IN THE MATTER OF A COMPLAINT pursuant to Sections 6 & 9 of the ***Human Rights Code***, R.S.N.L. 1990, c. H-14, as amended

File Nos. 2728 & 2741

BETWEEN:

TERRY SKINNER

COMPLAINANT

AND:

REGINALD GRIFFIN

COMPLAINANT

AND:

FISH, FOOD and ALLIED WORKERS UNION

RESPONDENT

Heard: September 08-10, 2009 and September 12, 2009

Decision: April 15, 2009

Appearances

On behalf of the Newfoundland and Labrador Human Rights Commission and the Complainants:	Helen Conway
On behalf of the Respondent:	Greg Kirby

INTRODUCTION

1. Pursuant to a request made by Ms. Conway on behalf of the Human Rights Commission ("HRC") and with the consent of the Respondent the complaints of each of Mr. Skinner and Mr. Griffin against the Fish, Food and Allied Workers Union ("FFAW") were heard together.

2. This Board of Inquiry (the "Board") appointed pursuant to Section 25 of the ***Human Rights Code***, R.S.N.L. 1990, c. H-14, as amended (the "***Code***") began hearings

on Monday, September 08, 2008 at the Mount Peyton Motel (the "Motel") in Grand Falls-Windsor. The hearing continued at the Motel until Wednesday, September 10, 2008 when it was adjourned at the request of the Respondent whose witness was outside the Province of Newfoundland and Labrador and would be available to testify before the Board on Friday, September 12, 2008. The Complainants consented to the request for a postponement and the hearing reconvened at the Traveller's Inn (the "Inn") in St. John's on Friday, September 12, 2008.

3. The Complainants were present at the hearing on Monday, September 08, 2008 but thereafter the Board continued hearing evidence in their absence, both Complainants having consented to the hearing proceeding in this manner.

NATURE OF COMPLAINTS

4. Each of the Complainants completed and signed a standard Complaint Form prepared by the HRC, Mr. Skinner on June 12, 2006 and Mr. Griffin on June 14, 2006.

5. Mr. Skinner's Complaint Form states as follows:

> *I started work with FPI Limited in a fish plant in Harbour Breton in 1986 and was a member of the Fish, Food and Allied Workers Union. I acquired 18 years of seniority in the fish plant. In July 2002, I was required to stop work because I suffered a stroke, which left me with a number of physical and mental difficulties.*
>
> *In April 2004, FPI Limited closed the fish plant in Harbour Breton where I had worked. Because of my medical problems I was not able to return to work in the fish plant between July 2002 and when the plant closed in April 2004.*
>
> *In order to comply with the provincial legislation, FPI Limited was required to pay a sum of money to the Government of Newfoundland and Labrador and the money was to be paid to former employees of the fish plant in Harbour Breton, with all former employees receiving the amount of $5000 as a severance payment. The Fish, Food and Allied Workers Union was given responsibility for distributing this money to the former employees of the fish plant.*
>
> *My name was on the original list of former employees who were to receive the $5000 as a severance payment but I was advised in April 2006 that the Local Union Committee of the Fish, Food and Allied Workers Union established a requirement that in order to receive the severance payment a former employee had to have worked in the fish plant in the year 2004 and had to have been eligible to return to work prior to the plant closure. I was ruled to be ineligible to receive the severance payment because I did not meet the requirement established by the Local Union Committee.*

I believe that the Fish, Food and Allied Workers Union has discriminated against me because I was mentally and physically unable to return to work and that these actions amount to discrimination on the basis of a mental and physical disability contrary to section 6 and section 9 of the ***Human Rights Code****.*

6. Mr. Griffin's Complaint Form states as follows:

I started work with FPI Limited in a fish plant in Harbour Breton on or about September 30, 1981 and was a member of the Fish, Food and Allied Workers Union. I acquired 23 years of seniority in the fish plant. On or about July 28, 2001, I was required to stop work because I suffered from depression. I also developed physical complications from a previous accident in which I was involved.

In April 2004, FPI closed the fish plant in Harbour Breton where I had worked. Because of my depression and my physical problems I was not able to return to work in the fish plant between July 28, 2001 and when the plant closed in April 2004.

In order to comply with the provincial legislation, FPI Limited was required to pay a sum of money to the Government of Newfoundland and Labrador and the money was to be paid to former employees of the fish plant in Harbour Breton, with all former employees receiving the amount of $5000 as a severance payment. The Fish, Food and Allied Workers Union was given responsibility for distributing this money to the former employees of the fish plant.

My name was on the original list of former employees who were to receive the $5000 as a severance payment but I was advised in April 2006 that the Local Union Committee of the Fish, Food and Allied Workers Union established a requirement that in order to receive the severance payment a former employee had to have worked in the fish plant in the year 2004 and had to have been eligible to return to work prior to the plant closure. I was ruled to be ineligible to receive the severance payment because I did not meet the requirement established by the Local Union Committee.

I believe that the Fish, Food and Allied Workers Union has discriminated against me because I was mentally and physically unable to return to work and that these actions amount to discrimination on the basis of a mental and physical disability contrary to section 6 and 9 of the ***Human Rights Code****.*

7. These are the complaints which were before the Board and upon which the Board is required to render its decision.

LEGISLATION

8. The Complainants have relied upon Sections 6 and 9 of the Code which state as follows:

Right of the Public to Services

6.(1) A person shall not deny to or discriminate against a person or class of persons with respect to accommodations, services, facilities or goods to which members of the public customarily have access or which are customarily offered to the public because of the race, religion, religious creed, political opinion, colour or ethnic, national or social

origin, sex, sexual orientation, marital status, family status, age, physical disability or mental disability of that person or class of persons.

(2) Notwithstanding subsection (1), a limitation, specification, exclusion, denial or preference because of physical disability or mental disability shall be permitted if that limitation, specification, exclusion, denial or preference is based upon a good faith qualification.

(3) Subsection (1) does not apply

(a) to accommodation in a private residence;

(b) to the exclusion of a person because of that person's sex from, accommodation, services or facilities upon the ground of public decency;

(c) to accommodation where sex is a reasonable criterion for admission to the accommodation;

(d) to a restriction on membership on the basis of a prohibited ground of discrimination, in a religious, philanthropic, educational, fraternal, sororal or social organization that is primarily engaged in serving the interests of a group of persons identified by that prohibited ground of discrimination; or

(e) to other situations where a good faith reason exists for the denial of or discrimination with respect to accommodation, services, facilities or goods.

(4) Notwithstanding paragraph (3) (a), subsection (1) shall apply to a private residence that offers a bed and breakfast accommodation for pay.

(4.1) Nothing in subsection(1) shall prevent the denial or refusal of accommodations, services, facilities or goods to a person who has not attained the age of majority if the denial or refusal is required or authorized by another Act.

(5) For the purposes of this section "accommodation, services, facilities or goods to which members of the public customarily have access or which are customarily offered to the public" shall include accommodation, services, facilities or goods which are restricted to a certain segment of the public.

Discrimination in employment

9.(1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of:

(a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability; or

(b) that person's age, if that person has reached the age of 19 years;

but this subsection does not apply to the expression of a limitation or preference based on a good faith occupational qualification.

(2) An employer, or a person acting on behalf of an employer, shall not use, in hiring or recruitment of persons for employment, an employment agency that discriminates against a person seeking in employment because of his or her race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability, or age, where the person has reached the age of 19 years.

(3) A trade union shall not exclude a person from full membership or expel or suspend or otherwise discriminate against 1 of its members or discriminate against a person in regard to his or her employment by an employer, because of

(a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability; or

(b) that person's age, if that person has reached the age of 19 years;

(4) A person shall not use or circulate a form of application for employment or publish an advertisement in connection with employment or prospective employment or make a written or oral inquiry in connection with employment that expresses either directly or indirectly

(a) a limitation, specification or preference as to race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability; or

(b) an intent to

(i) dismiss from employment;

(ii) refuse to employ or rehire, or

(iii) discriminate against a person because of age, if that person has reached the age of 19 years,

but this subsection does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

(5) Notwithstanding subsection 19(1), the provisions of subsections (1), (3) and (4) as to age shall not apply to

(a) prevent the operation of a good faith retirement or pension plan;

(b) operation of the terms or conditions of a good faith retirement or pension plan which have the effect of a minimum service requirement; or

(c) operation of the terms or conditions of a good faith group or employee insurance plan.

(5.1) Paragraph (5)(a) does not apply to a provision of a good faith retirement or pension plan requiring a person to retire at an age set out in the plan.

(6) This section does not apply to an employer

(a) which is an exclusively religious, fraternal or sororal organization that is not operated for private profit;

(b) in respect of the employment of a domestic employed and living in a single family home.

(7) The right under this section to equal treatment with respect to employment is not infringed where a judge is required to retire on reaching a specified age under the ***Provincial Court Act, 1991.***

EVIDENCE

By Consent

9. The Parties to this proceeding agree that on December 01, 2004 Fishery Products International Limited ("FPI") notified the Government of Newfoundland and Labrador of its intention to close its fish plant in Harbour Breton effective February 28, 2005. The FFAW- CAW (the "Respondent") alleged that the notice of intention provided by FPI did

not meet statutory requirements and that FPI Limited had contravened Sections 52, 55 and 57 of the ***Labour Standards Act,*** RSNL 1990, c. L-2, as amended (the "LRA")**.** On March 31, 2005 the Respondent filed a grievance with the Labour Relations Board (the "LRB") alleging that FPI had failed to provide adequate notice of its intention to close its fish plant in Harbour Breton. Prior to a hearing before the LBR, FPI reached an agreement with Government and the Respondent which, in part, required FPI to pay to the Government of Newfoundland and Labrador, in trust, the sum of $1,500,000.00.

On behalf of the Complainants

Reginald Griffin

10. Mr. Griffin is fifty eight (58) years of age. He commenced work on Nova Scotia draggers when he was eighteen (18) years of age. In 1980 Mr. Griffin was involved in an accident in which he sustained injuries to his ribs and hips. Mr. Griffin was required to have steel plates inserted in both of his hips. At the time of this hearing he advised that he still had a plate in one hip.

11. Despite his injuries, on September 30, 1981 Mr. Griffin began work with FPI, initially on its draggers but in later years he worked as trimmer at its Harbour Breton fish plant. Mr. Griffin described trimming fish as cutting and cleaning any dirt from the fillet of fish. He periodically experienced problems with trimming fish as the stands upon which the fish were processed were high and he is not a tall individual. He changed employment duties on several occasions during his years of employment with FPI in an effort to find work that was not as physically demanding. The Respondent and FPI cooperated in finding alternate employment for him.

12. In 2001 Mr. Griffin found that he was suffering from depression brought on, in part, by the physical requirements of his employment. As a result of his depression and his physical limitations Mr. Griffin ceased work on or about July 28, 2001. Mr. Griffin advised that two (2) doctors confirmed that he was fully disabled and unable to pursue gainful employment. He did not receive Workers Health and Safety Compensation

Benefits (“WHSCB”) or Employment Insurance Sick Leave Benefits (“EI”). He applied for and after an appeal of the original determination, received Canada Pension Disability (“CPP”) Benefits in August 2002, retroactive to July 2001. He has remained in receipt of CPP Benefits since that time.

13. Mr. Griffin testified that his physical and mental capacity has not improved since July 28, 2001. He has not received medical clearance to return to employment. He has not applied for any jobs since he ceased working at the Harbour Breton fish plant. He believes that he can retain his CPP Benefits during the first three (3) months of his return to employment but will lose these CPP Benefits should he continue to be employed for longer than three (3) months.

14. Mr. Griffin stated that after leaving work he never thought that he would be able to return to his employment and he did not hear anything further from representatives of the Harbour Breton fish plant. He does however state that at some point after he left his employment on July 28, 2001 and prior to the closure of the Harbour Breton fish plant on February 28, 2005, specifically he believes in late 2001 or early 2002, Wesley Morris, who worked in the personnel office at the Harbour Breton fish plant, telephoned him to inquire when he expected to return to work. During this telephone conversation Mr. Morris also advised him that they might have to take him off the list. In response to this inquiry Mr. Griffin advised Mr. Morris that he would have to talk with his doctor and obtain permission to return to work so he had no idea when, or if, he might return to work. The list to which Mr. Griffin referred is the seniority list maintained by the Respondent and/or FPI at each of its fish plants.

15. Mr. Griffin advised that he was aware that he would require medical clearance to return to his employment. He stated that he not only suffered from depression but also experienced problems with his legs and noise bothered his head. Specifically, Mr. Griffin advised that he suffers from extreme anxiety, hearing problems, arthritis, depression and high cholesterol. Many of the medications that he takes affect his ability to drive.

16. Mr. Griffin advised that despite not working he believed that he retained his seniority at the Harbour Breton fish plant after July 28, 2001 and that although he did not pay union dues after July 28, 2001 he believed that he remained a union member. Mr. Griffin testified that he believed that when, and if, he returned to work he would be able to pay any arrears of union dues that had accumulated during the period of time that he was absent from employment. Mr. Griffin also stated that he was never notified by the Respondent that he was required to pay his union dues while he was off work in order to retain his membership in the Respondent.

17. In or about July 2008 Mr. Griffin testified that Judy Drake telephoned him to see if he was able to go to Alberta to undergo training. He advised her that he did not have clearance from his doctor. In or about late August 2008 Mr. Griffin testified that Judy Drake telephoned him again to see if he might be able to undergo training in New Brunswick or Prince Edward Island, he could not specifically recall which Province, and he reiterated that he did not have medical clearance to return to work. There was no evidence that Judy Drake was acting on behalf of the Respondent.

18. Mr. Griffin, as with most people residing in Harbour Breton, was aware that an arrangement had been reached between the Respondent and FPI arising from the closure of the fish plant and that this arrangement required FPI to pay money to the workers at its Harbour Breton fish plant. When the time came to distribute the funds paid by FPI to the Government of Newfoundland and Labrador (the "Government") amongst the employees of FPI's Harbour Breton fish plant Mr. Griffin was advised by his friend that his name was not on the list of employees who would be receiving these funds. In response to this information he asked his sister-in-law, Geraldine Skinner, who was the union representative for trimmers at the fish plant and a member of the local union committee assigned the task of determining which employees of the fish plant were to receive compensation from FPI arising from the closure of its Harbour Breton fish plant, why his name was not on the list of employees entitled to receive a portion of these funds. He stated that she advised him that his name had been removed from the list because they did not think that he was going back to work.

Terry Skinner

19. Mr. Skinner is forty two (42) years of age. He began work with FPI at the Harbour Breton fish plant in 1986 and continued to work seasonally as a trimmer until 2002 when he suffered his third (3rd) stroke. Subsequent to each of the first two (2) strokes, Mr. Skinner recovered sufficiently to return to his employment. The third (3rd) stroke significantly impaired Mr. Skinner's ability to use the entire left side of his body and he has been advised that his condition is unlikely to improve.

20. After his stroke in 2002 Mr. Skinner did not attempt to return to his employment at FPI. He has not applied for any other employment and he does not believe that he will ever be able to return to gainful employment.

21. Subsequent to his stroke, Mr. Skinner received fifteen (15) weeks of EI Sick Leave Benefits ("EI") and then applied for and received CPP Benefits. He has been in receipt of CPP Benefits since 2002.

22. Mr. Skinner has no personal knowledge of why his name was not on the list of FPI employees entitled to receive moneys on the closure of the Harbour Breton fish plant. He advised that his wife who was a casual employee at the fish plant spoke with people about whether or not he was on the list and the reasons why he might not be on the list. He always considered himself to be a member of the Respondent even though he did not pay union dues after he ceased work at the Harbour Breton fish plant in 2002.

23. Mrs. Skinner is the wife of the Complainant, Terry Skinner. She advised that her husband worked at the Harbour Breton fish plant from 1986 to 2002 and that she herself worked at the same plant on a casual basis from 2001 until it closed. She did not receive compensation when the fish plant closed as she did not meet the criteria set by the Local Union Committee.

24. Mrs. Skinner advised that it was not until August 2004 that the doctors advised Mr. Skinner that he would not be able to return to his employment. At that point in time

he had reached a plateau in his recovery and it was unlikely that his physical condition would improve. Mrs. Skinner advised that Mr. Skinner can not work at this time and has not been able to work since his last stroke.

25. Mrs. Skinner advised that when she became aware that there was going to be money paid to the employees of the fish plant she contacted three (3) members of the Local Union Committee whom she identified as Geraldine, Gloria and Eric and whom through later testimony we more definitely identified as Geraldine Skinner, Gloria Pearce and Eric Day. Mr. Day advised her that her husband was not entitled to receive the money being paid out to employees as a result of the closure of the Harbour Breton fish plant.

26. Mrs. Skinner also stated that she spoke with a representative of the Respondent in St. John's, Greg Pretty, who advised her to speak with another representative of the Respondent, Ben Baker. Mrs. Skinner stated that she spoke with Mr. Baker who advised her that Terry Skinner was on the list and that he would be receiving money from the fund established by FPI and the Government upon the closure of the Harbour Breton fish plant. In a subsequent discussion with Mr. Day, Mrs. Skinner advised that he told her Ben Baker had nothing to do with who got the money. In a later discussion with Mr. Day, a few days after their earlier conversation, Mrs. Skinner advised that he told her that "Terry will get the money but don't mention it to anyone else." Mrs. Skinner further alleges that in or about 2007 she ran into Mr. Day at Jackman's One Stop and that he said "We haven't forgotten about him, we're still trying to get the money for him." Mrs. Skinner testified that she assumed Mr. Day was talking about her husband and that the "we" he referred to was him, Gloria and Geraldine.

27. Mrs. Skinner testified that she also spoke with Ron Murphy who she understood to be the Government representative responsible for distributing the money to the fish plant employees. In response to her inquiries she states that Mr. Murphy advised her that her husband's name was not on the list and that the money could not be paid to anyone who was not on the list provided to Government by the respondent. Mr. Murphy advised

her that the Local Union Committee determined who was on the list and that he understood that if you did not work in 2004 then you were not entitled to receive the money.

28. Mrs. Skinner testified that they never received anything from the FFAW saying that Mr. Skinner was required to pay union dues when he was not working or advising him of any consequences arising from the non-payment of his union dues.

29. In 2003 Mrs. Skinner advised that she received a telephone call from Mr. Wesley Morris inquiring whether Mr. Skinner could attempt a return to his employment. Mrs. Skinner advised Mr. Morris that her husband could not go back to work as he was going back and forth to Grand Falls-Windsor for therapy.

30. Mrs. Skinner alleges that in either 2003 or 2004 she received a letter or note written on a prescription pad from Mr. Skinner's family doctor advising that Mr. Skinner could attempt a return to his employment but that Mr. Skinner was too afraid to try as his balance was significantly impaired. She stated that she brought this letter to Mr. Morris. She also acknowledges that the letter is not in Mr. Skinner's employment file at FPI nor is a copy of the letter in his family doctor's file.

31. During her cross examination Mrs. Skinner advised that she made all necessary inquiries on behalf of Mr. Skinner as he experienced problems with his speech subsequent to his stroke(s). She further advised that Mr. Skinner has stated that he does not want to attempt a return to work and that he has never personally sought clearance from his family physician to return to employment.

Ronald Murphy

32. Mr. Murphy has worked with the Government in its Employment Support Programs since 1997. He is currently the Manager of Employment Support Programs

with the Department of Municipal Affairs. Prior to this he had been acting in this same position.

33. Mr. Murphy testified that effective February 2005, FPI closed its fish plant in Harbour Breton and sought an amendment to the ***FPI Act*** to allow it to access funds from the Income Trust.

34. As a result of the closure of the Harbour Breton fish plant and subsequent negotiations between FPI, the Government and the Respondent, FPI paid the Government $1,500,000.00 together with the transfer of certain specific fish quotas and equipment. These moneys were to be used to benefit the displaced workers at the Harbour Breton fish plant. The Province contributed a further $1,250,000.00 to develop initiatives and to provide assistance to the former fish plant workers.

35. Government representatives initially met with the workers at the FPI fish plant in Harbour Breton in December 2005 to determine what their specific concerns were and to begin to formulate a plan to address these concerns.

36. Based upon the available funds and the needs of the former fish plant workers it was decided that the moneys would be dispersed among the former fish plant workers, at their option, in one (1) of the two (2) following manners:

(a) a lump sum payment of $5,000.00; or

(b) work on an employment project at the rate of $14.50 per hour which would be of sufficient duration to qualify them for receipt of EI Benefits.

37. As some of the former fish plant workers were already employed on other make work projects on October 24, 2006, the date set for the dispersal of moneys, they continued to work on these projects at the rate of $8.75 per hour and had no option but to receive the $5,000.00 lump sum payment.

38. The Respondent was primarily responsible for determining who would be on the list and had the final say as to which workers would be eligible to receive these moneys pursuant to one (1) of the two (2) options developed by Government in consultation with the various stakeholders.

39. The initial list of workers at the Harbour Breton fish plant consisted of 320 names and was provided to Government by FPI sometime prior to March 17, 2006. On March 21, 2006 the Respondent provided Government with its initial list of 310 eligible workers.

40. As there were discrepancies in the two (2) lists received by Government, spreadsheets were prepared by Mr. Murphy and his staff in consultation with the Local Union Committee. These lists were amended several times as additional information on the employment status of these workers was obtained by the Local Union Committee. The moneys in the fund were ultimately paid out to 310 workers and there remains a surplus of approximately $58,560.00 that the Respondent intends to disperse amongst the eligible workers. An audit of the list and the fund was completed by an independent auditing firm retained by Government.

On Behalf of the Respondent

Eric Day

41. Mr. Day testified that he was a Unit Chairperson at the FPI fish plant in Harbour Breton along with Mike Whittle and Geraldine Skinner.

42. He was not aware of the complaint made by the Respondent to the LRB. He stated he knew that there had been a grievance filed by the Respondent arising from FPI's intention to close the Harbour Breton fish plant although he was not aware of its outcome. He was aware that the payment of money from FPI to the Government was dependent upon FPI being able to access moneys contained in the Income Trust and

understood that FPI paid approximately $1,200,000.00 to the Government and believed that is was compensation for FPI's failure to provide twelve (12) weeks notice of its intention to close the Harbour Breton fish plant as required under the union contract.

43. Mr. Day was aware that displaced workers had two (2) options, one being to work on a project at $14.50 per hour and the other to receive $5,000.00. Mr. Day was working on a project cutting brush at $8.75 per hour on October 24, 2006 so he had no option but to receive the lump sum payment of $5,000.00 plus whatever EI benefits he was entitled to from his work on the project. He stated that fifty five (55) people were in the same position as him and received the $5,000.00 lump sum payment.

44. Mr. Day testified that he was a member of the Local Union Committee tasked with compiling a list of fish plant workers entitled to benefit from the fund that was established from money paid by FPI to the Government and the additional moneys contributed to the fund by the Government. The list was compiled by the Local Union Committee in consultation with Greg Pretty, a representative of the Respondent. Mr. Day states that the four (4) members of the Local Union Committee, Mr. Pretty and Mr. Murphy finalized the list

45. The initial list that was presented to Government by FPI included the names of individuals who did not work in the Harbour Breton fish plant in 2004. The Local Union Committee had to establish the criteria for entitlement to receive funding and his recollection was that no fish plant workers were on maternity leave or in receipt of WHSCC Benefits. He believed that in order to qualify for the funding you had to have worked in the fish plant in 2004 and be subject to recall when the Harbour Breton fish plant was scheduled to reopen. Individuals who were on approved leaves of absence from the Harbour Breton fish plant were entitled to receive compensation as were approximately twelve (12) to thirteen (13) casual employees who essentially worked a regular shift schedule and were considered regular casual employees as opposed to irregular casual employees.

46. Mr. Day stated that Local Union Committee members were sometimes harassed by disgruntled former employees and that they were required to make some tough decisions in determining who should be entitled to receive compensation. At no time did they look at or consider the number of people who might receive the money as a basis for including or excluding someone from the list. Seniority was not a determinative factor to entitlement and was not one of the specific criteria considered by the Local Union Committee.

47. Mr. Day stated that to the best of his knowledge Mr. Skinner and Mr. Griffin were "out of the workforce." He understood from a friend that Mr. Griffin was not returning to the workforce. He had no specific knowledge of Mr. Skinner's circumstances as Mr. Skinner worked on the night shift which was the responsibility of another union representative. He did understand that Mr. Skinner could not talk although he was uncertain how he received that information. He did not telephone or otherwise speak with Mr. Griffin or Mr. Skinner with respect to their circumstances. Mr. Day specifically stated that the fact that Mr. Griffin and/or Mr. Skinner might be handicapped was not a consideration in their entitlement to receive a portion of the available funds.

48. He recalled that he had assisted in providing accommodation in employment duties for Mr. Griffin when he worked at the Harbour Breton fish plant. He understood that when there were no longer any lighter duties available to Mr. Griffin he left the workforce and did not return.

49. Mr. Day stated that a record of the payment of union dues was maintained by the Respondent at its office in St. John's and if an individual was absent from employment and not paying union dues, accumulated arrears were paid when they returned to employment. He personally had no knowledge of whether Mr. Skinner and/or Mr. Griffin were still paying union dues.

50. Mr. Day advised that to his knowledge the seniority list at the Harbour Breton fish plant was supposed to be updated by the Respondent and FPI every two (2) years. He

understood that if you were sick and unable to return to your employment then both the Respondent and FPI could remove you from the list. Mr. Day advised that the seniority list that they initially looked at included the names of people who were deceased.

51. Mr. Day states that subsequent to the fish plant closure he never had any dealings whatsoever with either Mr. Griffin or Mr. Skinner although he admits that he may have come across Mr. Griffin when he was running for a position on the community council. He states that to the best of his recollection he may have spoken with Mrs. Skinner in person on one occasion subsequent to the closure of the fish plant. He does not recall her advising him that she had spoken with Ben Baker or that Ben Baker told her that her husband was entitled to receive money from the available funds. He acknowledges that he may have told her that Ben Baker had nothing to do with the determination of entitlement to share in the funds. Specifically he states that he did not advise Mrs. Skinner that her husband would receive money and that she was to keep quiet about it. He denies having spoken with Mrs. Skinner at Jackman's One Stop.

Geraldine Skinner

52. Ms. Skinner testified that she had been the Vice President of the Local Union Committee for four (4) years, having commenced her duties in February 2004. She is related by marriage to Mr. Griffin and has known him for twenty three (23) years. She was aware that Mr. Skinner had been employed at the Harbour Breton fish plant for a long time. She was not personally aware whether either of the Complainants would ever return to their employment

53. She understood that the criteria employed by the Local Union Committee to determine an employee's entitlement to share in the available funds were provided to the Local Union Committee by Government. She did not take direction from Mr. Pretty. She did not meet with or talk to Mr. Murphy. She met with Ms. Strong who worked with Mr. Murphy on one occasion when she visited Harbour Breton.

54. There were many discussions amongst the members of the Local Union Committee as they attempted to finalize the list for submission to Government. To the best of her knowledge in determining whether an individual was entitled to receive a share of the available funds the Local Union Committee considered whether the employee had worked in 2004 and was subject to recall when the fish plant re-opened. If the employee did not work in 2004 then before they were excluded from the list the Local Union Committee then considered whether an employee:

1. was on a leave of absence from his or her employment;
2. was on a leave of absence that had the leave of absence been approved by the Respondent and/or FPI and was therefore subject to re-call;
3. was on maternity leave;
4. was in receipt of WHSCC Benefits and if so, was the employee likely to return to employment after receiving a medical clearance;
5. was in receipt of long term or short term disability benefits.

55. While the Local Union Committee garnered the list of names that they ultimately submitted to Government from the FPI seniority list, seniority was not a criteria used by the Local Union Committee in determining eligibility.

56. Regular meetings were held between the employees and the Local Union Committee who attempted to keep the employees apprised of new developments. Based upon discussions with the Local Union Committee and FPI employees, Government developed two (2) options by which employees could receive their share of the available funds.

57. Ms. Skinner stated that she did not speak directly with Mr. Griffin, Mr. Skinner or Mrs. Skinner. She advised that she did speak with Mrs. Griffin who stated “We’re family.” Mrs. Griffin advised Ms. Skinner that she had contacted people and Ms. Skinner told Mrs. Griffin to do what she felt she needed to do.

Gloria Pearce

58. Ms. Pearce testified that she has been a member of the local executive committee of the Respondent for the past fifteen (15) years and that, at the time of this hearing, she is the Secretary-Treasurer. She was a member of the Local Union Committee tasked with determining who would qualify to receive a portion of the fund established by Government and FPI to assist the displaced workers at the Harbour Breton fish plant. Other members of the committee were Eric Day (president), Geraldine Skinner (vice president) and Mike Whittle (chief steward).

59. Ms. Pearce stated that she understood that the funds paid by FPI on behalf of the employees of the Harbour Breton fish plant represented pay in lieu of the twelve (12) weeks notice FPI had failed to provide to its workers at the fish plant in Harbour Breton.

60. The criteria for qualification was established by the Local Union Committee and approved by the Respondent and by Government. To her knowledge the criteria used by the Local Union Committee consisted of, but was not limited to, the following considerations:

(a) whether an individual worked in 2004. In the case of casual employees they had to be regular casual employees who received sufficient hours of work to qualify for EI;

(b) whether an individual was in good standing with the Respondent, including having their union dues paid up to date;

(c) whether an individual was on maternity leave;

(d) whether an individual was in receipt of CPP Disability Benefits and, if so, whether they were expected to return to their employment;

(e) whether an employee was in receipt of WHSCC Benefits and, if so, whether they were expected to return to employment;

(f) whether an individual was on a leave of absence and, if so, whether the leave of absence had been approved by the Respondent and/or FPI.

61. The initial list of employees considered by the Local Union Committee was provided to them by FPI. The Local Union Committee met on several occasions to review and to revise the lists in an effort to determine which individuals met the criteria that had been established. Ms. Pearce advised that the Local Union Committee had to satisfy itself that the information that it received from FPI on each employee was accurate. She met personally with Mr. Wesley Morris, the personnel manager for FPI at the Harbour Breton fish plant. She also met personally with Marguerite Delaney, the office manager for FPI at the Harbour Breton fish plant.

62. The Local Union Committee obtained information from the employee files maintained by FPI through Mr. Morris and/or Ms. Delaney but they were not permitted to view the personnel files. Information obtained by the Local Union Committee in this manner included, but was not limited to, the number of hours worked by an employee in 2004, the reasons for which an employee was on a leave of absence from his or her employment and whether an employee was on permanent or short term disability. To the best of her knowledge no employee was on maternity leave during the relevant period. Unpaid union dues would not, in and of themselves, result in the employee being found to be ineligible to receive a share of the available funds. They also received payroll printouts to confirm the hours worked by casual employees as they required 420 hours to qualify for receipt of EI.

63. With respect to specific information considered by the Local Union Committee in relation to the Complainants, Ms. Pearce testified that:

(a) Mr. Griffin

(i) Mr. Morris advised that Mr. Griffin had not worked in 2004 and was not able to work;

(ii) Mr. Griffin spoke with her by telephone and did not advise her that he was available to return to work. He inquired why he was not entitled to receive a portion of the available funds and she advised him that he was in receipt of CPP Benefits and was not cleared to return to work;

(iii) He had not worked in 2004; and

(iv) His union dues were in arrears.

(b) Mr. Skinner

(i) Mr. Morris advised that there was a letter in his personnel file stating that Mr. Skinner was in receipt of long term disability (confirmed in this hearing to be CPP Disability Benefits) and was not able to return to work.

(ii) Mrs. Skinner telephoned and advised that she was calling on behalf of her husband who could not speak and she was advised by Ms. Pearce that Mr. Skinner did not meet the eligibility criteria as he was in receipt of CPP Disability Benefits and was not able to return to his employment, his union dues were in arrears and he did not work in 2004;

(iii) She subsequently spoke with Mrs. Skinner on several other occasions about Mr. Skinner's eligibility;

(iv) Ms. Pearce spoke with Mr. Ronald Murphy by telephone who advised her that Mrs. Skinner had spoken with Government officials about the issue of her husband's entitlement to share in the fund and Ms. Pearce advised him what she had said to Mrs. Skinner to which Mr. Murphy replied "very good, Gloria."

64. Ms. Pearce indicated that the Local Union Committee also spoke with Mr. Greg Pretty about certain individuals. Neither the Respondent nor Government had a final say as to who was eligible to receive a share of the funds. She was not certain who received a share of the funds through the two (2) available options which she understood to be:

<u>Option 1</u>

Individuals whose EI benefits had not expired and were employed on a make work project on October 24, 2006 received $5,000.00;

<u>Option 2</u>

Individuals who were not employed on a make work project would be provided with work on a make work project at the rate of $14.50 per hour and would receive sufficient hours to qualify for receipt of EI benefits.

Greg Pretty

65. Mr. Pretty testified that he had been a member of the Respondent for twenty nine (29) years and had been the Industrial Director for the past five (5) years. He advised that the Respondent had approximately five hundred (500) full time members and three hundred (300) seasonal members. The FPI fish plant in Harbour Breton had processed Russian Cod for a period of forty (40) years prior to its closure.

66. Mr. Pretty stated that in April 2004 the employees of the Harbour Breton fish plant received their normal "lay off" from their employment with FPI. On December 01, 2004, FPI notified the Government that it was closing its Harbour Breton fish plant effective February 28, 2005 because of the high costs of Russian cod and of maintaining the equipment in the fish plant.

67. On March 31, 2005 pursuant to the LSA, the Respondent filed a complaint against FPI with the LRB alleging that FPI had violated certain provisions of the LSA. In 2005 the Respondent negotiated an agreement with FPI intended to resolve the Respondent's complaint to the LRB. Pursuant to the terms of this agreement FPI was, among other things, required to pay $1,500,000.00 to the Government on behalf of the unionized workers at its Harbour Breton fish plant. This payment was made to Government on December 01, 2005.

68. Mr. Pretty believes that had the LRB ruled on the Respondent's complaint its ruling would have affected only regular workers at the Harbour Breton fish plant. As such the Respondent was required to look at its Collective Agreement with FPI and to consider such issues as due diligence, duty to accommodate and human rights prior to establishing the criteria upon which they relied to disperse these funds.

69. Mr. Pretty stated that approximately 1800 people resided in Harbour Breton at the time of FPI's announcement of the closure of its fish plant operations. As many people in the community were employed with FPI, the Government wanted to initiate some short term income support programs to assist the workers. An Industrial Adjustment

Committee ("IAS Committee") was formed consisting of representatives from the Respondent, the Departments of Labour, Municipal Affairs and Fisheries, the Atlantic Canada Opportunities Agency ("ACOA") and representatives of the local union. This Committee was chaired by Dave Vardy of the Harris Centre.

70. Mr. Pretty stated that he provided guidance and instruction to the IAS Committee with respect to what would have happened had the Respondent's complaint proceeded to the LRB and who was entitled to receive a share of the moneys generated from the complaint. From his perspective the moneys were paid to the Government by FPI as a result of FPI's failure to provide sufficient notice of its intention to close its Harbour Breton operations. The Collective Agreement which governs the relationship between the members of the Respondent and FPI does not provide for the payment of severance pay on the termination of the employer-employee relationship. As such he believed that in order to qualify for a share of the available funds there had to have been an employer-employee relationship in existence between the worker and FPI at the time of the plant closure.

71. Mr. Pretty stated that he instructed the Local Union Committee to secure a list of the employees of FPI at the fish plant in Harbour Breton and determine their employment status. He testified that Ms. Skinner was incorrect in her testimony when she suggested that the criteria used to determine and employee's entitlement to share in the available funds was provided to the Local Union Committee by Government. He advised that the criteria were developed by the Respondent and the Local Union Committee having regard to the terms of the Collective Agreement.

72. Mr. Pretty testified that the Complainants names were never on the list prepared by the Respondent and submitted to Government. Before a decision was made by the Local Union Committee to strike the Complainants names from the list it provided to Government the Local Union Committee spoke personally with representatives of FPI to determine whether either or both of the Complainants were on an approved leave of absence. Specifically, Mr. Pretty stated that he was aware that there could be serious

implications if they did not properly apply the criteria for entitlement that the Local Union Committee had established. Mr. Pretty stated that he had been advised that both Complainants were in receipt of CPP Disability Benefits and were totally disabled from gainful employment. Neither of the Complainants had sought or received an approved leave of absence.

73. Mr. Pretty determined that neither of the Complainants worked in the Harbor Breton fish plant in 2004, were due to be recalled to work when the fish plant was supposed to re-open or were on approved leaves of absence. As far as he was concerned Mr. Griffin and Mr. Skinner were no longer a part of the Harbour Breton fish plant workforce and were therefore no different than former employees who had left the Province to find work elsewhere. Mr. Pretty stated that in the case of the Complainants there was a "disconnect" in the employer-employee relationship. The Respondent has a right to determine who is included on a seniority list and who is a union member. Mr. Griffin and Mr. Skinner had severed their employment relationship with FPI.

74. Mr. Pretty testified that he did not personally speak with Mr. Griffin, Mr. Skinner or Mr. Skinner's wife. He denied that he had spoken with Mrs. Skinner about the seniority list or that he had ever advised her to speak with Ben Baker.

75. Mr. Pretty further testified that the responsibility of the Respondent was to obtain interim financial support for its members who were without income as a result of the fish plant closure. Both Mr. Griffin and Mr. Skinner were receiving CPP Disability Benefits and had a guaranteed income. This was a factor that he personally considered. The Respondent has a duty to represent all of its members and eight (8) field workers are available to assist members with, amongst other things, applications for CPP Disability Benefits.

76. With respect to the subsequent inclusion of some casual employees on the list, Mr. Pretty stated that the Local Union Committee distinguished between employees who

were classified as casual but had a regular shift schedule and those who were “called in” when additional work was available.

77. Mr. Pretty testified that unpaid membership dues arising from an absence from employment are generally collected when the unionized employee returns to his or her employment and in rare incidents, these arrears are written off by the Respondent.

78. Mr. Pretty stated that he advised the Local Union Committee on such issues as:

1. approved leaves of absence wherein an employee was permitted to be absent from employment to, among other things, upgrade his or her skills, to pursue educational opportunities, to run for public office, to care for a dependent (compassionate leave), and to perform work for the union and illness. These leaves of absence were requested from and accepted as reasonable by FPI;
2. maternity leave which constituted an exemption to “lay off” under the LSA;
3. WHSCC where the injury is deemed to be of a short term nature.

79. Mr. Pretty testified that he spoke with Sadie Popovitch of FPI and based upon this discussion determined that there were no employees of FPI on an approved leave of absence at the time of the closure of its Harbour Breton fish plant. He further stated that non-payment of union dues was not really an issue in the determination of entitlement to receive a share of the available funds. He acknowledged that it was not typical for members who were off work because of illness to apply for a leave of absence.

80. Mr. Pretty stated that it was determined that the displaced workers of the FPI fish plant in Harbour Breton would be provided with two (2) options by which to receive a share of the fund created by monetary contributions from FPI and the Government. The first option was to work on a Community Enhancement Program at the rate of $14.50 per hour. This short term employment would provide sufficient hours for the worker to then qualify for EI benefits. The second option was to receive a $5,000.00 lump sum payment. Individuals who were working on October 24, 2006 had no option but to elect to receive the $5,000.00 lump sum payment.

81. There is presently $58,560.00 left in the fund which the Respondent intends to distribute amongst the eligible former employees of the FPI fish plant in Harbour Breton.

Ben Baker

82. Mr. Baker testified that he had been an employee of the Respondent for twenty three (23) years. At the time of the closure of the Harbour Breton fish plant he was a SAB representative and a negotiator. Shortly after the plant closure he attended the membership meeting and the day of mourning in Harbour Breton with Earle McCurdy.

83. At the time of the closure he was not responsible for the Harbour Breton fish plant. He never spoke with the Complainants or with Mr. Skinner's wife. He denied that he had ever made representations to anyone that the seniority list at the Harbour Breton fish plant would be relevant to which employees were entitled to share in the fund established by FPI and the Government. He stated that he had no idea who was on the seniority list at the Harbour Breton fish plant. To the best of his knowledge, Greg Pretty dealt with the criteria for receipt of payment by employees from this fund and Eric Day was the Chairperson of the Local Union Committee.

84. Mr. Baker testified that since Cook's Aquaculture took over operations at the Harbour Breton fish plant he has been responsible for union negotiations affecting that fish plant. He stated that he did not know Ronald Murphy and had no dealings with him or any other Government representative with respect to the Harbour Breton fish plant while it was operated by FPI.

85. In general, Mr. Baker stated that the seniority lists in the plants are prepared by the employer and posted in the fish plant. To his knowledge there is no consistency in when the list is updated by the employer. He stated that the Respondent does not have much say in the seniority lists other than ensuring that the terms of the Collective Agreement are complied with. An employee can be removed from the seniority list for,

amongst other things, stealing and being absent from employment without leave. To secure an approved leave of absence both the Respondent and the employer must agree.

ARGUMENT

On behalf of the Complainants

86. The Commission argued that the burden of proof on the Complainants is to establish a *prima facie* case of discrimination by the Respondent against the Complainants on the *balance of probabilities.* Should the Complainants be able to meet this burden then the Commission argues that the burden of proof then shifts to the Respondent to satisfy this Board that its actions were reasonable in all of the circumstances and thus do not constitute discrimination against the Complainants.

87. The Commission relies upon the decision of the Supreme Court of Canada in ***Ontario Human Rights Commission and O'Malley*** v. ***Simpsons-Sears Limited,*** (1985), 7 C.H.R.R.D/3102 which was an appeal of a decision originating from the Ontario Human Rights Commission Board of Inquiry at (1980), 2 C.H.R.R. D/267. In particular, the Commission refers to paragraph 24782 of the Supreme Court of Canada decision as a correct statement of the law as to the burden of proof in matters of this nature. Justice McIntyre, writing for the Court states:

> *..I agree then with the board of inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under the* ***Etobicoke*** [Ontario Human Rights Commission et al v Borough of Etobicoke [1982] 1 S.C.R. 202, (1982) 3 C.H.R.R. D/781] *rule as to burden of proof, the showing of a prima facie case of discrimination, I see no reason why it should not apply in all cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer...once the prima facie proof of a discriminatory effect is made it will remain for the employer to show undue hardship if required to take more steps for its accommodation than he has done.*

88. The Commission submits the Supreme Court of Canada decision in ***British Columbia*** (***Public Service Employee Relations Commission)*** v. ***B.C.G.E.U***, (1999) 35 C.H.R.R. D/257 supports its proposition that the Commission is required to establish its claim against the Respondent on the balance of probabilities.

89. The Complainants must establish that they suffer from a disability. In our present circumstance the Respondent has not denied that both of the Complainants suffer from a physical and/or mental disability as defined in section 9 of the ***Human Rights Code***, RSNL 1990, c. H-14, as amended.

90. The Commission argues that this Board must find that:

1. the Complainants suffer from a disability;
2. the Complainants were treated unjustly because of their disability; and
3. based upon the evidence presented it is reasonable to infer that the Complainants disability was a factor in the alleged discrimination.

91. The removal of the Complainants names from the list of employees eligible to share in the fund established by FPI and the Government and their inability to receive the lump sum payment of $5,000.00 constitutes adverse treatment of the Complainants by the Respondent.

92. The Board need not find that the Complainants disability was the only or primary factor in their adverse treatment by the Respondent but rather that their disability was one of the factors considered by the Respondent. The Commission alleges that once the Complainants establish that their disability was a factor considered by the Respondent in removing them from the list the onus shifts to the Respondent to establish to the satisfaction of the Board that:

1. the acts complained off did not happen;
2. there was no discrimination in the treatment of the Complainants by the Respondent; and
3. the factor is a bona fides requirement of the Complainants employment.

93. The Commission argues that contrary to Mr. Pretty's suggestion that the Respondent was required to establish criteria to determine who was entitled to receive a share of the fund and that the criteria used was fair and just, the criteria employed by the Respondent in making its decision as to the entitlement to share in the fund was arbitrary and was not applied consistently to all employees. The Commission alleges that the original list supplied to the Government by FPI was the correct seniority list and it was the list used by FPI at the time of the fish plant closure. Therefore, it ought not to have been altered by the Respondent.

94. The Commission alleges that the evidence of the members of the Local Union Committee and of Mr. Pretty is contradictory. It is alleged that each of these witnesses had a different perspective on the relevance of the various criteria used in creating the list. Specifically, Mr. Day alleged that those employees who worked in 2004 were eligible. He then later stated that those employees who were on approved leaves of absences and were regular as opposed to irregular casual workers were also eligible. Mr. Day did not reference WHSCC nor did he state that the non-payment of union dues were factors considered by Local Union Committee.

95. Ms. Skinner testified that she believed that the criteria used by the Local Union Committee in creating its list of eligible employees was provided to them by Government and included as consideration for the Committee whether an employee worked in 2004, was on an approved leave of absence, was on WHSCC benefits, was on maternity leave or was in receipt of CPP Disability Benefits. Specifically, Ms. Skinner stated to Mrs. Griffin that Mr. Griffin did not qualify to receive a portion of the fund as he was in receipt of CPP Disability Benefits, had not worked in 2004 and the two (2) years previous.

96. Ms. Pearce stated that the criteria was established by the Local Union Committee and approved by Government, yet Ronald Murphy testified that Government was not aware of the criteria employed by the Respondent and/or the Local Union Committee in

establishing the list of employees entitled to share in the fund. She understood the criteria to be whether an employee worked in 2004, was on maternity leave, was on WHSCC, was on a leave of absence, was on permanent or long term disability, was expected to return to work and, in the case of a casual employee, the number of hours worked in 2004.

97. Ms. Pearce spoke with Mrs. Skinner and advised her that Mr. Skinner could not receive money from the fund as he did not work in 2004, was on long term disability and was in arrears of payment of his union dues.

98. Mr. Pretty stated that the primary factor was whether an employee worked in 2004 and whether or not there had been a "disconnect" in the employer-employee relationship. He testified that the Complainants were not notified that they were required to pay union dues when they were off work or what consequences might arise if they failed to do so. From his perspective seniority was not a factor nor was the non-payment of union dues.

99. The Complainants were disabled and unable to work at the time of the closure of the fish plant in Harbour Breton. If the FPI seniority list was inaccurate and did not correctly list its employees who were required to be members of the Respondent, then why did Mr. Griffin receive telephone calls from Ms. Drake inquiring as to whether he was able to pursue further educational and/or training opportunities?

100. The Commission alleges that Article 17 of the Collective Agreement addresses the affect that an approved leave of absence may have on seniority but does not address the effect on seniority of an employee who is on long term disability. The Commission alleges that pursuant to the terms of the Collective Agreement the onus is on the Respondent and FPI to mutually agree upon an approved leave of absence and to obtain medical evidence about an employee who is seeking a leave of absence.

101. The Commission alleges that the payment by FPI was, in reality, severance pay and relies upon the decision of the British Columbia Court of Appeal in ***Sandhu*** v. ***International Forest Products Ltd.*** 2008 BCCA 204 [2008] B.C.W.L.D. 4248, 2008 CarswellBC 928 and, in particular, Page14, Paragraph 15 which states:

> *The tribunal member then turned to the law to determine the purpose of severance pay and relied heavily on **O.N.A**. v. **Mount Sinai Hospital** (2004) 69 O.R. (3d) 267 (Ont. Div Ct.) (Ontario Nurses'), a case decided under the **Canadian Charter of Rights and Freedoms**. Based on that decision and other authorities, the tribunal member concluded that, absent a definition of the term in the agreement under consideration, the parties intended "severance pay" to mean "an earned benefit of employment which acknowledged length of service." I do not consider the definition of severance pay to be important because this case is more about reasonable entitlement to such pay than about what it represents. Employees who retire or whose employment is terminated for non-acceptance of absenteeism, absent a contractual or statutory entitlement, do not receive severance pay.*

102. The Commission then refers to the comments of Justice Abella of the Supreme Court of Canada in ***Syndicat des employes de l'Hopital general de Montreal*** c. ***Sexton*** [2007] 1 S.C.R. 161 quoted by the Court at Page 17, Paragraph 25 of its decision and the decision of the Supreme court of Canada in ***Andrews*** *v.* ***Law Society (British Columbia)*** [1989] 1 S.C.R. 143 quoted by the Court at Page 17, paragraph 26 of its decision, both of which address the issue of what is discrimination.

103. The Commission in relying upon these decisions alleges that the Respondent had a duty to accommodate the Complainants and that it failed to do so. Based upon the analysis conducted by the Supreme Court of Canada in ***British Columbia*** (***Public Service Employee Relations Commission)*** v. ***B.C.G.E.U*** the Commission submits that a full review of the actions and rationale of the Respondent in reaching its decision to exclude the Complainants from the list is not required as the Respondent failed to take any steps to accommodate the Complainants. In any event, the Commission submits that the rationale employed by the Respondent to support its decision not to accommodate the Complainants was arbitrary and negatively impacted the Complainants.

104. The Commission requests that the Respondent be ordered to pay each of the Complainants the sum of $5,000.00 and damages for the negative impact the actions of

the Respondent has had on the dignity and feelings of the Complainants in an amount determined by this Board.

On behalf of the Respondent

105. Mr. Griffin had not worked in the FPI fish plant in Harbour Breton since July 2001 and Mr. Skinner had not worked there since July 2002. In fact, in the case of Mr. Skinner he was in receipt of Canada Pension Disability benefits within one (1) month of him leaving his employment at the Harbour Breton fish plant. Neither of the Complainants had returned to work in the fish plant at the time of its closure and there was no evidence to suggest that either of them intended to return to their employment at any time in the future.

106. In December 2004 FPI notified the Government of its intention to close its fish plant operation in Harbour Breton. In March 2005 the Respondent filed a complaint with the LRB pursuant to the LSA. The LRB complaint was withdrawn prior to a hearing and in December 2005, $1,500,000.00 was paid by FPI to the Government.

107. Thereafter the money was dispersed by the Government to employees designated by the Respondent. Both Complainants did not receive a portion of these funds and on June 12, 2006 Mr. Skinner filed a complaint with the Newfoundland and Labrador Human Rights Commission followed on June 14, 2006 by the complaint of Mr. Griffin.

108. The Respondent submits that the complaint by the Complainants alleging discrimination by the Respondent pursuant to Section 6 of the ***Code*** is without merit as Section 6 deals specifically with the right of the public to services including access to accommodations not, for example, the duty of an employer to accommodate an employee. Section 6 is not applicable to our current circumstances.

109. With respect to Section 9 of the ***Code*** the Respondent submits that it is not an employer nor was it acting on behalf of an employer as contemplated in Subsections 9(1) and 9(2). Subsection 9(4) addresses the circumstance wherein an application or advertisement for employment is discriminatory and is not applicable. Subsection 9(5) deals with the situation of retirement and is also not applicable. Subsection 9(6) and 9(7) are similarly not applicable to our fact circumstance.

110. The Respondent is a trade union as contemplated in subsection 9(3) but submits that this subsection deals specifically with the exclusion or expulsion of a person from membership in the union. The allegation is therefore that the Respondent violated subsection 9(3) of the ***Code*** when it removed the Complainants names from the seniority list supplied to the Government by FPI.

111. The Respondent refers to the Collective Agreement which governs its relationship with its members and the relationship of its members with FPI and, in particular:

Clause	
1.03	*The Company shall not make any individual agreement with any member of the bargaining unit directly or indirectly in conflict with the provisions of this Agreement.*
1.04.01	*The terms and conditions of this Agreement shall be binding upon the Company, its officers and employees, upon the Union, its officers and members but shall not include work performed by sub-contracts who provide services of labour under contract with eth Company. However, the Company agrees not to sub-contract or contract out work normally done by employees within the bargaining unit provided there are employees within the bargaining unit with the necessary skills and ability who are available to perform the work.*
2.01	*The Company will give preference of employment to Union members except those who have qui or have been dismissed and employ only Union members when such are available and are capable, in the opinion of management, of doing efficiently the work for which they are hired.*
2.02.01	*It is to be a condition of employment that all prospective employees, not already Union members, sign application forms to join the Union prior to commencement of work with the Company and that the Company upon hiring, shall deduct from the wages of such employees the initiation fee, the Union dues, on a weekly basis, as advised by the Secretary-Treasurer of the Fish, Food and Allied Workers in accordance with their Constitution.*
2.03.01	*the Company shall make it a condition of employment that every member who is now a member or who hereafter becomes a member of the Union shall maintain his membership therein.*
2.03.02	*The Company agrees to deduct from employees who are returning to the bargaining unit as a result of exercising their right under Clause 15.08(d), the*

amount of Union dues required to update their membership as advised by eth Secretary-Treasurer of the Fish, Food and Allied Workers.

15.08 *Employees shall retain and accumulate seniority:*

9(a) *While on lay-off up to twenty-four (24) months;*

(b) *While on sick leave, Workers' Compensation, pregnancy leave;*

(c) *While on leave of absence; or*

(d) *Where a seniority employee is promoted to a permanent vacancy or to a new position outside the Bargaining Unit for a period(s) totaling One (1) calendar year. Time periods shall be cumulative on the basis of appointment by calendar months, not employees' working months.*

15.09 *Employees shall lose all seniority if:*

(a) *Discharged for just cause;*

(b) *Quit;*

(c) *Fail to return to work without just cause following lay-off and after being notified of the availability of work.*

(d) *Pursuant to Clause 17.03.*

The Local Unit will be given notice prior to the removal of employees' names from the seniority list under (c) above.

17.03 *The Company shall grant leave of absence for reasons of bonified illness, industrial accident or disease. The employee's status will be reviewed at the end of the first year and annually thereafter. An employee may only be removed from the seniority list where the parties mutually agree that the employee will be unlikely to return to work. The parties will seek advice of an attending physician in determining the issue.*

112. The Respondent states that subsection 1.03 and 1.04.01 were designed to make it clear to the Respondent, FPI and the union members that the Collective Agreement is binding on them all. Subsection 2.01 and 2.02.01provide for the exclusive employment of union members at the fish plant and the preferential employment of union members for any additional work. Subsection 2.02.01 and 2.03.01 indicate that the fish plant is a "closed shop" and that to be employed at the fish plant you must be a union member and you must maintain your membership status with the union to remain in employment. Subsection 15.08 provides for the retention of membership status in the union and seniority while on lay-off. Subsection 15.09 sets out the basis upon which you might lose membership status and seniority and subsection 17.03 provides, among other things, that if a union member has a significant bona fides illness then he or she shall, upon application be granted a leave of absence from his or her employment.

113. The Respondent submits that one of the key factors for consideration by the Board is the fact that the Complainants failed to apply for a leave of absence in accordance with subsection 17.03 of the Collective Agreement.

114. The Respondent next referred to Article XI, Section 4 at page 37 of the Constitution of the Respondent which states:

> *Section 4*
> *Notwithstanding the provisions of Section 1, 2 and 3 above, in order to maintain membership in good standing all members shall be required to pay the minimum annual dues as per the following:*
> *2004 - $170 annually*
> *2005 - $175 annually*
> *2006 - $180 annually*
> *Thereafter, the minimum annual dues will be adjusted in accordance with changes in the Consumer Price Index for Newfoundland and Labrador.*

115. The Respondent states that the Complainants failure to pay their minimum dues technically removed them from good standing within the Respondent.

116. The Respondent submits that by their own evidence both Mr. Griffin and Mr. Skinner acknowledged that at the time of the closure of the fish plant neither had any intention of returning to their employment.

117. Specifically the evidence of Mr. Griffin was that he had been involved in a motor vehicle accident in 1980 and that in July 2001 he was suffering from depression and arthritis. In his testimony Mr. Griffin stated that "he never thought that he could return to work" and that he had "not paid his union dues." In 2008 he was contacted by Judy Drake who inquired whether he wished to complete training outside the Province. This contact with the Respondent was not initiated by Mr. Griffin. He did not contact Geraldine Skinner when he learned that his name was not on the list of employees entitled to share in the fund. In 2002, when Wesley Morris telephoned him on behalf of FPI to inquire whether he was returning to his employment, Mr. Griffin in his testimony advised Mr. Morris that he was not able to return to his employment.

118. With respect to Mr. Skinner the Respondent submits that Mr. Skinner testified that he never expected to return to work after his third (3rd) stroke. In 2003, Mr. Morris on behalf of FPI telephoned Mrs. Skinner to inquire whether Mr. Skinner would be returning to work and she advised him that he could not go back to work because he was

undergoing therapy in Grand Falls-Windsor. Mrs. Skinner alleged that she had provided FPI with a letter from Mr. Skinner's doctor advising that he was permitted to attempt a return to his employment however the letter can not be located and was not acted upon by either FPI or Mr. Skinner.

119. Mr. Murphy testified that the criteria upon which an employee would be entitled to share in the fund proceeds was developed by the Local Union Committee in consultation with Mr. Pretty. The list of employees that the Respondent provided to Government was in the handwriting of a member of the Local Union Committee, Ms. Pearce.

120. The Respondent submits that whether or not the eligible employees had two (2) options to choose from is irrelevant to the determination of these complaints. Inconsistencies in the evidence of the Local Union Committee members ought not to be taken as demonstrating that the appropriate criteria were not consistently relied upon. Ms. Skinner had just started with the Local Union Committee and had dealt with the issues surrounding the individual employees less than Mr. Day and Ms. Pearce. Ultimately, it was Mr. Pretty who had the final say in who was included or excluded from the list.

121. Mr. Pretty testified that he was cognizant of the various issues surrounding the Complainants. Had they been on an approved leave of absence as provided for in the Collective Agreement, then their names would have been on the final list that was submitted to Government. Based upon the wording of the Collective Agreement the Respondent submits that the onus was on the Complainants to apply for a leave of absence and had they applied they would have received the approval of both the FFAW and FPI.

122. That being said, the Respondent submits that an approved leave of absence is not contemplated to be of indefinite duration. There is an expectation on the part of all Parties to the Collective Agreement that the employee will return to his or her employment. In the case of each of the Complainants the Respondent submits that it was clear that neither

intended to return to their employment. The employment of the Complainants while requiring compliance with the ***Code*** is governed by the Collective Agreement and the Constitution.

123. The Respondent submits that unlike the situation in ***British Columbia*** (***Public Service Employee Relations Commission)*** v. ***B.C.G.E.U*** the Complainants and the Respondent are not in an employer-employee relationship.

124. The provision for accommodation of the Complainants is contained in Section 17 of the Collective Agreement – Leave of Absence – and the Complainants failed to take advantage of this and it is no longer available to them.

125. The Respondent submits that the crutch of the ***Sandhu*** v. ***International Forest Products Ltd.*** supra, is contained at page 19, paragraph 33 which states:

> *The evidence before the tribunal is incapable of supporting the conclusion that the agreement contained anything other than a fair and commercially-sensible distinction between the respondents and the active employees on the basis of availability for work. It was clearly not a distinction based upon physical and mental disability. The respondents did not receive severance pay because they did not become available for work before retirement or before Intefor invoked the absenteeism clause in the collective agreement. They suffered no disadvantage under the agreement between Intefor and the union. The agreement caused no negative impact on the respondents and the distinction was not discriminatory on the proper application of* ***Andrews***.

126. The Respondent submits that the decision to exclude the Complainants from the list was made by Mr. Pretty and it was based upon the Complainants failure to apply for a leave of absence and not upon their disability. The Respondent can not be penalized for the inaction of the Complainants.

127. The Respondent requests that the Complainants be dismissed.

DECISION

128. Before commencing a detailed analysis of the facts and evidence presented to this Board I find that Section 6 of the ***Code*** is not relevant to these complaints. Section 6 is

located under the heading – Right of public to services –and is intended to address a person's right to access accommodations, services and facilities that are customarily accessible by the public. As such, the only section of the ***Code*** that will be addressed is Section 9 – Discrimination in employment – and, in particular, subsection 9(3).

129. Specifically, I accept that the Respondent is not an employer of the Complainants but rather is a trade union tasked with representing its members and in our circumstance, establishing the criteria upon which moneys set aside for the benefit of displaced employees of the FPI fish plant in Harbour Breton is to be distributed by Government.

130. During the preliminary stages of this hearing it was evident that the phrases "long term disability" ("LTD") and "short term disability" ("STD") which were being employed by the Parties were actually references to CPP Disability Benefits. The Complainants, Counsel for the Commission and Counsel for the Respondent all acknowledged this to be correct. Neither of the Complainants received STD or LTD benefits arising from a group insurance policy through their employment with FPI Limited or through a private disability plan. Other than the EI sick leave payments received by Mr. Skinner, both Complainants have received only CPP Disability Benefits.

131. With respect to disability benefits the ***Canada Pension Plan***, R.S., 1985, c. C-8, s. 42; R.S., 1985, c. 30 (2nd Supp.), s. 12; 1992, c. 1, s. 23; 1996, c. 11, s. 95; 1997, c. 40, s. 68; 2000, c. 12, s. 44; 2005, c. 35, s. 67., states:

> (2) For the purposes of this Act,
>
> (*a*) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
>
> (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
>
> (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and
>
> (*b*) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in the prescribed manner to be the time when the

> person became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

132. It is therefore accepted by all Parties that on the date when FPI notified the Government of its intention to close the FPI fish plant in Harbour Breton and also on the effective date of the closure of the fish plant by FPI, both of the Complainants had met the requirements of the legislation as set forth above and were in receipt of CPP Disability Benefits. Their illnesses were accepted to be both "*severe"* and "*prolonged."*

133. I have reviewed the decision of the British Columbia Supreme Court in ***Sandhu v. International Forest Products Ltd.*** supra, and I am unable to conclude that the funds which form the subject matter of these complaints represent a severance package based upon the following:

(a) The Collective Agreement between FPI and the Respondent (Consent Exhibit #7) governs the contractual relationship between the union members and their employer, FPI. The Collective Agreement makes no reference to severance being a contractual entitlement or obligation;

(b) The Complaint filed with the LRB by the Respondent was made pursuant to Part X – Notice of Intention to Terminate - Sections 52, 55, 57(3)(b) of ***The Labour Standards Act,*** RSNL 1990, c.L-2, as amended (Consent #8) which states:

> **No termination without notice**
>
> **52.** (1) An employer or employee shall not terminate a contract of service unless written notice of termination is given by or on behalf of the employer or employee within the period required by section 55.
>
> (2) An employer shall not temporarily lay off an employee unless written notice of the temporary lay-off is given by or on behalf of the employer to the employee within the period required by section 55.
>
> (3) [Rep. by 2001 c33 s24]
>
> 1977 c52 s48; 1984 c29 s2; 1992 c17 s15; 2001 c33 s24

Period of notice

55. (1) The period of notice required to be given by the employer and employee under section 52 is

(a) one week, where the employee has been continuously employed by the employer for a period of 3 months or more but less than 2 years;

(b) 2 weeks, where the employee has been continuously employed by the employer for a period of 2 years or more but less than 5 years;

(c) 3 weeks, where the employee has been continuously employed by the employer for a period of 5 years or more but less than 10 years;

(d) 4 weeks, where the employee has been continuously employed by the employer for a period of 10 years or more but less than 15 years; and

(e) 6 weeks, where the employee has been continuously employed by the employer for a period of 15 years or more.

(2) For the purpose of subsection (1) "continuously employed" includes the employment of seasonal workers who are engaged under a contract of service of 2 or more consecutive seasons of at least 5 months in each season during which the employee is occupationally engaged.

2001 c33 s27

Provisions relating to redundancy

57. (1) Without limiting the provisions respecting notice of termination required to be given under this Part by an employer to each employee, where an employer intends to terminate the contracts of service of 50 or more employees within a 4 week period, the employer shall, in accordance with subsection (3), give to each employee written notice of intention to terminate the contract of service.

(2) The employer shall,

(a) for the duration of the notice period set out in subsection (3), continue to employ the employees on whom notice of intention to terminate has been served under subsection (1); or

(b) pay the employee wages equal to the normal wages covering the period of notice that the employer would otherwise be required to give under this section.

(3) The period of notice of intention to terminate the contracts of service required by subsection (1) is as follows:

(a) 8 weeks' notice of the intention when the employer intends to terminate the contracts of service of 50 or more but fewer than 200 employees;

(b) 12 weeks' notice of the intention when the employer intends to terminate the contracts of service of 200 or more employees but fewer than 500 employees; and

(c) 16 weeks' notice of the intention when the employer intends to terminate the contracts of service of 500 or more employees.

(4) Where notices of intention to terminate contracts of service are given by an employer under this section, the employer shall, immediately after the notices are given, notify the minister in writing of the number of persons to whom the notice is given and the period of notice, and shall provide the minister with the reasons for the giving of the notices.

(5) Nothing in this section prevents an employee from giving an employer notice of termination of employment under this Part.

(6) Where an employer fails to give the notices of intention to terminate the contracts of service of employees required by this section, or fails to notify the minister in accordance with subsection (4), notice of termination of employment of 50 or more employees of the employer within a 4 week period shall not be given to those employees by the employer and no action by the employer shall be taken to terminate the services of those employees.

(7) This section does not apply in respect of employees whose contracts of service have existed for less than 1 month.

1977 c52 s53; 2001 c33 s28

(c) The Complaint made by the Respondent to the LRB was not settled but withdrawn as a result of a negotiated settlement reached between the Provincial Government and FPI which was acceptable to the Respondent.

(d) Correspondence dated December 23, 2005 from Mr. Don Osmond, Deputy Minister of the Department of Municipal Affairs for the Government of Newfoundland and Labrador, to Mr. Jack Lee, Assistant Director of Collections for the Canada Revenue Agency, Mr. Wayne McCarthy, Regional Manager of Employment Insurance, and Mr. Mike Alexander, Acting Regional Executive Head of Human Resources and Skills Development Canada, in discussing the proposal for distribution of the funds paid by FPI Limited to the Government (RM#1) states, in part:

> …We have never considered our planned intervention as being in any way severance pay related and therefore did not feel it necessary to seek such a ruling. However, now that the issue has been formally raised, we are seeking your support in securing an advance ruling on the insurability and tax implications of the proposed program response…
>
> …FPI has consistently contended that there has never been any liability for severance pay to its former workers…Subsequent to the closure of the FPI plant in Harbour Breton, the company sought the support of the Province to amend the *FPI Act* to allow the company to pursue further business interests through the use of an Income Trust instrument. This request for a legislative amendment prompted the provincial government to enter into negotiations with FPI. As a consequence of theses negotiations, the Province secured, among other things, access to some fish quota, the physical plant and equipment, as well as a commitment of $1.5M from FPI for the benefit of the workers of the Town of Harbour Breton affected by the closure of the FPI plant. While the funding is for the benefit of those impacted by the closure of the plant, it is otherwise unconditional and could be used for any number of purposes, including such things as the purchase of quota, investment in industry, economic development opportunities, or infrastructure development etc, etc.
>
> The provincial government is now in receipt of the monies from FPI and wishes to utilize that money in conjunction with a further provincial funding commitment of $1.25M to fund a series of economic development and municipal infrastructure maintenance initiatives for the benefit of those workers of the Town of Harbour Breton who have been negatively impacted by the closure of that plant…
>
> …Again, we do not consider this to be severance as there has never been an established liability for severance and there are no such conditions attached to any of the funding….

134. While the Respondent has periodically referred to the $1,500,000.00 paid by FPI to the Government as payment in lieu of notice, based upon the evidence, including Government's position as stated in the correspondence of Mr. Osmond referenced above, it would appear to me and I find that the payment of $1,500,000.00 to Government by FPI was not payment in lieu of notice but a condition precedent to Government amending the ***FPI Act*** to allow FPI to pursue further business interests through the use of its Income Trust.

135. I interpret Section 57(3) of the ***LSA*** to require the employer to either continue to pay the employee as he or she works their notice period or to pay to each employee an amount equivalent to the wages the employee would have earned during the relevant notice period. There is no evidence before me to indicate the method of calculation used by Government or FPI to arrive at the sum of $1,500,000.00. Furthermore, the moneys

provided by FPI to Government were supplemented by a further sum of $1,250,000.00 from Government and these combined funds financed the two (2) options that were made available to those workers whose names were included on the final list provided to Government by the Respondent.

136. Given that I have concluded that the funds which financed the two (2) options that provided financial assistance to displaced workers of the FPI Limited fish plant in Harbour Breton were not severance benefits that were payable to its employees as a result of a contractual obligation or as a result of their seniority with FPI Limited and further were not pay in lieu of notice which would be directly quantifiable in the hands of each worker, the basis of these complaints is not so much the characterization of the moneys paid to the workers whose names appeared on the final list but whether the Complainants names ought to have been included on the final list.

137. Both of the Complainants were frank and forthright in their evidence. While Mr. Skinner indicated that he had returned to his employment at the fish plant subsequent to his two (2) previous strokes and that he had initially hoped that he would return after his third (3rd) stroke he acknowledged that he was afraid to return to his employment, that he did not expect that he would ever return to his employment and that in August 2004 his treating physician advised him that he would not be able to return to work. Mr. Griffin initially stated that it was possible that he might return to his employment but on cross examination acknowledged that he did not believe that he would return to his employment given the multitude of his symptoms. Both seemed reluctant to attempt a return to work and were cognizant of the fact that a return to work would eventually affect their ability to continue to receive CPP disability benefits.

138. Mrs. Skinner acknowledged that Mr. Morris had telephoned to inquire whether Mr. Skinner was able to return to his employment and that she had advised him that Mr. Skinner was continuing with treatments in Grand Falls Windsor. It was assumed by the Respondent and by the Local Union Committee that Mr. Morris took that to mean that Mr. Skinner was not, at that time, able to return to his employment. There was no further evidence of FPI inquiring as to Mr. Skinner’s ability to return to his employment. Ms.

Pearce testified that she was, on inquiry, advised by Mr. Morris that Mr. Skinner was in receipt of CCP Benefits and that there was a letter in his personnel file stating that he was unable to return to his employment. It is apparent that the Local Union Committee relied upon information received by it from FPI in its determination as to whether the Complainants and, in this instance, Mr. Skinner, was able to return to his employment.

139. Mr. Skinner did not contact FPI to advise that he was ready to return to his employment or to inquire when he might be able to return to his employment.

140. Pursuant to a request by or on behalf of Mr. Griffin, on April 08, 2002 FPI confirmed in writing that Mr. Griffin had been offered additional work in each of the years 1999, 2000 and 2001 that he had been unable to avail of because of illness. Furthermore, FPI confirmed that as of April 08, 2002 Mr. Griffin had not worked since July 28, 2001 because of his disability (RG#1). It is apparent that the reason why Mr. Griffin was not able to work had been communicated to FPI and one would assume based upon Mr. Griffin's evidence as to the date upon which he received his CCP disability benefits that he had relied upon the information provided by FPI to support his application for entitlement to receive CCP Disability Benefits.

141. Although Mr. Griffin was contacted by Judy Drake subsequent to the closure of the FPI fish plant in Harbour Breton to inquire whether he was able to attend a re-training program there was no evidence as to whether Ms. Drake was telephoning on behalf of the Respondent or if she was a representative of the Respondent. I assume for the purposes of this matter that she was. Mr. Griffin suggested that this was evidence that he was still on the membership list of the Respondent. On each of these occasions Mr. Griffin advised Ms. Drake that he was not able to re-train because he was disabled.

142. The Respondent relies upon the provisions of the Collective Agreement (Consent #7) and in particular, clauses 15(08), 15(09) and 17(03). Pursuant to these provisions the Respondent alleges that the Complainants ought to have been excluded from the list of workers entitled to take advantage of the two (2) options funded by moneys from Government and FPI because they failed to:

(a) return to their employment without just cause upon being contacted by Mr. Morris at the time when all employees regularly returned to work after their seasonal lay off contrary to clause 15.09(c),

(b) apply for a leave of absence arising from their illness and/or disability contrary to clause 17.03; and

(c) maintain their status as members in good standing of the Respondent when they failed to pay their union dues contrary to Article XI, Section 4 of the Constitution.

143. The evidence discloses that the Respondent did not notify the Complainants that their failure to return to their employment when telephoned by Mr. Morris might result in them being removed from the seniority list at the FPI fish plant in Harbour Breton. Mr. Morris on behalf of FPI did, however, advise the Complainants of this potential consequence. The evidence further discloses that the Respondent did not advise the Complainants that they were required to apply for a leave of absence and further that it was not the practice of the Respondent to notify its members of their contractual obligation pursuant to clause 17.03. Finally, the evidence discloses that typically when a union member is in arrears in the payment of their membership dues the dues are collected upon their return to employment or, at the discretion of the Respondent, waived if the collection of the arrears is likely to lead to financial hardship.

144. Before considering the question whether the Respondent is entitled to rely upon these factors to justify its decision to remove the Complainants from the final list of workers entitled to receive money upon the closure of the FPI fish plant and the second question which arises, whether or not the Respondent is entitled to rely on these factors to justify its actions, was the reason for the Complainants removal from the final list a result of their disability, we first need to determine whether or not there was, in fact, a continued employment arrangement between the Complainants and FPI. Simply put, did the Complainants sever their employment relationship with FPI prior to FPI notifying the Government of its intention to close the Harbour Breton fish plant.

145. In ***Canadian Employment Law,*** Volume 2, July 2008 by Stacey Reginald Ball, a publication of Canada Law Book Inc. the author writes at page 6-16, paragraph 6:65, relying upon such cases as ***Hildebrandt v. Wakaw Lake Regional Park Authority*** (1999), 41 C.C.E.L. (2d) 281, et al, that *seasonal workers who have been rehired on an annual basis and who had a reasonable expectation of annual rehire have been found to be indefinite term employees.* On this basis the Complainants were indefinite term employees of FPI. This is a status which is distinct from their characterization as members of the Respondent. As the Respondent has pointed out it is not the employer of the Complainants but rather the trade union that represents their interests in, among other things, negotiating a contract of employment between the employer and the employee. As part of its representation of employees it has been accepted by both the employees and the employer that the employees are required to be members of the Respondent in order to work with the employer, in this case, FPI.

146. In ***Marshall v. Harland & Wolff Ltd.*** [1972] 2 All E.R. 715 (C.A.), the Court relied upon a five (5) fold test to determine whether a contract of employment was frustrated by virtue of the illness and/or disability of an employee. At page 104, Paragraph G the Court states that:

> *For our part, we do not see how a court or tribunal can decide whether a dismissal is wholly or mainly on account of redundancy without, in an appropriate case, first considering whether there was a dismissal at all or whether in truth the relationship of employer and employee had been dissolved by operation of the law at an earlier point of time.*

147. At page 105, Paragraphs A through and including H, the Court sets forth the considerations that it believes must be considered by any tribunal when determining whether a contract of employment has been frustrated and states, in part, that:

> *The Tribunal must ask itself: "was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment? In considering the answer to this question, the tribunal should take account of:*
>
> *(a) The terms of the contract, including the provisions as to sickness pay;*
>
> *(b) How long the employment was likely to last in the absence of sickness;*

(c) The nature of the employment;

(d) The nature of the illness or injury and how long it has already continued and the prospects for recovery;

(e) The period of past employment; and

(f) Any other factors which bear upon this issue must also be considered.

148. In considering the factors set forth by the Court in ***Marshall*** *supra* I find that the relationship between the Complainants and FPI was governed by a Collective Agreement whose term was stated to be from and including January 01, 2003 to and including March 31, 2005. As was standard practice prior to the expiration of the Collective Agreement the Respondent would enter into negotiations with FPI intended to formulate a further contract which would govern its relationship with its employees who would, by virtue of the Collective Agreement be members of the Respondent. This Collective Agreement would have followed in the same manner as previous Collective Agreements however and unfortunately FPI ceased its operations at the fish plant in Harbour Breton prior to the expiration of the Collective Agreement. The Collective Agreement and the employment relationship between the Complainants and FPI, as adduced from the evidence, disclose that:

(a) there was no provision for paid sick leave;

(b) an employee would lose seniority if he or she failed to report to work without just cause;

(c) an employee had the right to apply for a leave of absence in the case of sickness or disability in order for them to preserve their seniority;

(d) in the absence of illness or dismissal for just cause the employee could continue to work in his or her job until such time as he or she willingly terminated their relationship or the operation ceased;

(e) the employer would attempt to accommodate an employee who by virtue of disability was unable to continue in his or her own job;

(f) the employment was regular seasonal employment and a casual employee could be called into work to replace a regular employee who was absent or to fill a job for which a regular employee was unavailable;

(g) the Complainants had not returned to their employment duties or any other employment subsequent to the dates upon which their disability began and based upon their own evidence were unlikely to return to their employment duties had FPI not ceased operations;

(h) the Complainants had been employed and accumulated seniority, in the case of Mr. Griffin from September 03, 1981 to July 28, 2001 and in the case of Mr. Skinner from March 23, 1987 to July 2002; and

(i) the Complainants suffered from a *"severe"* and *"prolonged"* disability and as such were unlikely to be available to purpose substantially gainful employment in the foreseeable future.

149. Although FPI and the Respondent had the right to update their seniority lists on a regular basis they failed to do so. While the Collective Agreement permitted FPI to cease the accumulation of seniority by employees who failed to return to work without just cause, in the case of the Complainants they appear not to have taken any initiative to remove the Complainants from the seniority list. While the Complainants had the right to make application for a leave of absence which in their circumstances would likely have been granted they failed to do so and further it is apparent from the evidence that they were not advised of this contractual right by their union representatives, the Respondent. While the Respondent was able to remove its employees from membership in the union by virtue of the non-payment of union dues thereby resulting in these individuals being unable to work in a "closed shop", the evidence suggests that this did not occur unless there were exceptional circumstances. They did not do so in the case of the Complainants.

150. It is clear from the evidence of the Complainants that they did not believe that they would be capable of returning to their employment at any time in the foreseeable

future. Based upon the medical evidence submitted by them to CPP and by their receipt of CPP Disability Benefits it must be accepted that an independent determination has been made that each of the Complainants suffers from a *"severe"* and *"prolonged"* disability that has rendered them incapable of pursuing any type of gainful occupation in the foreseeable future. At the time of this hearing both Complainants remained in receipt of CPP Disability Benefits.

151. Had FPI not closed its fish plant operations in Harbour Breton, the Complainants would not have expected to receive any disability benefits from their employment with FPI or any other compensation for their years of employment with FPI. Having regard to the decision of the Court in ***Sandhu v. International Forest Products Ltd.,*** supra, the Complainants *"did not become available for work"* prior to the closure of the FPI fish plant in Harbour Breton. Further, relying on ***Marshall v. Harland & Wolff Ltd.,*** supra, the Complainants incapacity, looked at before the removal of their names from the list submitted by the Respondent to Government, was such that *"further performance of his [their] obligations in the future would be impossible or would be a thing radically different from that undertaken by him [them] and agreed to be accepted by the employer under the agreed terms of his [their] contract."*

152. Upon consideration of all of the factors including the acts and/or omissions of the Respondent and FPI, I find that the employment relationship between the Complainants and FPI had terminated prior to the closure of the FPI fish plant in Harbour Breton and that the Complainants were not *"affected by the closure of the FPI plant."* (RM#1). The purpose of the fund was to assist displaced workers of the FPI fish plant in Harbour Breton. The Complainants were not displaced workers. The employment relationship between the Complainants and FPI had ceased prior to FPI notifying Government of its intention to close the fish plant.

153. Based upon the evidence before me I am unable to conclude that the Complainants were excluded from full membership or expelled or suspended or otherwise discriminated against as a result of their disability contrary to subsection 9(3) of the ***Code.***

154. Pursuant to the request of the Respondent I order that the complainants to the Newfoundland and Labrador Human Rights Commission made by each of Terry Skinner and Reginald Griffin on June 12, 2006 and June 14, 2006, respectively, are dismissed.