with Dr. Rinke after he delivered the March 20, 2000 letter to the agency. At another point in his evidence, he said that he did not know whether the meetings were as a result of the delivery of the March 20, 2000 letter to the agency. It appears from the documents before me (Exhibit 23) that Dr. Rinke had meetings with Sheila Fagnan on March 7 and March 17, 2000, well before the date of Dr. Newton's letter. Dr. Vanderwoude was not present for those meetings, and no one with first-hand knowledge of those meetings attended. There is no documentary evidence of any meetings occurring after March 17, 2000, between Dr. Rinke and the CFIA. The next meeting for which there is some documentary evidence is a meeting on July 10, 2000. No one with any first-hand knowledge of meetings gave evidence.

[61] Dr. Vanderwoude indicated in his evidence on June 22, 2004, that:

> *In the hindsight of time, I am sure that I delivered it to the New Westminster office. Can I say, not 100 % even (sic). I don't believe we would have put it in the mail, (sic) hand delivered it. It was a desperate situation. I brought Dr. Rinke to the doctor. I cannot say 100 %. This letter is part of the WCB disclosure, that the CFIA has had it through the WCB. I submitted it myself in the WCB process. For sure they had disclosure there.*

[62] On June 23, 2004, Dr. Vanderwoude's examination in chief continued. His representative asked Dr. Vanderwoude if he had anything else to add to his testimony. He replied:

> *I have had the evening to think about this event. Although I can't say with 100 % certainty whether I hand delivered it or sent it by registered mail, with a critical document I would not have dropped it into the mail. She was desperate not to go back to the abattoir. For most of 1999 I was a manager for Sheila Fagnan [reporting to her], and I knew my way around the regional office. If she was not in the office I would give it to Glenda Buyan, her assistant. I dealt with sensitive documents on a routine basis and knew how to get a sensitive document to the director. It is unlikely I would have put it in the mail.*

[63] Dr. Vanderwoude then referred to a breakdown in communications in the New Westminster office of the CFIA that was reported in a letter to the Workers' Compensation Board dated February 19, 1992, from Pat Henderson, Manager, Human Resources Western Area (Exhibit 24). Dr. Vanderwoude indicated that he referenced the March 20, 2000 letter in a letter dated March 10, 2003, to the CFIA and it did not respond to this. In this letter that he wrote to Susan Dibble of the CFIA dated March 10, 2003 (Exhibit 25), Dr. Vanderwoude refers to the March 20, 2000 letter as follows:

> *I also remind you of the March 20, 2000 letter from Dr. Newton, which was sent to Sheila Fagnan, that strongly advised Dr. Rinke against returning to [the Vancouver area abattoir] on medical grounds.*

[64] In cross-examination, counsel questioned Dr. Vanderwoude about the March 20, 2000 letter as follows:

> *Q: Was there any written response to this letter?*

> *A: No, I used the confirmatory thing with Susan Dibble I was fairly sure with delivery.*

I note that the "confirmatory thing" referred to by Dr. Vanderwoude was a letter that he wrote to Susan Dibble on March 10, 2003, some three years after the purported delivery. It is difficult to see how a letter written by Dr. Vanderwoude in 2003 confirms that he delivered the letter to the CFIA in 2000.

[65] Counsel for the employer then asked Dr. Vanderwoude the following question and he gave the following answer:

> *Q Did you receive acknowledgement of receipt of the letter from Dr. Newton?*
>
> *A: I don't believe there was, just a sec, I don't believe there was a response but various meetings were initiated, there was some activity by management. I was hopeful there would be an accommodation.*
>
> *I had no reason to believe that she [Sheila Fagnan] did not have the letter. I had gone on the assumption that the CFIA had the letter.*

[66] As I have indicated earlier, no meetings appear to have been initiated after the March 20, 2000 letter, although there were meetings earlier in March and a meeting on July 10, 2000. Dr. Vanderwoude then admitted that there was no request by the agency for an assessment by Health Canada until August of 2000.

[67] In cross-examination, counsel asked Dr. Vanderwoude:

> *Q: You claim you took it to the New West office?*
>
> *A: No, I testified 100 % not in the mail [a long pause] likely would have been the New West office.*

[68] In his oral testimony, he denied that he would send such an important letter by ordinary mail. He is not precise about the circumstances surrounding the delivery of the letter and has suggested previously that the letter was sent. When he was asked how he delivered it, he referred to his standard practice of delivering sensitive documents, rather than answering the question directly. I note that it is clear that there were two processes ongoing during this time period: a WCB complaint that was filed by Dr. Rinke in 1999, which Dr. Vanderwoude was dealing with, and the ongoing employment relationship between Dr. Rinke and the Agency.

[69] It appears that a further letter from Dr. Newton was obtained on July 12, 2000, (Exhibit 28) certifying:

> *This is to certify that Dr. Rinke is not fit to return to a job in a slaughterhouse at the present time for medical reasons. She should not return to this kind of work until further notice.*
>
> *I trust that this is the information that you require. Should you require any further information, please contact me at the above noted address.*

[70] There is some suggestion from the handwritten note on the exhibit that this was faxed to the CFIA on both July 13 and 17, 2000, and the transmission was successful on July 17, 2000. I accept that the July 12, 2000 letter was delivered by fax to the CFIA in July of 2000. If the letter of March 20, 2003 (Exhibit 73), had been received by the CFIA in March, the July letter would have been unnecessary. There was no evidence before me that the employer requested a letter from Dr. Newton in July of 2000.

[71] There was also some evidence before me that Dr. Rinke met with Theresa Morton, who was an acting director of the employer, on or about July 10, 2000, about other work placements for Dr. Rinke that did not involve working in meat hygiene. Again, no one with direct knowledge of those meetings was called as a witness. Around this time, Dr. Vanderwoude secured a contract position to work in Ontario, in a non-abattoir environment. Dr. Vanderwoude said that he was desperate for someone in management to recognize Dr. Rinke's psychological condition and to "find non-abattoir work for us".

[72] Dr. Rinke apparently received a letter from Health Canada in August of 2000 requesting that she attend an assessment of her fitness to work. Applying the test in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), I find it more probable than not that the CFIA was advised that the grievor was suffering from a disability as a result of having worked in a slaughterhouse environment in July of 2000. I note that this letter would be sufficient to put an employer on notice that it should explore the nature of the problem. Generally, such an exploration would start with a Health Canada assessment. The very brief letter by Dr. Newton, while sufficient to raise an issue, is not helpful in determining the real nature of the problem or in identifying any residual employability in Dr. Rinke's case. It is likely, however, that it was this letter that stimulated the employer's request for the Health Canada assessment.

[73] I note that the standard of proof of a fact is on the balance of probabilities and not to a reasonable doubt standard. Nevertheless, applying the civil standard and considering all the evidence on this point, including Dr. Vanderwoude's credibility, I am not satisfied that he delivered the March 12, 2000 letter from Dr. Newton at the time or near the time that Dr. Newton wrote the letter.

[74] Dr. Vanderwoude may have delivered this letter at a later time. The CFIA may well have had disclosure of that letter through the WCB process or through this grievance process; however, I am not satisfied that the agency received the letter during March of 2000.

[75] Dr. Rinke filed a WCB complaint for post-traumatic stress arising out of the incidents at the Vancouver area abattoir. The claim form was not filed as an exhibit in these proceedings. I do not have a full copy of the materials that were before the WCB. The precise date of the filing of that claim is not before me, but it appears by the oral testimony of Dr. Vanderwoude to have been sometime early in 1999. The claim was rejected by the caseworker on June 17, 1999, and in a review on June 7, 2000. There was a further Manager's review conducted on January 3, 2001, which did not result in a finding of a compensable injury.

[76] On August 30, 2001, the WCB Review Board rendered a decision in Dr. Rinke's favour, finding that she suffered from post-traumatic stress. There are outstanding WCB processes at the present time regarding assessment of the degree of permanent disability. Following the receipt of the WCB decision, Dr. Vanderwoude wrote a number of letters to the CFIA seeking different work for his wife. By the time the WCB Review Board issued its decision, Dr. Vanderwoude and Dr. Rinke had secured employment in Ontario.

[77] Dr. Vanderwoude had secured a two-year term contract position in Ontario in July of 2000. The family then made the decision to sell the house, "sell everything", and move to Ontario. Dr. Vanderwoude sought and obtained leave from the CFIA for personal needs. The leave was approved for a year less a day. Dr. Vanderwoude knew, at the time of applying for the leave, that he could apply for a further three-month extension prior to the expiration of the leave. Dr. Rinke sought and obtained leave for temporary relocation of spouse. Both these leaves are unpaid leaves.

[78] On or about August 15, 2000, shortly before leaving for Ontario, Dr. Rinke received a letter from the CFIA to arrange for an assessment by Health Canada. The letter was not filed as an exhibit before me. Dr. Vanderwoude characterized this offer of an assessment as "far too little and too late". Dr. Rinke did not follow up on any assessment by Health Canada. In his examination in chief, Dr. Vanderwoude was asked what action he took following receipt of the Health Canada letter. His response was:

> *I made a phone call saying that we were moving to Ontario. If it had come two months earlier it may not have come to this. It came too late; this thing in July was the last opportunity for us to stay.*

[79] Dr. Vanderwoude then was asked:

> *Q: Because of the decision to move to Ontario and all that work she decided not to submit to the Health Canada assessment?*
>
> *A: We didn't ask for it no, we let it die there.*

[80] In cross-examination on this issue, Dr. Vanderwoude said that he phoned the author of the letter and advised that there was no need for the assessment, as they were moving to Ontario. Dr. Vanderwoude also stated that this was a time of extreme stress.

[81] I note that there was a significant outburst by Dr. Vanderwoude at the hearing, necessitating an adjournment of the hearing from approximately 10:20 a.m. to 1:00 p.m. on June 25, 2004. The employer's counsel was "gently" cross-examining Dr. Vanderwoude concerning the family's move to Ontario and the employer's request for a Health Canada assessment of Dr. Rinke received shortly before the move. Dr. Vanderwoude was obviously under a significant degree of stress, and he lost total control of his emotions and reason during the course of what was very gentle cross-examination. I do not intend to set out the full particulars of Dr. Vanderwoude's outburst. Two officers with the Vancouver City Police arrived at the hearing rooms, following the outburst of Dr. Vanderwoude; however, the incident had ended prior to their attendance. I caucused with counsel for both parties during the adjournment. When the hearing resumed, Dr. Vanderwoude, who was obviously embarrassed, apologized for his actions and agreed to remain present while the employer filed exhibits by consent in what would have been the balance of his cross-examination. He

agreed to absent himself from the balance of the case, which consisted of the examination and cross-examination of a witness called by the employer for the purpose of explaining leave periods and submissions.

[82] Both Dr. Vanderwoude and Dr. Rinke have secured full-time jobs, described by Dr. Vanderwoude as "good jobs", with the Government of Ontario. Dr. Vanderwoude's job changed from a contract to a permanent or indeterminate position some time between the first and second year of his contract. Dr. Rinke is employed as a Farm Food Safety HACCP advisor. Her job does not entail going into meat packing plants. While Dr. Rinke commenced contract work in January of 2001, it appears from the evidence that she had a full-time position with the Government of Ontario by the date that she tendered her resignation to the CFIA.

[83] Prior to tendering his resignation, Dr. Vanderwoude sought to extend his leave until the CFIA found a suitable position for Dr. Rinke, in a non-slaughterhouse environment. This is expressed in a letter from Dr. Vanderwoude to the CFIA dated October 26, 2001 (Exhibit 33):

> *I believe that you have ample justification to create/transfer a BIO3 position in food safety for Dr. Rinke in Burnaby. We are also open to other possibilities, such as an animal health position in Abbotsford.*
>
> *Given that the appeal period for the claim only ended last week, we are not in a position to return to B.C. in November. We also have to consider further disruption of our daughter's education. A realistic date would be within 60 days of when a suitable position is found for Dr. Rinke.*

[84] Dr. Vanderwoude stated in his evidence:

> *I would hold my nose and work in an abattoir, but for Bea it was a different situation, and we could not go back unless Bea had a safe job.*

[85] Dr. Vanderwoude corresponded on a number of occasions with the CFIA concerning his leave (October 26, November 19, 2001, and January 3, 2002). On January 3, 2002, Dr. Vanderwoude sought an extension of leave from November 22, 2001, to August 1, 2002, on the basis of "temporary leave for relocation of spouse" (Exhibit 36):

> *Bea has accepted a position with OMAFRA to upgrade her skills prior to returning to B.C... I am therefore applying for leave for the period November 22, 201(sic) to August 1, 2002. This is temporary leave for relocation of spouse. We can discuss Bea's leave situation once mine has been sorted out.*
>
> *My plan is to return to Britco Export Packers on Friday August 2, 2002. As I said to you verbally, the reason for this is purely because of family reasons.*
>
> *This is a final request for leave extension. There will be no others. I realize that you have to make staffing plans.*

[86] Dr. Vanderwoude's leave request based on a relocation for Dr. Rinke is a rather peculiar request. Dr. Rinke had applied in August of 2000 for the leave to relocate with Dr. Vanderwoude to Ontario, and Dr. Rinke had secured employment by January of 2001 with the Government of Ontario. I do not accept that this is a case where Dr. Rinke took the Ontario job to "upgrade her skills". When Dr. Rinke started work with the Ontario ministry, both Dr. Vanderwoude and Dr. Rinke knew that the WCB had not made any link between the events at the Vancouver area abattoir and any workplace-related injury to Dr. Rinke. The more plausible explanation is that Dr. Rinke took the work because she was interested in the work, and the family needed the income.

[87] The employer's answer to Dr. Vanderwoude's leave requests can be found in a letter from James Sigurdson dated January 29, 2002 (Exhibit 37), which reads as follows:

> *With respect to your request for leave without pay for relocation of spouse, I must inform you that this type of leave is not available for you. An employee is entitled to this kind of leave when the spouse is relocated. In your case, your spouse accessed this leave to accompany you as a result of your decision to relocate. Accordingly, your request for relocation of spouse leave for the period from 22 November 01 to Aug 02 is denied.*
>
> *Our records indicated that you were granted Personal Needs Leave for the period from 11 Sept 00 to 20 Aug 01 and then for a further period from 21 Aug 01 to 21 Nov 01. Your position at Britco has not been filled on an indeterminate basis and you will therefore return to work on 04 Mar 02. For your information, due to the delay in my response to your correspondence, I will authorize your absence for the period from 21 Nov to 04 Mar 02. I must further inform you*

> *that should you fail to report to work on 04 Mar 02 I have no alternative but to consider that you are absent without authorization and I will undertake appropriate administrative measures accordingly.*

[88] Dr. Vanderwoude wrote to James Sigurdson, inspection manager at the CFIA, on February 8, 2002 (Exhibit 38). He enclosed a copy of Dr. Rinke's WCB Review Board decision and noted:

> *[...] I do not know if you have seen the decision of Dr. Rinke's WCB case but am enclosing it now. You are aware that a decision of a senior CFIA manager to return Dr. Rinke to [the Vancouver area abattoir] forced us to leave B.C.*
>
> *This matter could be settled by the grievance route following adjudication when myself and Dr. Rinke are released however such a route would be expensive and time consuming for all parties. It would also damage the reputation of the CFIA with respect to the protection of hogs at [the Vancouver area abattoir] and its treatment of female veterinarians. This is not a routine collective agreement situation but one that touches on discrimination, harassment, gender equity and other issues. There is much history that neither yourself nor Sheila Fagnan are aware of.*
>
> *[...] I manage three major programs - Meat Inspection, Livestock Community Sales, and the Deadstock portfolio. I am on two national committees. I have direct reports of numerous staff including four veterinarians, five contract auditors (who were senior veterinarians in the CFIA) and oversee the activities of over one hundred appointed veterinarians. Dr. Rinke also is working at the national level and is organizing all on farm food safety programs for the province. We have both won awards from the ministry for our work.*
>
> *[...] As in my previous letter, I am asking for leave until August 2, 2002. Quite frankly, both my spouse and I are torn between pursuing careers with a wonderful, first class employer like OMAFRA and the happiness of our child and concerns about her elderly father. [...]*

[89] The Acting Inspection Manager, P.J. Edwards wrote to Dr. Vanderwoude on February 21, 2002, as follows:

> *This is in response to your request to be granted leave until August 2, 2002, I must reiterate Mr. Sigurdson's January 29, 2002 response to you that you have exhausted your entitlement to leave without pay at the expiration of your current period of leave without pay.*

> *In view of the foregoing, if you wish to remain employed by the Canadian Food Inspection Agency, you are required to return to your position at Britco Export Packers Ltd. (Est. 513) on March 4, 2002. Should you fail to report for work on that date as directed, I will have no alternative but to declare that you have abandoned your position. ...*

[90] Dr. Vanderwoude felt that his wife had a good case for accommodation in a non-slaughterhouse environment, given the WCB Review Board decision.

[91] Both Dr. Rinke (Exhibit 30) and Dr. Vanderwoude (Exhibit 40) submitted resignation letters to the employer dated February 28, 2002. The resignation letters appear to be substantially similar in form. It is unnecessary to set out the full text of each resignation letter. Each letter commences with the following paragraphs:

> *This letter is to advise you that I am resigning from my position with the Canadian Food Inspection Agency, effective immediately.*
>
> *This is a forced resignation.*

[92] Each letter of resignation then alleges "three failures of the CFIA" with respect to incidents witnessed by Dr. Rinke of inhumane treatment of hogs, the agency's blocking of Dr. Rinke's attempts to secure an animal health or food safety position and its actions to "force Dr. Rinke back to the abattoir", and the CFIA's failure to take corrective action to place Dr. Rinke in a non-abattoir position following receipt of a WCB Review Board decision, which action would permit the grievors to return from Ontario. Each resignation letter is two pages long.

[93] The CFIA did not immediately accept the resignation of either Dr. Rinke or Dr. Vanderwoude. The CFIA took steps to ensure that each grievor was fully aware of implications of a resignation on compensation matters. The CFIA wrote to Dr. Rinke on March 18, 2002, and August 16, 2002 (Exhibits 63 and 67). The CFIA wrote to Dr. Vanderwoude on March 18, March 20 and May 6, 2002 (Exhibits 56, 58 and 62). The particular problem was that there were substantial consequences if the grievors did not make a choice as to how to deal with superannuation, prior to the resignation date. The problem was also compounded by the fact that each grievor contributed to a plan in Ontario and could only contribute to one plan at one time. Each grievor was advised that the resignation would be accepted if each grievor still wished to resign following receipt of the compensation information.

[94] Each grievor was first advised by the CFIA on August 29, 2000 (Exhibits 51 and 52), when each grievor took a leave without pay in excess of three months, that a leave in excess of three months gave the employee an option not to count the period of leave in excess of three months as pensionable service. If the grievor wished to count that time as pensionable service, the grievor was required to pay the employee and the employer share of contributions. Dr. Rinke's compensation position was exacerbated by the fact that she had many leaves without pay during the course of her time with the CFIA. In a letter from Jo Ann Miller-Kurchaba, Manager, Compensation Western Area, to Dr. Rinke dated August 13, 2002 (Exhibit 44), Ms. Miller-Kurchaba stated as follows:

> *As per our previous conversations and emails, you are reminded that the Option Not To Count the Superannuation deficiencies in excess of the first three months, which thereby renders the period of leave without pay exceeding the first three months non-pensionable, must be signed and dated prior to your resignation date. I have also confirmed with the Superannuation Branch that the only two options that you have available are:*
>
> *1) to count the entire period of leave without pay as pensionable and to pay the deficiencies related to the entire period for Superannuation purposes;*
>
> *OR*
>
> *2) to sign the Election Not to Count the period of leave without pay in excess of the first three months and to pay the deficiencies for Superannuation for the first three months of leave without pay only. Deficiencies for Supplementary Death Benefit Plan and the Disability Insurance Plan are payable for the entire period of leave without pay.*
>
> *It is important to note that the period of leave without pay, and thus the deficiencies, continue to accumulate up to the resignation date and therefore the figures provided will increase if the resignation date occurs after 31 July 2002. Under the Income Tax Act you cannot contribute to two pension plans with respect to the same period of service and therefore if you choose to consider the entire period of leave without pay as pensionable you will need to request a reimbursement of contributions from your current employer for the overlapping period.*

[95] Dr. Vanderwoude made the election in accordance with the options available. Dr. Rinke did not sign the election not to count the period of leave prior to the

acceptance of her resignation by the CFIA. The CFIA wrote to Dr. Rinke on August 16, 2002 (Exhibit 67), and September 9, 2003 (Exhibit 68), concerning the making of the election. Dr. Rinke did not respond and choose either of the options set out in Exhibit 44. Dr. Rinke's lawyer wrote to the CFIA on December 26, 2003, demanding that the employer accept the resignation effective March 31, 2002, and indicated counsel's intention to pursue further legal action for a constructive dismissal of Dr. Rinke. Ms. Parton, Manager Corporate Compensation and Occupational Safety, wrote to Dr. Rinke on January 29, 2004 (Exhibit 70), outlining the effects of a retroactive termination date of March 30, 2002, and the implications on options under the Public Service pension plan. The CFIA accepted Dr. Rinke's letter of resignation, after receipt of a letter from Dr. Rinke's lawyer dated December 26, 2003 (Exhibit 69).

[96] As of July 31, 2002, Dr. Rinke was entitled to a severance payment of $10,285.70. The deficiencies exceeded the amount of the severance payment and the amount of the deficiencies varied based on the election made by Dr. Rinke prior to resignation.

[97] From the information before me, it appears that the grievors filed a complaint to the Canadian Human Rights Commission (CHRC or Commission) on February 27, 2003. The grievors' complaint letter was not filed as an exhibit in these proceedings.

[98] In a letter responding to the complaint, dated June 2, 2003 (Exhibit 32), the Commission said as follows:

> *I have carefully reviewed your correspondence and must advise you that the Canadian Human Rights Commission cannot offer you assistance in this matter as the incidents which you have described are outside of the one year limitation period imposed by the Act. From your documentation, it would appear that you left British Columbia and your employer for Ontario in the Fall of 2000. In addition, the most recent events seem to be related to issues of severance pay and transfers of pensionable service. Furthermore, these issues, on their own, do not appear to be related to a ground protected by the Act. Consequently, your file will now be closed.*

Argument

For the bargaining agent

[99] The bargaining agent says that Dr. Rinke has been subject to different actions against her for most of the twelve years that she was employed with Agriculture Canada, and then the CFIA. In the absence of any other rationale, the only conclusion is that the actions were deliberate. The bargaining agent says that her troubles started with her maternity leave and the assignment to the Aldergrove plant rather than the Sunrise plant, which was a location nearer the grievor's home. She was denied relocation assistance. The bargaining agent says that this is the first clear example of bad faith treatment of the grievor by the employer.

[100] The bargaining agent says that the poor treatment continued and that Dr. Rinke experienced hostility, poor appraisals, denial of leave to attend her mother's anniversary, nit-picking on expense claims, and denial of training opportunities. The bargaining agent says that some employees avail themselves of care and nurturing leave when they find situations untenable, and Dr. Rinke was otherwise eligible for the leave. The bargaining agent says that the extension of the care and nurturing leave was a reasonable action given her apprehension of the employer, and the employer's intention to declare her surplus.

[101] The bargaining agent says that the next example of the employer's bad faith is the assignment of vacation leaves, which would have been done in a way that singled out Dr. Rinke and Dr. Vanderwoude.

[102] The bargaining agent then says that the employer's suspension of Dr. Rinke from the Vancouver area abattoir, rather than taking enforcement action, was concrete evidence of the employer's bad faith and intent to dismiss Dr. Rinke.

[103] The bargaining agent further says the fact that Dr. Rinke was screened out from the animal health position in Osoyoos in 1999 is evidence of bad faith, as was the employer's failure to extend Dr. Rinke's temporary assignment.

[104] The bargaining agent further says that it was bad faith on the part of the employer to offer the Health Canada assessment at a time when the employer knew that Dr. Vanderwoude and the family were moving to Ontario.

[105] Further, the bargaining agent says that the employer's failure to respond to or accommodate Dr. Rinke after the employer became aware of the WCB decision finding a permanent and continuing disability is evidence of bad faith.

[106] The bargaining agent says that the history shows that Dr. Rinke and Dr. Vanderwoude have been continuously mistreated and constructively dismissed by the CFIA. The bargaining agent relies on the doctrine of constructive dismissal, as set out in the cases of *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 (QL), *Grice and McBurney Transport Ltd.*, [1999] C.L.A.D. No. 361 (QL) and *May and Fifth Dimension Communications Corp.*, [1998] C.L.A.D. No. 832 (QL). The bargaining agent says that a finding of constructive dismissal is within the jurisdiction of the Board.

[107] The bargaining agent also referred to *McNab v. Treasury Board (Transport Canada)*, Board File No. 166-2-14343 (1984)(QL) and *Charron v. House of Commons*, 2002 PSSRB 90.

[108] The bargaining agent asks that Dr. Rinke be reinstated to a non-abattoir position with the CFIA, and that she be placed on leave without pay until she is accommodated. She seeks to have costs reimbursed and to be made whole in every way. Dr. Vanderwoude seeks reinstatement to his position and leave without pay until Dr. Rinke is accommodated. Dr. Vanderwoude prepared a document which was filed as an exhibit in the hearing (Exhibit 46), enumerating 17 claims for relief, which I summarize as follows:

1) A payout to Dr. Rinke and Vanderwoude of 90 % of what they would earn as a VM-02 to age 65, or alternatively creation of a position for Dr. Rinke involving food safety advice and training to children in B.C.;

2) Compensation for lost vacation time to age 65;

3) Compensation for belongings liquidated in the move, estimated at $30,000;

4) Lost value of real estate sold in British Columbia in the approximate amount of $200,000;

5) Compensation for forced retirement of Dr. Vanderwoude at $10,868.10;

6) Repayment of superannuation costs paid by Dr. Vanderwoude to the CFIA in the amount of $1,246.44;

7) Adjustment of the amount of $28,414.95 to reduce the amount for forced care and nurturing leave, injury on duty leave, costs associated with the CFIA's obstruction in failing to accept Dr. Rinke's resignation, compensation for the wage loss between August 1, 2000, and January 1, 2001;

8) Adjustment of Dr. Rinke's severance pay;

9) Adjustment of the disability overpayment for Dr. Rinke;

10) Relocation costs including real estate costs and traditional costs;

11) Compensation for the difference between early retirement options with the CFIA and early retirement options for Government of Ontario employees;

12) Compensation for vacation leave credits;

13) Full compensation for a forced care and nurturing leave;

14) Legal costs to correct inhumane situation at the abattoir;

15) Legal costs to get CFIA to accept Dr. Rinke's resignation;

16) Legal costs to stop CFIA from putting Drs. Rinke and Vanderwoude in separate vacation groups;

17) Paid leave for Dr. Rinke for the period August 23, 2000, to January 1, 2001, when she was "forced to take unpaid leave when she fled B.C. for Ontario."

For the Employer

[109] The employer says that I do not have jurisdiction to deal with any of the grievances. The employer says that the Board only has jurisdiction in a case of disguised discipline: *McNab v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-14343 (1984) (QL); *Hudson v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-2-14572 (1984) (QL); *St. Jacques v. Treasury Board (Department of Agriculture)*, PSSRB File No. 166-2-10946 (1982) (QL); *McIlroy v. Treasury Board (Revenue Canada, Customs & Excise)*, PSSRB File No. 166-2-12359 (1982) (QL); *Merrill v. Treasury Board*

(Revenue Canada - Customs & Excise), PSSRB File No. 166-2-15133 (1986) (QL); *Bodner v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-21332 (1991) (QL); *Walker v. Treasury Board (Royal Canadian Mounted Police)*, PSSRB File No. 166-2-21292 (1991) (QL); *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[110] The employer says that Drs. Vanderwoude and Rinke resigned voluntarily. There was no force applied by the employer to extract a resignation. This is not a case where the employees imprudently or on the spur of the moment sought to resign and then sought to retract a resignation.

[111] The employer says that even if the employees felt there was no choice but to resign, they were fully aware of the ramifications and made a voluntary choice. The employees could have sat back and waited for administrative action and then filed the appropriate grievance. Whether they felt they had no choice does not transform it, legally speaking, into a non-voluntary choice.

[112] This is a case where the employer refused to accept the resignations of Drs. Rinke and Vanderwoude until they were able to make an informed choice. The employer says that the CFIA is a separate employer and that the Board has no jurisdiction to hear or determine a case of constructive dismissal, unless there is a disciplinary component to it. The employer says that the resignation of each employee was voluntary.

[113] The employer says that asking someone to return to a job is not punitive, and the threat of disciplinary action is not discipline. The employer says that it was apparent that the employer was willing to discuss an accommodation with Dr. Rinke and that there were several meetings with her; however, the failure to attend the Health Canada assessment indicates that this is a case where Dr. Rinke was happy to take her chances on moving to Ontario with Dr. Vanderwoude and looking for work there.

[114] The employer says that the Board does not have any jurisdiction to deal with "accommodation or other human rights matters", unless the Canadian Human Rights Commission has referred the matter back to the Board under section 41(1)(a) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. In the present case, the CHRC refused to examine the issues. This does not give the Board jurisdiction: *Canada (Attorney*

General) v. Boutilier, [2000] 3 F.C. 27 (C.A.) (QL); *Djan v. Treasury Board (Correctional Service of Canada)*, 2001 PSSRB 60.

[115] On the third grievance relating to Dr. Rinke, the employer says that the employee is seeking to "re-write" the history of leaves that have already been authorized by the employer. The employer says that the grievance is untimely and the Board has no jurisdiction to deal with this grievance.

[116] The employer submits that I ought to exercise caution with regard to much of the evidence that was tendered in this case by the bargaining agent, given that Dr. Rinke did not appear to give evidence or be cross-examined. The employer objects to the hearsay evidence. The employer objects to the use of Dr. Daigen's report, admitted for the purpose of explaining Dr. Rinke's absence and for the purpose of finding facts related to the cause of her problems, as the employer was given no advance notice of the report, Dr. Rinke was not present, and Dr. Daigen was not present for cross-examination on his report. Further, the employer says that the WCB report should not be considered to be determinative of the facts contained in that decision, particularly the portions of the report which are critical of the Agency and its dealings with Dr. Rinke. The employer says that the WCB Review Board did not have the benefit of any evidence from the CFIA prior to making its determination. Further, the employer says that the WCB Review Board was not aware that Dr. Vanderwoude was Dr. Rinke's spouse at the time that Dr. Vanderwoude participated in the Review Board's processes.

Bargaining agent's reply

[117] The bargaining agent says that the Board has the right to deal with the human rights issue, because the Canadian Human Rights Commission did not determine the issue.

[118] It is the bargaining agent's view that I should give full weight to the decision of the Workers' Compensation Board. The bargaining agent also says that I should not be diverted by the employer's assertion that Vanderwoude was the spouse and the WCB Review Board did not know that Vanderwoude was Dr. Rinke's spouse at the time of the WCB Review Board matter.

Reasons for Decision

Human Rights Issue

[119] There are two issues raised in this case which are of a human rights nature. The first issue is that the CFIA discriminated against Dr. Rinke by failing to select her for non-abattoir positions on the basis of her gender. The review of selection or appointment decisions is dealt with in another forum, either by way of review of the merit principle by an appeal board, or by the CHRC and Tribunal under the *CHRA*. Human rights issues are not dealt with by the Board, unless the Commission refers the matter to the Board under section 41(1)(a) of the *CHRA* and the relevant collective agreement contains a non-discrimination clause. If Dr. Rinke intended to obtain relief with regard to these claims, these claims should have been raised in the proper forum. I have no jurisdiction to determine the issue of discrimination on the basis of gender with regard to the allegation that Dr. Rinke did not succeed in selection processes for non-abattoir jobs.

[120] The second issue is the allegation that the CFIA failed to accommodate Dr. Rinke, by failing to place her in a non-abattoir position once the agency became aware of her disability. I note that typically "accommodation" is a term that is used in connection with human rights complaints, and the duty to accommodate arises after the employer becomes aware of an employee's permanent disability. Dr. Rinke filed a human rights complaint. The full text of that complaint is not before me. The Tribunal declined to investigate the complaint (Exhibit 32). The CHRC refused to deal with the complaint because the Commission considered that it was presented more than one year after the subject matter arose, did not identify any issue related to a ground protected by the *CHRA*, and dealt with severance pay issues arising after the employees resigned.

[121] The bargaining agent argues that I have jurisdiction to deal with this matter because the Commission declined to deal with the issue. I note that the Commission refused to investigate a complaint filed by Dr. Rinke on the basis of timeliness, and because the complaint disclosed no ground of discrimination under the *CHRA*. I do not have the full text of that complaint before me. The employer says that it is only if the Commission or Tribunal has referred the matter back on the basis that the grievance process should be exhausted that the Board would have jurisdiction to deal with the issue: *Djan* (*supra*).

[122] After reviewing the evidence and argument in this case, it is my determination that this matter is in substance a human rights complaint. The complaint is that the employer failed to accommodate Dr. Rinke on the grounds of her disability. The complaint is that the resignations of Dr. Rinke and Dr. Vanderwoude are not genuine resignations because of the employer's failure to accommodate Dr. Rinke and Dr. Vanderwoude. The third grievance relates to a revision of the grievor's record for severance purposes. This is also tied to the issue of resignation, which is tied to the alleged failure of the employer to accommodate Dr. Rinke's disability.

[123] Section 91 (1) of the *Public Service Staff Relations Act* reads as follows:

> *91(1) Where any employee feels aggrieved*
>
> *(a) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award, or*
>
> *(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (iii),*
>
> *in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievances process provided for by this Act.*

[124] The issue of whether an adjudicator has jurisdiction to hear and decide a matter which is in substance a human rights matter in a public service employment relationship has been considered and decided in a number of cases. I note that the relevant collective agreement contains a no discrimination clause and includes sex, family status, marital status and mental or physical disability as prohibited grounds of discrimination. The presence of a "no discrimination clause", however, is not determinative of the jurisdiction of an adjudicator under the *Public Service Staff Relations Act.*

[125] Parliament has provided a complete remedy in the *CHRA*, which includes investigation by the Commission of complaints and hearings by the Canadian Human Rights Tribunal (CHRT) of the complaint, with a complete set of remedies. I do not intend to set out the full text of the relevant legislative provisions, because these have been set out elsewhere and analyzed by the Board: *Chopra v. Canada (Treasury Board)*, [1995] 3 F.C. 445 (T.D.), *Mohammed v. Canada (Treasury Board)*, [1998] F.C.A. No. 845, *Boutilier* (*supra*), and in *O'Hagan v. Canada (Correctional Service)*, [1999] F.C.J. No. 32 (T.D.), *Audate v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-2-27755 (1999) (QL).

[126] In *Audate* (*supra*), Yvon Tarte, Chairperson of the Board (the adjudicator), referred to and cited the following passage in *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854, where La Forest J., commented on the scheme of the *CHRA*, as follows:

> *The Act sets out a complete mechanism for dealing with human rights complaints. Central to this mechanism is the Commission. Its powers and duties are set forth in ss. 26 and 27, and Part III of the Act. Briefly put, the Commission is empowered to administer the Act, which includes among other things fostering compliance with the Act through public activities, research programs, and review of legislation. It is also the statutory body entrusted with accepting, managing and processing complaints of discriminatory practices. It is this latter duty which is provided for in Part III of the Act.*
>
> *A complaint of a discriminatory practice may, under s. 40, be initiated by an individual, group, or the Commission itself. On receiving a complaint the Commission appoints an investigator to investigate and prepare a report on its findings for the Commission (ss. 43 and 44(1)). On receiving the investigator's report, the Commission may, after inviting comments on the report by the parties involved, take steps to appoint a tribunal to inquire into the complaint if having regard to all the circumstances of the complaint it believes an inquiry is warranted (ss. 43(3)(a)). Alternatively the Commission can dismiss the complaint, appoint a conciliator, or refer the complainant to the appropriate authority (ss. 44(3)(b), 47(1) and 44(2) respectively).*
>
> *If the Commission decides that a tribunal should be appointed, then, pursuant to the Commission's request, the President of the Human Rights Tribunal Panel appoints a tribunal (s. 49). This tribunal then proceeds to inquire into the complaint and to offer each party the opportunity to*

> *appear in person or through counsel before the tribunal (s. 50). At the conclusion of its inquiry the tribunal either dismisses the complaint pursuant to s. 53(1) or, if it finds the complaint to be substantiated, it may invoke one of the various remedies found in s. 53 of the Act. These remedies include an order that a person cease a discriminatory practice; that a right, opportunity or privilege denied the victim be made available to him or her; and that the person engaged in the discriminatory practice compensate the victim of the practice and, where it is warranted, pay a fine to the victim. Finally, if the tribunal was composed of less than three members, it is open to a party to appeal the tribunal's decision to a three-member Review Tribunal on any question of law or fact or mixed law and fact (ss. 55 and 56).*

[127] The legislation scheme set out in the *CHRA* empowers the Commission and the Tribunal with a broad jurisdiction to resolve human rights disputes. The CHRC and CHRT are experts in human rights matters. The process under the *CHRA* has been held by the Federal Court to be an administrative procedure for which redress is provided in or under an Act of Parliament. This constitutes a barrier to the taking of jurisdiction by the Public Service Staff Relations Board. The exception to this is if the Board is referred the matter under s. 41 (1)(a) of the *CHRA*. This section reads as follows:

> *41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that*
>
> *(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available; [...]*

[128] I refer particularly again to the case of *Audate* (*supra*). The issue confronting the adjudicator was whether the adjudicator had jurisdiction to consider a suspension issue, where the employee alleged that the employer discriminated against her in imposing the suspension on the basis of her race, colour and ethnic origins. The particular argument that was raised was that the fact that other matters could be argued other than discrimination did not empower the adjudicator to hear and decide the case.

[129] In *Audate* (*supra*), the adjudicator said:

> *With respect to Ms. Audate's grievance, section 3 of the CHRA defines the prohibited grounds of discrimination which are*

> *based on race, national or ethnic origin and colour; section 7 prohibits such grounds of discrimination in the course of employment; section 40 provides for a complaint to be filed; and section 53 defines the powers of redress available if the complaint is substantiated. It seems clear that Ms. Audate's grievance could have been the subject of a complaint to the Canadian Human Rights Commission and that Commission was in a position to grant her the redress she was seeking in her grievance should the complaint be substantiated.*

[130] In *Audate* (*supra*), the adjudicator referred to and analyzed the decisions in *Chopra* (*supra*), *Mohammed* (*supra*), *Boutilier* (*supra*) and *O'Hagan* (*supra*). The adjudicator held (at paragraph 21):

> *While the above-cited cases are not all to the same effect, particularly with respect to the nature of the powers of redress available under another procedure for redress, it does not change the fact that, in each one, all of the courts agree on one point. An adjudicator is without jurisdiction to hear a grievance when the substance of the grievance can be dealt with under another procedure of redress.*

[131] The adjudicator also held (at paragraph 27):

> *Since the resolution of Ms. Audate's grievance depends on a ruling of discriminatory practice by the employer, based on one or more of the prohibited grounds of discrimination under the CHRA, I conclude that I am without the necessary jurisdiction to decide this case.*

[132] This case involves an allegation that Dr. Rinke was subject to discriminatory treatment on the basis of her gender, marital status, family status and disability. Dr. Vanderwoude's allegation that he was forced to resign relates to alleged discriminatory treatment of Dr. Rinke by the CFIA, and this action also is alleged to discriminate against him on the basis of marital or family status. The *CHRA* provides a complete mechanism for dealing with human rights complaints. The case law cited demonstrates that the *CHRA* is an administrative procedure for which redress is provided in or under an Act of Parliament, and therefore I have no jurisdiction to consider the claim for constructive dismissal.

[133] In this case, it is my view that it is open to Dr. Rinke and Dr. Vanderwoude to file a complaint under the *CHRA*. The Commission would have jurisdiction to consider whether the CFIA engaged in any discriminatory practices with respect to Dr. Rinke and Dr. Vanderwoude and whether the matter should proceed further. The grounds

alleged appear to be grounds all found in section 3 of the *CHRA*. It may be that in this particular case, the failure to file a complaint at an earlier time may raise an issue of timeliness. There is a possibility that the grievors will not be able to obtain redress in the process under the *CHRA*, because of timeliness. Under section 41(1)(e) of the *CHRA*, the Commission appears to have discretion as to whether it will deal with an untimely complaint.

[134] In looking at the words "in respect of which no administrative procedure for redress is provided in or under an Act of Parliament", in section 91 of the *Public Service Employment Act*, the issue of timeliness in accessing the other administrative procedure does not come into play in the assessment of this Board's jurisdiction. The issue is whether or not there is another administrative procedure. The fact that the grievors may no longer have access to the other administrative procedure does not, and indeed cannot, confer jurisdiction upon the Public Service Staff Relations Board.

[135] In this case, the grievors presented a complaint to the Commission, and the Commission declined to investigate on the issue of timeliness and because the issues raised by the grievors did not appear to relate to any grounds protected by the *CHRA*. I note that from the materials before me, I cannot be certain that the grievors raised all the issues in their complaint before the Commission that they raised during these grievances. In my view, the fact that the Commission declined to investigate cannot confer jurisdiction on the Public Service Staff Relations Board to hear and decide a human rights case. It is only if the Commission exercises its jurisdiction under section 41(1)(a) of the *CHRA* that the Board then has the jurisdiction to hear the grievance.

[136] It is apparent that by virtue of the decisions in *Boutilier* (*supra*), *Djan* (*supra*) and *Audate* (*supra*), the Board lacks jurisdiction to rule on human rights complaints, unless the matter is referred to the Board under section 41(1)(a). Section 91 of the *Public Service Staff Relations Act* R.S.C. 1985, c. P-35 precludes an adjudicator from hearing and deciding human rights cases. In my view it is not open to me to accept jurisdiction to deal with the human rights issues. In this decision, I make no comment as to whether or not Dr. Rinke was subjected to discrimination on the basis of disability, gender, marital status or family status, in the Agency's treatment of Dr. Rinke during the course of her employment relationship. I make no comment as to whether Dr. Vanderwoude suffered discrimination on the basis of family or marital status.

[137] The present case has a substantial human rights overtone, as the bargaining agent alleges that a failure to accommodate caused Dr. Rinke and Dr. Vanderwoude to submit an involuntary resignation. In my view, there is no jurisdiction to deal with the aspect of the complaint related to the '"genuineness of the resignations", given that the grievors' complaints in all three grievances are inextricably intertwined with the allegation that the employer failed to accommodate Dr. Rinke.

[138] Having decided this issue on the basis of a lack of jurisdiction to adjudicate a human rights complaint, I do not have to decide this case on the alternative jurisdictional argument raised by the employer. The dismissal of these grievances on the basis that they should be filed under the *Canadian Humans Right Act* does not give either of the grievors any answer to their claim that they were dismissed constructively by the CFIA. If I am wrong in my analysis above, in the alternative, I would like to set out my analysis with regard to the bargaining agent's argument that "the lack of accommodation of Dr. Rinke by the CFIA" means that the resignations of Dr. Rinke and Dr. Vanderwoude cannot be said to be genuine resignations, but were in fact a constructive dismissal by the CFIA of both the grievors.

[139] In my view, the Board's jurisdiction is a limited one in the case of a separate agency such as the Canadian Food Inspection Agency. The Board's jurisdiction with regard to grievance adjudication for the employees of a separate agency such as the Canadian Food Inspection Agency is set out in section 92(1)(c) of the *Public Service Staff Relations Act*, which reads as follows:

> *92(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*

> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in the termination of employment, suspension or financial penalty.*

[140] In order to take jurisdiction, I must find that the resignation was involuntary and that there was a disciplinary element to the decision-making of the CFIA, which resulted in the termination of employment, suspension or a financial penalty. The Board's jurisdiction is well summarized in *McIlroy v. Treasury Board, (Revenue Canada, Customs & Excise)*, PSSRB File No. 166-2-12359 (1982)(QL):

> *37. It may nevertheless be useful again to call attention to the fact that employment in the Public Service of Canada may be terminated by a variety of procedures ranging from voluntary resignation to disciplinary discharge. The statutory authority for disciplinary discharge is derived from paragraph 7(1)(f) of the Financial Administration Act and section 106 of the Terms and Conditions of Employment Regulations. The legislative basis for most, if not all other forms of termination is found in the Public Service Employment Act [see note * below]. Chief Adjudicator Joliffe, as he then was, discussed some of these procedures in two of his early decisions - Lafleur (Board File 166-2-397) and Robertson (Board File 166-2-454) - and dealt with the question of the adjudicability of grievances arising from termination of employment. In a long succession of grievance cases arising out of the termination of employment (other than discharge) adjudicators had found it necessary to determine as a preliminary question of fact whether or not the termination regardless of its technical form (i.e. lay-off or rejection on probation, etc.), was attributable in whole or in part to some disciplinary motive of the employer. It is now established that if he finds this element of disciplinary intent an adjudicator can assume jurisdiction to determine the grievance on its merits. (See The Attorney General of Canada v. Public Service Staff Relations Board [1977] 1 F.C. 91, affirmed [1978] 2 S.C.R. 15 in Roland Jacmain v. The Attorney General of Canada et al). I would emphasize, however, that it is not enough for the disciplinary element to be present in the environment within which the termination takes place; it must bear a causal relationship to the termination action.*
>
> *[...]*
>
> *39. I have gone to some length in the preceding paragraphs to re-emphasize the distinction between adjudication under the Act and grievance arbitration in the private sector, It may well be, as suggested by Mr. Simpson, that in the private sector an involuntary resignation can be the basis of a grievance that is referable to arbitration on the*

> *grounds that it is a termination without just cause. The jurisdiction of the arbitrator derives from a collective agreement between the parties which normally requires that any termination of employment be for just cause. The jurisdiction of an adjudicator under the Act, however, is prescribed by the legislation [...]*
>
> *40. In the circumstances of the present case it is not enough to argue that Mrs. McIlroy's resignation was involuntary, that it was "engineered" by the employer. It is necessary to prove that it was the result of disciplinary action or that it was extracted under the threat of disciplinary action.*

[141] The facts in *McIlroy* (*supra*) are instructive. This was a case where the grievor resigned after she was declared surplus and the employer had made an offer of employment in a community other than the community where she had previously resided. She developed a medical condition related to nervousness and submitted her resignation. The adjudicator found that the employer did not engineer the facts for a disciplinary purpose, and there was no disciplinary taint.

[142] It is apparent from the prior jurisprudence that the Board has jurisdiction where a resignation is coerced. In *Bodner* (*supra*), the Board was presented with a resignation tendered by the employee, after the employee was presented with a list of eight areas of "administrative concern" during a meeting with the employer. The Board said (at page 8):

> *For the grievance to succeed, it had to be first established that this board was able to assume jurisdiction. To do so, it was necessary for the grievor's representative to demonstrate that the resignation was involuntary and that it had been obtained through a disciplinary motivation on the part of the employer which had as its objective the termination of the grievor's employment. If this could be established, the onus would then be on the employer to convince this board that the termination of employment was appropriate in the circumstance.*

[143] The Board will take jurisdiction for the purpose of determining whether the grievance is one of disguised discipline. For example in *Charron* (*supra*), the Board reviewed the circumstances surrounding a resignation submitted by Ms. Charron. In *Charron* (*supra*), the grievor was given the option of resigning and taking severance pay, or being dismissed for misconduct amounting to fraud. She signed a release after opting for resignation. It is apparent from *Charron* (*supra*) that a choice made

between dismissal with a disciplinary record or a resignation is not an easy choice for an employee. However, the difficulty of the choice does not render a decision an involuntary decision. I would adopt the reasoning of the Board set out at paragraphs 60 to 64, after referring to sub-section 92(1) of the *Public Service Staff Relations Act*:

> *[60] These principles are listed in the decision relied on by the employer. In McNab (supra), the adjudicator recognized that the facts had to be examined in order to determine whether there was a subjective intent to resign and an objective act. He also recognized that a positive effort to withdraw a resignation must be made with due diligence; that is, within a few days of submitting the resignation.*
>
> *[61] In Bodner (supra), the adjudicator referred to the test that the employer had to have acted coercively and, in Arsenault (supra), the adjudicator considered a situation where the employee chose between dismissal and resigning.*
>
> *[62] Ms. Charron, like the grievor in Hélène Arsenault, had to choose between dismissal and resigning. Ms. Charron adopted the arguments of the employee's representative in Arsenault. But they cannot succeed here either.*
>
> *[63] Ms. Charron was not the subject of any threat or coercion. She had a choice between a dismissal with a disciplinary record or a resignation without a disciplinary record but with good references. The choice was not easy but the emotional pressure that she was under was not caused by the employer.*
>
> *[64] Ms. Charron had the time to reflect and ask for advice. She now regrets her choice and has doubts about the quality of the advice she received. However, she herself chose the person who represented her. She did not use all of the time she had at her disposal to seek other advice.*

[144] In the sections of this decision below, I set out an analysis of the resignations of each grievor. As resignation is a decision personal to each employee, it is important to analyze each resignation separately. There are some common issues, which I wish to deal with at this point.

[145] I place no particular weight on the words in each of the resignation letters dated February 28, 2002:

> *This is a forced resignation.*

[146] The resignation letters were written approximately 17 months after Dr. Rinke and Dr. Vanderwoude moved to Ontario and took up full-time employment in Ontario, with the Government of Ontario. It is clear from the wording of the letters that each employee understood that these letters would end their employment relationship with the CFIA. The letters were no doubt written in an attempt to preserve whatever legal arguments could be made in pressing an argument for constructive dismissal. Particularly, Dr. Vanderwoude appears to have drafted each of the letters, and it appears that he believed that Dr. Rinke had a good claim for failure of the CFIA to accommodate Dr. Rinke in her desire for non-abattoir work.

[147] Dr. Rinke and Dr. Vanderwoude had many months to consider resignation from the CFIA and were employed in what they considered to be excellent non-abattoir jobs in Ontario. They also had many months to consider rescinding their resignations, as the resignations were not accepted immediately by the CFIA. I do not accept the contention of either grievor that they resigned without full information as to the effect of the resignation. Over a period of months, each grievor received information of the effect of resignation on superannuation, severance pay and other benefits. In Dr. Rinke's case, the employer conducted an audit of her various leaves, for the purpose of determining the effect on Dr. Rinke's entitlement to severance pay.

[148] I turn now to consider the resignation of each of the grievors.

Dr. Vanderwoude's Resignation

[149] The decision to resign is a decision which is personal to the employee. An employer cannot force a resignation on an employee. Resignation is said to consist of an intention, plus some concrete or objective evidence of an intention to resign. Authority for this proposition can be found in *McNab* (*supra*), which contains a discussion of the arbitral approach as set out in *Brown and Beatty, Canadian Labour Arbitration*, pages 393 to 394:

> *In determining whether or not an employee has quit his employment arbitrators are generally agreed that the basic task confronting them is to ascertain the intention of the employee involved. That is the arbitrator must determine whether or not the employee actually intended to voluntarily sever the employment relationship. There is also a consensus of arbitral opinion stemming from the earliest cases, that the act of quitting embraces both a subjective intention to leave*

> *one's employment and some objective conduct which manifests an attempt to carry that intention into effect.*

[150] It is quite apparent that Dr. Vanderwoude feels that the CFIA mistreated his wife over a number of years and discriminated against her. This is not a case where an employee is attempting to resile from a hastily made decision, which was snapped up by an employer.

[151] The resignation letter sets out the allegation that the resignation was a forced resignation. Dr. Vanderwoude's statement in that regard is not conclusive and merits a further analysis.

[152] In my review of Dr. Vanderwoude's testimony, I have considered and applied the test in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at page 356 on the issue of Dr. Vanderwoude's credibility:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.*
>
> *The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.*

[153] In order to understand Dr. Vanderwoude's situation, it is important to highlight the facts at the time of his decision to leave British Columbia to go to Ontario. After giving this matter considerable thought, I find that Dr. Vanderwoude and Dr. Rinke faced a difficult decision. The difficult decision was to remain in British Columbia and likely work in a food inspection/slaughterhouse environment, or move to Ontario and try to get into a non-slaughterhouse environment.

[154] I note that this decision was made in a time frame roughly six to eight months following Dr. Vanderwoude's unsuccessful application for the animal health position in Osoyoos.

[155] There is no evidence in this case that he discussed with the CFIA in advance of accepting a contract position with OMAFRA, his intention to go to Ontario and explore other opportunities in order to further his career within the CFIA, before accepting a contract position with OMAFRA. Common sense suggests that if a person is committed to continue to work with the CFIA, that person would discuss with the CFIA any developmental opportunity that he was pursuing outside the CFIA that would further career prospects within the CFIA. In my view, the grievor's actions are more consistent with an intention to sever an employment relationship with the CFIA rather than preserve it.

[156] At the time that Dr. Vanderwoude made his decision to leave British Columbia and move to Ontario, the Workers' Compensation Board of British Columbia had not recognized any workplace injury entitling Dr. Rinke to receive workers' compensation payments. On the contrary, the WCB had denied compensation for a workplace injury alleged by Dr. Rinke.

[157] It is also apparent from Dr. Vanderwoude's evidence that his wife, Dr. Rinke, was unhappy working in a slaughterhouse environment, and from his evidence he had been observing his wife in a state of stress for some time. It is also apparent from Dr. Vanderwoude's evidence that both he and Dr. Rinke felt that the Agency was not treating his wife in an appropriate manner. It is also clear that Dr. Rinke's career had not progressed into the animal health field, which she had expressed an interest in as early as 1991. She had been unable to obtain work outside of a slaughterhouse environment.

[158] Dr. Vanderwoude repeatedly spoke about selling off household effects and real estate in order to move. There was no evidence in this case that Dr. Vanderwoude placed household goods or furnishings into storage in anticipation of a return to British Columbia. This is consistent with a move intended to be permanent, rather than temporary.

[159] I do not accept Dr. Vanderwoude's testimony that "he was forced to leave British Columbia". He had a position with the CFIA and was being paid for his work in British Columbia. At all material times, a position was available for him at the Britco establishment. He managed to land a plum position in Ontario in a non-slaughterhouse environment, while he had been unsuccessful in selection processes for a non-slaughterhouse job with the CFIA in British Columbia. I think it more probable than not that he left British Columbia and the CFIA because of enhanced career prospects for him in Ontario.

[160] In my view, if Dr. Vanderwoude and Dr. Rinke were serious about pursuing work outside a slaughterhouse environment for Dr. Rinke within the CFIA, Dr. Vanderwoude and Dr. Rinke should have pursued a Health Canada assessment. I was furnished with no reason why this avenue was not pursued other than "it was a difficult time", and he and Dr. Rinke "had a difficult decision to make". I note, in particular, that Dr. Vanderwoude's outburst at the hearing, which led to an adjournment of the hearing, occurred at the very point in the evidence when the employer's counsel was questioning him as to the reasons why Dr. Rinke did not attend a Health Canada assessment. I find it unusual that, if both employees intended to return to British Columbia and work for the CFIA, there was no attempt by the grievors to arrange a new assessment by Health Canada. This is a telling point, which in my view points in favour of a finding of a genuine resignation.

[161] There is no evidence in this case of any disciplinary action being taken against Dr. Vanderwoude at any time by the CFIA. The CFIA did grant Dr. Vanderwoude's request for a one-year leave for personal needs on September 8, 2000. Dr. Vanderwoude apparently reached an agreement with the Ontario ministry OMAFRA on July 26, 2000, but did not apply for the leave from the CFIA until August 17, 2000. As Acting Regional Director, Teresa Morton pointed out in a letter to Dr. Vanderwoude dated September 8, 2000 (Exhibit 54):

> *I note that your agreement with OMAFRA is dated July 26, 0000 (sic), and yet your application for leave did not reach my office until August 17th. This has caused significant difficulties for me in terms of lead time, and is not consistent with the well established* ***requirement that all leave other than sick leave is pre-approved.*** *Please ensure that in future all leave is pre-approved.*
>
> *Please be aware that 'leave for personal needs' in order to pursue career options is not necessarily granted. In some areas such an application would be denied and the employee required to choose between working for CFIA or another employer.*

[162] I find some support in the testimony and exhibits that Dr. Vanderwoude preferred work in a non-abattoir setting, thus supporting an inference that his resignation from a meat hygiene position was voluntary. The tenor of his evidence, particularly his repeated references to the slaughterhouse environment in less than complimentary terms, indicates to me that he preferred to work in a non-slaughterhouse environment if possible. That possibility was not likely with the CFIA within British Columbia, and so he took work in Ontario.

[163] In particular, in reaching this conclusion I place some weight on Dr. Vanderwoude's e-mail to Wayne Holmes, Acting Regional Director (Exhibit 55) dated July 24, 2001, which reads as follows:

> *[...] I have taken an assignment as Program Manager, Policy and Audit services with the Province of Ontario. The job is fantastic but the pollution here is very bad. In addition, I have invested many years with CFIA and am not quite ready to abandon that organization.*
>
> *I would like to apply for either a 3 month leave without pay under C11.01 or (preferably for me) a year minus a day under C23.* ***I intend to return to CFIA for a week (August 13 - 17) to see if I can still stand abattoir work.*** *...*

[164] After receiving his three-month extension, Dr Vanderwoude wrote another e-mail to Wayne Holmes (Exhibit 55) dated July 26, 2001:

> *Thanks for the three months. Hopefully that should give me enough time to make my required decisions. I'll be in Vancouver for the CVMA so I may stop by for a visit.*

[165] In my view, Dr. Vanderwoude's suggestion that the only reason that he could not return to B.C. was that the CFIA was refusing to accommodate his wife is not

credible in light of the facts and probabilities, particularly the fact that he moved to Ontario to obtain what he considered to be a better type of job in a non-abattoir position, which was not available to him in British Columbia.

[166] The CFIA did deny Dr. Vanderwoude a continuation of leave more than a year after he moved to Ontario (Exhibit 53). While the CFIA took some time to respond to his application for an extension of the leave, it did on July 25, 2001, indicate its willingness to grant a further three months of leave for personal reasons (from August 21 to November 21, 2001).

[167] On February 21, 2002, Mr. Edwards wrote to Dr. Vanderwoude with instructions to report to work by March 4, 2002, or face administrative action for failure to report. A failure to report and termination of employment for failure to report to work would be a termination pursuant to the *Financial Administration Act*, R.S.C. 1985, c. F-11, and administrative, rather than disciplinary, in nature. It is apparent from the case law that a threat to take administrative or disciplinary action is not in and of itself disciplinary: *Merill* (*supra*).

[168] One of the allegations raised by Drs. Rinke and Vanderwoude is that their resignations were not voluntary because of the failure to accommodate Dr. Rinke in her need to work in a non-slaughterhouse environment. I note that this is a human rights issue, which the Board is without jurisdiction to decide. I note, however, that Dr. Rinke neglected or refused to attend a Health Canada medical assessment when it was offered by the employer in August of 2000. There is no evidence that Dr. Rinke expressed any interest in any assessment by Health Canada, at any time since leaving British Columbia. Dr. Rinke did not attend this hearing to give any evidence concerning the Health Canada assessments. In my view, her non-attendance at the Health Canada assessment is fatal to her claim.

[169] One of the reasons given by Dr. Vanderwoude for his resignation is the allegation that the CFIA attempted to force Dr. Rinke back to the abattoir and refused to provide her with alternative non-abattoir work. It is difficult to place any weight on this assertion, given that at the time when Dr. Vanderwoude decided to leave the province of British Columbia, the WCB decision at that time was that there was no workplace injury, and given the fact that Dr. Rinke failed to pursue a Health Canada assessment necessary to investigate the issue of her accommodation and, finally, given that both Dr. Rinke and Dr. Vanderwoude had secured excellent positions in non-

abattoir work environments in Ontario which they had been unable to obtain in British Columbia.

[170] I am satisfied that Dr. Vanderwoude's resignation letter was a genuine expression of his intention to resign from employment with the CFIA. There is no doubt that he was unhappy with the CFIA's treatment of Dr. Rinke and that he perceived that the CFIA had not treated Dr. Rinke in a "fair manner". There was no disguised discipline surrounding his resignation. I am therefore without jurisdiction to consider further his grievance and the relief sought.

Dr. Rinke's Resignation

[171] As I have indicated earlier in this decision, resignation is an employee's right. Generally, in order to properly explore whether a resignation is "voluntary or coerced", I would need to hear the evidence of the grievor alleging that her resignation was not voluntary. In order to assess her credibility for fact-finding purposes, oral testimony and cross-examination are important. Dr. Rinke did not give evidence. There was a medical opinion tendered which explained her absence as one where she was "too stressed to attend and give evidence". I note that Dr. Vanderwoude and the bargaining agent determined to proceed with the case and did not ask for an adjournment. I note that this may have been a last-minute development and not the preference of the bargaining agent's experienced representative.

[172] I am asked to assess this case as it relates to Dr. Rinke's grievance on the basis of Dr. Vanderwoude's testimony and documentary evidence. I note that I have not accepted Dr. Vanderwoude's evidence that "he was forced" out of the province of British Columbia, and I have found that he left primarily for career advancement reasons. As counsel for the employer has argued, much of what has been placed before me is in the nature of hearsay evidence. I am concerned about the adequacy of that evidence to assess the issue of voluntariness or compulsion surrounding Dr. Rinke's resignation. What we do know is that Dr. Rinke left British Columbia for Ontario with her husband. She sought a leave for that purpose. She is working at a good job and in a non-slaughterhouse environment. At the time when she left British Columbia, she knew that the WCB had not ruled in her favour establishing a workplace injury and that she had not been successful in obtaining alternative work in a non-slaughterhouse setting within the CFIA. She gave no advance notice to the CFIA of her intention to go on another leave to accompany Dr. Vanderwoude to Ontario.

[173] In order to determine intent to resign, I must look at all the facts, and I have been invited to look at the chain of facts or evidence in determining whether or not Dr. Rinke's resignation was a genuine resignation. In the absence of any oral evidence from her to the contrary, leaving the province to accompany her spouse to Ontario, selling off real estate in Vancouver and not placing goods into temporary storage in British Columbia are strong evidence of an intention to leave British Columbia and her position in British Columbia. These factors are evidence of a permanent intention to move. Further, there is no evidence before me that Dr. Rinke applied for positions with the CFIA in Ontario. An application for a transfer or for Ontario-based positions within the CFIA would be some evidence that she intended to preserve her relationship with the Agency. The only evidence is that she rather quickly found work in Ontario with the provincial government in a good position that was not in a slaughterhouse environment.

[174] What causes me grave concerns about Dr. Rinke's grievance is that there is some documentary evidence that Dr. Rinke, from an early stage in her career with the CFIA, wished to work in a non-slaughterhouse environment. I refer in particular to a memo prepared and signed by Dr. Rinke dated July 5, 1991 (Exhibit 4), in connection with her concern that the "plant kill" at the Aldergrove plant might shut down:

> *Lateral Transfers:*
>
> *Please amend my current lateral transfer requests already on file to include transfers to Animal Health positions as well. As per our telephone conversation last week, I would prefer Animal Health work close to my current residence, however, I might consider locations on Vancouver Island or the Interior, but not Dawson Creek. Relocation expenses would have to be discussed at that time. Currently I am trying to attain as much Animal Health experience as possible at my own expense on "no kill days".*

[175] Dr. Vanderwoude testified that Dr. Rinke took care and nurturing leave to avoid the declaration that she was surplus, rather than solely for the purpose of the care and nurturing of a child. This was a leave that was approved by the employer. I note that this also kept Dr. Rinke outside of the slaughterhouse work environment, which is consistent with her intention, expressed in 1991, to work in a non-slaughterhouse environment.

[176] Dr. Rinke expressed her preference for non-slaughterhouse work well before the events that Dr. Vanderwoude alleges gave rise to post-traumatic stress and permanent disability in the fall of 1998. Dr. Rinke is now working in a non-slaughterhouse environment. The only information about this work, which comes from Dr. Vanderwoude, is that Dr. Rinke is succeeding in the new work environment and has "won awards" for her work.

[177] The bargaining agent seeks to persuade me that by virtue of a series of events amounting to alleged ill treatment of Dr. Rinke, she was forced to resign, or that the dismissal was a constructive dismissal. It is unfortunate that Dr. Rinke was assigned initially to a plant for which she did not apply. The theory of the bargaining agent was that Dr. Rinke was treated in bad faith by the employer for many years and that the employer failed in its duty to accommodate Dr. Rinke:

> *... Dr. Rinke, in particular, has been subject to different actions towards her for most of the last 10 years that she was employed with Agriculture Canada and the CFIA*

[178] I have considered the individual events alleged as evidence of bad faith on the part of the employer, as well as the totality of the evidence. I am not satisfied that the bargaining agent has proven its case. For example, the decision to declare Dr. Rinke surplus seems to have a rational basis, which would have saved the CFIA the salary associated with a VM-02 position. While the CFIA could have organized its affairs differently, the organization of the workplace is a management right. Dr. Rinke was given the benefit of the workplace adjustment rights available to her.

[179] There is no evidence that the CFIA unfairly dealt with Dr. Rinke in making a reasonable work opportunity available when Dr. Rinke was declared surplus. In fact, the CFIA seems to have acceded to Dr. Rinke's request for an extended care and nurturing leave.

[180] Dr. Vanderwoude claimed, in essence, that Dr. Rinke was denied work opportunities, partly because she was a female veterinarian and the CFIA had a bias against female veterinarians, and because of her action in proceeding with a grievance at an earlier time. It is clear that in regard to work opportunities that she claimed she was denied, there is no evidence that she pursued recourse that was available to her in any proper manner. I am not prepared to conclude that but for the CFIA's malice towards her, she should have succeeded in selection processes. Other than

Dr. Vanderwoude's opinion, there is no evidence that the CFIA refused in bad faith to select Dr. Rinke for "other positions" with the Agency.

[181] It is apparent from the correspondence filed as exhibits at this hearing that Dr. Rinke sees that she has been singled out by the CFIA because she is a female veterinarian who had the audacity to file a grievance and who won. In my view, this is a human rights issue and beyond the jurisdiction of the Board.

[182] However, even if Dr. Rinke's theory is correct, I am not certain how this issue relates to the voluntariness of the resignation. There is no evidence before me that Dr. Rinke did not know that she was resigning when she submitted her resignation. Her perception may have been that she was resigning because she felt that she had been treated badly by the CFIA or treated in a discriminatory manner by the CFIA. She may have enjoyed her job in Ontario. This, however, does not detract from the fact that, on the information available in this hearing, she made a conscious choice to submit a resignation. In my view, if an employee resigns as a conscious choice, even if the employee feels there is no other choice but resignation, the resignation is her voluntary decision.

[183] If Dr. Rinke had not submitted a resignation, she might have ultimately been terminated by the CFIA for a failure to return to work. The facts in this case, however, do not demonstrate that the CFIA had taken any steps to force her to return to work or to dismiss her from work at the time that she submitted her resignation. The CFIA had not assigned her any work other than slaughterhouse work, which she refused. The last attempt at a work assignment appears to have been in March of 2000. The CFIA did not discipline her for refusing that work, it did not assign her any different work, and she did not attend a medical assessment by Health Canada to determine her fitness for work in meat hygiene or other work environments. She simply moved, with her husband, and found work of the nature that she liked in Ontario and then submitted a resignation to the CFIA from Ontario.

[184] Dr. Rinke sought to tender her resignation over a significant period of time. She tendered her resignation on February 28, 2002. She was given some advice as to the financial consequences of terminating her employment with the CFIA. She apparently had legal advice concerning her employment and resignation, because a lawyer wrote to the CFIA (December 16, 2003, Exhibit 69) demanding that the CFIA accept her resignation:

> *We hereby demand, on behalf of our client, that you immediately process her resignation, effective March 31, 2002. If, by December 19, 2003, we are not in receipt of your letter confirming that you will process our client's resignation effective March 31, 2002, on an expedited basis, and that you will have the appropriate employee of the CFIA contact our client directly to make arrangements for the conclusion of pension transfers, severance pay, and any other outstanding employment issues, then we will accept the instructions of our client to commence legal action against the CFIA and all other appropriate parties in the Supreme Court of British Columbia. In such an action we will claim damages, aggravated damages, punitive damages, and the extensive legal costs involved in such a proceeding.*

[185] The bargaining agent has presented a lengthy history of the CFIA's purported ill treatment of Dr. Rinke. Some of the alleged ill treatment consists of Dr. Vanderwoude's views that Dr. Rinke should have been successful in a number of selection processes for work in non-slaughterhouse environments. I cannot conclude that the CFIA exercised any bad faith or malice or any discipline in its failure to select Dr. Rinke for the food safety or animal health positions. There is no evidence before me that Dr. Rinke sought recourse regarding selection decisions that the CFIA made. The time to challenge those decisions, in the proper recourse process, is long past.

[186] In summary, in order to assess fully whether her resignation was coerced, I would need to hear testimony from Dr. Rinke. The burden of establishing that her resignation was not genuine rests with her. In the absence of oral evidence from Dr. Rinke, which could be tested by cross-examination, I am not satisfied that she has discharged the burden resting on her to show that her resignation was involuntary or coerced by the employer. There is no evidence in this case of a disciplinary component to the facts surrounding Dr. Rinke's resignation. While it is alleged that there is a course of conduct by the CFIA, I am not satisfied that the bargaining agent has demonstrated any malice, ill-will or bad faith on the CFIA's part towards Dr. Rinke from which one might infer disciplinary action. In reviewing the history, I see no evidence supporting a theory that there was disguised discipline. There is no hint of a disciplinary context in Dr. Rinke's resignation. I therefore find that Dr. Rinke's resignation was voluntary and that there was no disciplinary element to the CFIA's decision, which resulted in the termination of employment, suspension or a financial penalty.

[187] A resignation can be a difficult decision for the employee. Severing the employment relationship at minimum has financial consequences. One cannot but have sympathy for Dr. Vanderwoude and the extreme stress that he appears to be under and was under in dealing with his wife's employment issues over a number of years. According to him, it is his preference to live in British Columbia; his teenage daughter is not thriving in Ontario, and his father-in-law lives in the Okanagan. There may well have been an unpleasant adjustment for the family to move to Ontario. From Dr. Vanderwoude's evidence, it appears that his daughter has had difficulties in adjusting. I am satisfied, however, that the purpose in leaving British Columbia was to make a fresh start. The evidence, however, also shows that both Dr. Rinke and Dr. Vanderwoude have desirable positions in Ontario, and ones that they were unable to obtain in British Columbia with the CFIA. Life is full of difficult decisions. The difficulty of a decision, however, does not render the choice involuntary. Resignation is, however, a voluntary choice on the part of the employee.

[188] For all the reasons expressed above, I am satisfied that Dr. Rinke and Dr. Vanderwoude resigned from the CFIA. I am therefore without jurisdiction to provide the relief sought by Dr. Rinke and Dr. Vanderwoude, set out in the argument section of this decision.

Use of the WCB Decision

[189] Before leaving this issue, I wish to discuss the weight that I attach to the WCB Review Board decision. This was a case where the bargaining agent did not produce Dr. Rinke, any medical records relating to her diagnosis, or any of the records or evidence adduced, but provided a copy of the Workers' Compensation Review Board decision, which found a disability. The degree of permanent disability is not defined in that decision and, from the evidence before me, it appears that there is no final decision from the WCB on the degree of injury at the present time. I note that the WCB Review Board decision is of no assistance in determining what other work Dr. Rinke was capable of performing back in July or August of 2000, at the time that she left British Columbia for Ontario.

[190] The parties did not raise issue estoppel. The bargaining agent wishes me to rely on the entire contents of the WCB Review Board decision. The employer opposes the use of the decision in that manner. In my view, the decision can be relied upon for the purpose of proving the WCB Review Board found that Dr. Rinke suffered a workplace

injury. The bargaining agent wished me to rely on the findings of the Board with respect to the agency's treatment of Dr. Rinke, in support of the other documents and testimony provided by Dr. Vanderwoude. In my view, that is an impermissible use of the decision.

[191] In my view, it is not appropriate to place any weight on the WCB's findings, which were critical of the CFIA and its dealings with Dr. Rinke. I do not have before me the evidence that was before the Review Board, nor the arguments of the parties which would permit me to make a finding of issue estoppel on the basis of the test set out in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460.

[192] Pat Henderson, Manager of Human Resources, Western Region CFIA, wrote a letter dated February 19, 2002, with regard to an extension of time to appeal the Review Board decision (Exhibit 24). From Exhibit 24, it is apparent that there is some question as to whether the employer participated in the WCB process, or whether the decision was made solely on the basis of the evidence provided by Dr. Rinke and Dr. Vanderwoude supplemented by medical evidence. In Exhibit 24, Ms. Henderson states as follows:

> *Dr. Vanderwoude refers to the organization of CFIA and Human Resources during the creation of the Agency in 1997. The Human Resources organization in the West was not formally centralized to Calgary until late 2000. Prior to that four staff were located in the New Westminster office, however, the two Human Resources Advisors were away on extended leave for a considerable period of time, and staff in Calgary were attempting to look after the B.C. workloads. This led to the internal breakdown in processes. While the correspondence relating to the WCB Review Board may very well have been sent to CFIA, it was not transmitted to the appropriate level of management or the Human Resources office in Calgary. As indicated in previous correspondence, once it was brought to our attention, a formal request to present the Agency's position was immediately made.*

[193] There is a suggestion (in Exhibit 24) that Dr. Vanderwoude did not disclose his identity as Dr. Rinke's spouse during the course of his dealings with the WCB Review Board, and it is apparent from reading the decision (Exhibit 29) that the Board thought that Dr. Rinke was a veterinarian with the CFIA, and not Dr. Rinke's husband:

> *In support of Dr. Rinke's appeal Dr. Vanderwoude, another Veterinarian with the CFIA, provided a letter of February 25, 2001 (sic) in which he emphasized that the events which*

> *triggered his colleague's claim "went far beyond normal slaughterhouse problems". Instead the system fell apart, as under normal events the plant should have immediately suspended operations, but this did not happen.*

[194] Significant to the findings of the Review Board was the fact that Dr. Rinke experienced stress because the events went far beyond normal slaughterhouse problems. The only two persons who apparently gave evidence on these points were Dr. Rinke and Dr. Vanderwoude, and the WCB Review Board was apparently unaware of the spousal relationship and arguably made its decision on the basis of the evidence provided by Dr. Rinke and her colleague.

[195] In terms of the WCB history, it appears that the Workers' Compensation Board denied Dr. Rinke's claim initially. In a Review Board decision dated August 30, 2001, the Review Board found that there was a compensable injury. The evidence before me indicates that there has been a further appeal, which is currently unresolved as to the degree of permanent injury. The oral evidence before me provided by Dr. Vanderwoude indicated that the degree of permanent injury has not yet been assessed by the WCB.

[196] For the purposes of assessing whether the resignation was voluntary, coerced or the product of employer discipline, I put minimal weight on the fact that the Workers' Compensation Board apparently found that Dr. Rinke suffered a workplace injury. It is true that by September 2001, Dr. Rinke became aware of the findings of the WCB Review Board through the publication of the decision. At the time Dr. Rinke and Dr. Vanderwoude left British Columbia and took up employment with the Ontario ministry, it appears that the WCB finding was that there was no workplace disability. Dr. Rinke knew when she left the province that the WCB did not consider her problems to be work-related, and she knew that she had been unsuccessful in obtaining work in a non-slaughterhouse environment. She also must have known that most veterinarians in British Columbia who work for the CFIA work in meat hygiene in a slaughterhouse environment, and the non-abattoir career opportunities within the CFIA were extremely limited. Also, her decision to leave British Columbia was taken within months of her lack of success in competitions to secure employment outside of a slaughterhouse environment.

[197] The WCB decision before me is not helpful in determining the extent to which Dr. Rinke is disabled or the range of employment for which she is suited. She did not

attend the Health Canada assessment, nor did she ask for any other assessment of her health. In my view, all the circumstances, in the absence of Dr. Rinke's oral testimony, point to a voluntary resignation and not a resignation that was coerced by the employer or the product of employer discipline.

The Third Grievance (Board File 166-32-32344)

[198] The employer's response to the grievance of April 2, 2003, was as follows:

> *Following my review I have determined that you have not yet chosen a revised retirement date and your resignation has not yet been accepted by the Canadian Food Inspection Agency. By letter dated February 8, 2002 (sic) you indicated that the Agency had your permission to release your personal information to Dr. Robert Vanderwoude who was acting on your behalf in relation to your employment. In this regard, Dr. Vanderwoude was advised by Joann Miller-Kurchaba on May 23, 2002 (sic) that Public Works and Government Services would require more time to conduct a complete audit of your deficient contributions for Superannuation, Supplementary Death Benefit Plan and Disability Insurance. You chose to present your grievance before you received the results of this audit. Since you remain an employee of the Agency and no termination has occurred, you are not aggrieved and your grievance is considered premature.*

[199] Dr. Rinke's view is set out in her letter dated April 11, 2002 (Exhibit 64):

> *I started work with Agriculture Canada/CFIA on February 15, 1988. Aside from my maternity leave and my disability leave for abdominal surgery in March 1996, all other leaves were necessitated due to actions against me and are contentious. For this reason I need: 1) a detailed report and 2) detailed calculations for all my leaves that do not count for severance pay and 3) how much each time period costs me for each of the benefits, this includes dates, employee cost and calculation, employer cost and calculation.*
>
> *I especially want to know the start and end dates of each period in question and what portion of the owed superannuation money relates to my (1) maternity leave, (2) care and nurturing leave in the period August 1991 to late 1994, (3) disability from March 1996 to the fall of 1997, (4) the period disability/stress leave from December 1998 to November 1999, following senior CFIA management's actions against me for preventing humane violations at a B.C. abattoir and (5) forced leave due to my dismissal from my post at the Burnaby office to force me back into the untenable position at BC02 (the same plant with the humane*

> *problems) which resulted in my forced departure from British Columbia. This period runs from March 17, 2000 to the present date.*
>
> *After three years of waiting, the Worker's Compensation Review Board of B.C., recently ruled that my leave for the period of December 1998 to November 15, 1999 (sic) was a compensable injury and criticized the action of CFIA managers and program specialists responsible. Dr. Vanderwoude and I could not consider going back to CFIA until this decision was rendered since it proved that I could not go back to BC02 and clearly indicated that the CFIA was responsible for my disability.*
>
> *During the period March 17, 2000 to January 2, 2001, I was forced to 'burn up' accumulated vacation leave to avoid being forced back to the abattoir where the humane violations had taken place. When my leave was burned up, my husband, Dr. Vanderwoude and I was (sic) forced to leave B.C. and seek employment elsewhere. I would like to know the calculation of how much superannuation this period comprises. [...]*

[200] The CFIA prepared an audit for the purposes of answering Dr. Rinke's concerns regarding severance pay and superannuation options. The results of the audit were communicated to Dr. Rinke in a letter dated August 13, 2002 (Exhibit 44), from the Manager, Compensation, Western Region, Jo-Ann Miller-Kurchaba. The letter contained the following table, which sets out the employment for severance pay purposes:

PERIOD	STATUS	STATUS FOR SEVERANCE PAY PURPOSES	COUNTABLE PERIOD FOR SEVERANCE PAY PURPOSES
15 Feb 88 to 20 Aug 89	On duty	Countable	1 year 187 days
21 Aug 89 to 18 Feb 90	Maternity leave	Countable	182 days
19 Feb 90 to 25 Mar 90	Care & Nurturing	Not countable	
26 Mar 90 to 18 Aug 91	On duty	Countable	1 year 46 days
19 Aug 91 to 03 Jan 95	Care & Nurturing	Not countable	
04 Jan 95 to 26 May 96	On duty	Countable	
27 May 96 to 25 Jun 97	Illness-leave without pay	Not countable	
26 Jun 97 to 12 Oct 97	On duty	Countable	109 days

13 Oct 97 to 20 Oct 97	Illness-leave without pay less than 3 months	Countable	8 days
21 Oct 97 to 13 Dec 98	On duty	Countable	1 year 54 days
14 Dec 98 to 14 Nov 99	Illness-leave without pay	Not countable	
15 Nov 99 to 20 Aug 00	On duty	Countable	280 days
21 Aug 00 to present	Relocation-leave without pay	Not countable	

[201] Ms. Miller-Kurchaba prepared the chart and the audit on the basis of Dr. Rinke's personal history card, which sets out the compensation background. Ms. Miller-Kurchaba stated as follows:

> *When I looked at this letter, there were a lot of things in the history that I had no control over. I could not change the history [...] There was a request to change historical data, and it was not appropriate for me to change the records for those periods. Unfortunately, I was not able to help.*

[202] Ms. Miller-Kurchaba explained the double audit process which was followed. Two persons reviewed the data separately and independently prior to the release of the chart to Dr. Rinke.

[203] Ms. Miller-Kurchaba referred to clauses in the collective agreement. Ms. Miller-Kurchaba testified that if a clause doesn't specifically state how a leave without pay is calculated, sub clause 1.06(a) of the Collective Agreement applies. Clause 1.06 reads as follows:

> *1.06 Except as otherwise specified in this Agreement:*
>
> *(a) where leave without pay for a period in excess of three (3) months is granted to an employee, the total period of leave granted shall be deducted from "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave;*
>
> *(b) time spent on such leave which is for a period of more than three (3) months shall not be counted for pay increment purposes.*

[204] Ms. Miller-Kurchaba testified that a successful WCB claim does not have an effect on the severance pay calculation. Employees can be advanced sick leave until

the WCB decision is made. If there is no decision, or a denial of coverage, the employee can go on sick leave without pay. If the employee is successful, the employee is paid directly from WCB. Ms. Miller-Kurchaba administered WCB for the Department of National Defence. In the absence of any evidence to the contrary, I accept her conclusion that there is no effect of a successful WCB claim on a severance calculation.

[205] The audit revealed that Dr. Rinke was entitled to $10,285.70 in severance pay. The audit also revealed that as of July 31, 2002, there were deficiencies for superannuation, supplementary death benefit deficiencies ($1,255.60) and disability insurance deficiencies ($2,499.870). There was a difference in the superannuation deficiency based on whether Dr. Rinke chose to count the entire period of leave without pay as pensionable service (in that case a deficiency of $30,891.73) or if only the first three months of leave without pay were to be counted for the purpose of pensionable service (in that case a deficiency of $17,814.11). If the employee exercises the option not to count the superannuation deficiencies in excess of the first three months, the period of leave without pay in excess of three months is non-pensionable service. The election not to count the superannuation deficiencies in excess of the first three months leave without pay had to be made before the retirement date. Despite repeated correspondence from the CFIA, Dr. Rinke neglected or refused to exercise the options that were available to her.

[206] Dr. Rinke asks that I review the periods of leave and the implications. I am asked to revise the leave record and substitute periods of leave with pay for leave without pay, because of the CFIA's treatment of Dr. Rinke. Dr. Rinke wrote a letter dated April 11, 2002 (Exhibit 64), which sets out her disputes regarding how leaves were recorded.

[207] In my view, the only evidence that was presented in relation to this was from Ms. Miller-Kurchaba. It demonstrates that she was dealing with severance and pension issues on the basis of the leaves applied for by Dr. Rinke, and authorized and recorded by the employer at the relevant time. I am satisfied that it is not appropriate to "re-write" the history of the leaves for which Dr. Rinke applied and the employer granted.

[208] The bargaining agent has not called any evidence demonstrating an error in the manner in which the employer recorded the leaves, or in the calculation of the amounts of Dr. Rinke's entitlements or repayment obligations. I am not prepared to

disturb the calculations, as the bargaining agent has demonstrated no error. There is no evidence in this case of a financial penalty applied to Dr. Rinke by the CFIA.

[209] I note that the CFIA did not accede to Dr. Vanderwoude's or Dr. Rinke's request to offset severance amounts owing to Dr. Vanderwoude from amounts that Dr. Rinke owes to the CFIA. It was open to Dr. Vanderwoude to issue a cheque back to the CFIA, in partial payment of Dr. Rinke's compensation deficiencies. No inference of bad faith on the part of the CFIA can be drawn from its action to keep the "paper-trail" on compensation issues separate for each of the employees who resigned from the Agency.

[210] Finally, I note that there is a relationship to my findings in respect of the first two grievances and this third grievance. I have found, firstly, that I have no jurisdiction to entertain the grievances because this is primarily a human rights matter, for which another administrative procedure exists under another act of Parliament. If there is relief under the *CHRA* available at this time to the grievors, it is also open to the Canadian Human Rights Tribunal to decide whether the periods of leave were caused by the discriminatory acts of the employer. I have not made any rulings on discrimination because I have no jurisdiction to do so. As a secondary matter, in the alternative, I have found that this is a case of voluntary resignation. Given my findings that this is a voluntary resignation, it is apparent that Dr. Rinke did not challenge the leaves at the time of the recording of the leaves, and therefore this grievance can also be dismissed on the basis that it is untimely. I also note that I am not satisfied that re-writing the history is appropriate, and I am not satisfied that the bargaining agent has shown any error in the manner of recording the leaves.

[211] I therefore dismiss Dr. Rinke's grievance in Board File No. 166-32-32344 concerning leave entitlements.

[212] I note that there is an outstanding grievance, which has been filed by Dr. Rinke concerning the effect of the WCB award on severance pay. I have not seen the text of this grievance and this grievance is not before me. It is Dr. Vanderwoude's position that Dr. Rinke should have been granted the status of injury-on-duty leave and that the time spent in this capacity should be counted for severance purposes. I leave it to the Board member appointed to hear the subsequent grievance as to which portions of that grievance remain to be determined in light of my findings in this decision.

[213] For all the reasons outlined above, I dismiss the grievances filed by Dr. Rinke and Dr. Vanderwoude.

Paul E. Love,
Board Member

CAMPBELL RIVER, September 28, 2004.