IN THE MATTER OF a Complaint pursuant to sections 9 and 14 of the *Human Rights Act, 2010*, SNL 2010, c. H-13.1

BETWEEN:		
	EILEEN McBREAIRTY	**COMPLAINANT**
AND:		
	COLLEGE OF THE NORTH ATLANTIC	**RESPONDENT**
AND:		
	NEWFOUNDLAND AND LABRADOR HUMAN RIGHTS COMMISSION	**COMMISSION**

Adjudicator: Kimberley Horwood

Hearing Dates: 23rd – 27th October 2017
26th – 29th March 2018
26th – 28th June 2018
16th – 19th July 2018
7th September 2018

Decision: 11th October 2019

Appearances:

On Behalf of the Complainant:	Thomas J. Johnson, QC
On Behalf of the Respondent:	Greg Anthony
On Behalf of the Commission:	Donna Strong

DECISION OF THE ADJUDICATOR

BACKGROUND

1. A complaint was filed by Eileen McBreairty ["McBreairty"] on the 18th day of February, 2007, pursuant to section 9 of the *Human Rights Act, 2010,* against College of the North Atlantic ["the College"] alleging discrimination on the basis of marital status, and more particularly, that she was denied employment opportunities at the College because she was married to Peter McBreairty.

2. As far back as 1995, McBreairty had an employment relationship with the College. She worked in various temporary roles, some of which were in her chosen area of information technology ["IT"]. In or about 2002, McBreairty began teaching "Programmer Analyst – Business".

3. Shortly thereafter, an effort was underway to recruit for a new venture the College was undertaking, which was to open a campus in Doha, Qatar ["CNA-Q"], commencing in or about July 2002. Emails went around the College advising of this, and inviting applications from interested individuals.

4. McBreairty applied for an inaugural contract at CNA-Q, making her a "Year One Employee". She was successful and obtained a 3-year contract to teach at CNA-Q, which appointment began mid-late July 2002, and was scheduled to terminate on 30th June 2005.

5. The nature of the complaint is that McBreairty alleges that her initial contract with CNA-Q was not renewed in 2005 and that she was subsequently screened out of various job competitions because of the animosity that she alleges existed between the College and her (now former) husband, Peter McBreairty.

6. The College denies that it discriminated against McBreairty based on marital status when it did not offer her a second or any subsequent contract of employment to work at CNA-Q, following the expiry of her contract of employment at CNA-Q.

7. The College asserts that any hiring decisions were merit-based and that any decision not to offer to extend or renew McBreairty's contract of employment at CNA-Q was unrelated to her marital status.

8. As of the date of the hearing, McBreairty was employed with the College in Newfoundland and Labrador, as an Instructor.

ISSUES

9. ISSUE 1: Did the College discriminate against McBreairty based on marital status when it failed to extend or renew her employment contract as Instructor at CNA-Q, upon the expiry of her term in June 2005?

10. ISSUE 2: Did the College discriminate against McBreairty based on marital status regarding any of her applications for the positions of Programmer Analyst – Business Instructor made between 1st March 2005 and 18th February 2007?

11. ISSUE 3: Did the College discriminate against McBreairty based on marital status regarding any of her applications for the positions of Internet Applications Developer made between 1st March 2005 and 18th February 2007?

12. ISSUE 4: Did the College discriminate against McBreairty based on marital status regarding any of her applications for the positions of Program Development Coordinator made between 1st March 2005 and 18th February 2007?

13. ISSUE 5: If discrimination is found, what are the guidelines in establishing an appropriate remedy, in particular as it relates to lost wages?

EVIDENCE AT THE HEARING

Testimony of Eileen McBreairty

14. Eileen McBreairty began her evidence by reviewing her education and work history.

15. At the relevant times, she held a Bachelor of Education (English – High School) from Memorial University (1995), and she had also done a Bachelor of Biblical Studies (1985), which credits she transferred to Memorial University toward its Religious Studies program. She then went on to complete a Graduate Diploma in Programmer Analyst with the College in or about 1998.

16. McBreairty's evidence was that an undergraduate degree was a pre-requisite to the Graduate Diploma Program, upon completion of which, she would be qualified to be a Systems Analyst or a Programmer. She has since acquired other designations and qualifications, but not during the relevant timeframe.

17. Commencing in or about 1995, she held various temporary or relief positions with the College. In or about 2002, she was hired to teach Programmer Analyst – Business.

18. She then became aware that the College was recruiting for the CNA-Q campus. She applied and was successful in acquiring a 3-year contract, commencing in or about July 2002 through the end of June 2005. That made her one of the "Year One Employees", meaning that she was part of the inaugural year of CNA-Q.

19. In a document dated 22nd May 2002, which McBreairty signed on 30th May 2002, McBreairty was offered 3-year contract for the position of "Instructor" CNA-Q (Tab 29 – Consent #2). Attached to the letter were the "Terms and Conditions of Employment – Faculty", wherein "Article 1 – Term" stipulated:

> 1.2 The term of each employee's appointment to CAN – Qatar shall be at least two academic years in duration but shall not to exceed 3 calendar years in duration.
>
> 1.3 Notwithstanding any other term or condition in the Agreement, the term of appointment is renewable provided that the cumulative term of the

appointment does not exceed 3 academic years in duration, inclusive of leave and/or services performed outside of the State of Qatar.

20. It was generally understood that, at least initially, the reason for this was primarily based on Canada Customs and Revenue Agency ("CCRA" as it was then) requirements. McBreairty then referenced an email from Trent Keough, President, CNA-Q, with a subject line including "Notification to Year One Employees ending contracts in 2005", of which McBreairty was one. The email stated:

> Morning,
>
> Along with the ongoing initiative to develop the possibility for an off-shore corporation, also looking to extend opportunities for employment beyond the 3 year tax clemency ruling by CCRA.
>
> CAN is about to submit a rationale and request for the extension of its YEAR ONE employees, who would otherwise finish next year (end dates in 2005) due to retroactive tax implications.
>
> This notice is not a guarantee of employment offer or a notification of extension of employment beyond your existing contracts; however, we would like to know which of you are interested in being included in this request for exemption?
>
> Should you wish the college to consider seeking a tax exemption for the 3 year ruling enabling an additional year's employment please submit your legal name and SIN to my office by the afternoon.
>
> What we will be doing is writing to CCRA through our Tax Consultant asking that the individuals listed in our application be given further exemption for the Academic Year ending August 2006 (or until that year's vacation period in June).
>
> Again, this notice and request for information is not an offer of employment or a notification of extension of contracts.
>
> We are looking to determine who might desire and be eligible for contract extension.
>
> Please send the information in this format:
>
> John P. Gladstone
> 123-234-224
>
> Thanks Trent

21. McBreairty replied, in the requested format, with her information.

22. McBreairty then received a letter dated 2nd December 2004, indicating that "extensions could not be requested for all positions and your name was not put forward to the CRA."

23. On 7th February 2005, McBreairty sent an email to the then President of the College, Pamela Walsh, making a second request for the College to submit her name to CRA for an extension of the tax exemption status. The email response she received from Pamela Walsh, dated 10th February 2005, was that the College would not be submitting additional names to CRA at that time.

24. Soon after that, McBreairty advised that she took a prolonged absence from her position; that she went on sick leave for more than 24 days between February and April 2005. She states she then returned to fulfill the remainder of her contract, though once she returned, someone had been hired to fulfill her teaching duties in the classroom, so she was given another project to take her to the end of her contract in June 2005.

25. There was then some discussion surrounding "hard-to-fill" positions, and whether this was a criterion used in determining which employees might be put forward for CRA exemptions, that is, instructors in hard-to-fill courses were more likely to have their name put forward for consideration for CRA exemptions in order to acquire further employment at CNA-Q.

26. McBreairty then went on to discuss her applications for jobs between 2005 through 2007 and how she felt qualified for those jobs. She did acknowledge that she would not have known who the other applicants were in respect of what her actual chances at acquiring the position(s) would be, considering that, as she said, the College was going to choose the most qualified candidate. She was clear that she felt that her Education degree, together with her teaching experience ought to have fulfilled the job requirements and/or equivalencies. McBreairty did not, at that time, have a Computer Science degree.

27. There was a discussion about whether, at that time, her enrollment in the Masters of Science – Information Systems Program at Athabascan University would qualify as an equivalent for a Computer Science Degree. The screening notes for the job competitions for which she applied but was unsuccessful, noted "3-year contract ended" (2005 applications) and "no Computer Science degree" (2006 and 2007 applications). There was at least one that specified "lack of relevant experience". McBreairty took issue with the screening decisions.

28. There were two positions for which McBreairty applied in 2005, which did not list Computer Science degree as a pre-requisite, and she was screened out of those on the basis of "contract ended", not because she did not have a Computer Science degree.

29. Summaries of the qualifications of the successful candidates in the later job competitions, 2006-2007, where Computer Science degree was stipulated as a pre-requisite, showed that the successful candidates held Computer Science degrees. McBreairty was also not the only candidate screened out on that basis.

30. McBreairty then launched a complaint with the Public Service Commission in respect of the issue of her unsuccessful job applications, and requested an investigation. In a letter from the Public Service Commission dated 26th September 2008, McBreairty was notified that the Public Service Commission completed a review of concerns she raised in relation to the four job competitions she enumerated in her complaint. McBreairty had raised four issues: Issue 1 regarding an extension/renewal of her employment with CNA-Q following the expiry of her contract; and Issues 2-4 regarding subsequent applications for new jobs. The Public Service Commission concluded that, on Issue 1, that while there communications might have been deficient, that the College acted properly; and on Issues 2-4, that the recruitment and selection process utilized by the College was conducted in accordance with merit principles and that her application was treated in a fair manner.

31. McBreairty did not accept this. She then made an Access to Information and Protection of Privacy Act ["ATIPPA"] request for further information regarding this subject. McBreairty received quite a volume of material as a result of her request. It was following a review of certain emails from administrators at the College and/or CNA-Q that she developed a belief that there were other, more nefarious, reasons why they wanted her out of Qatar.

32. In the meantime, there was a discussion of her performance at CNA-Q. She noted that she had a positive performance evaluation conducted by Glenn Thorne, Chair of her department, and that the notable areas for improvement included that the lecturer should always stand and face the class when lecturing; enhance the material in the slides with further examples and detail; and utilizing more opportunities for questions and answers. Conversely, her strengths included that she was very comfortable with the class and natural in the course. Students appeared comfortable with the instructor and the material. The content of the slideshow was good and the students seemed generally engaged with the instructor.

33. In respect of other issues, she noted a verbal reprimand relating to her interaction with another employee, Judy Park, on the day of Peter McBreairty's termination, and also a written letter of discipline for sending a disparaging email to her colleagues back in Corner Brook regarding the College's conduct which followed Peter McBreairty's termination. These events occurred in or about May and June 2003. McBreairty challenged her letter of reprimand, which was ultimately removed from her personnel file.

34. There was another incident in or about April 2005 regarding a grievance McBreairty had with CNA-Q regarding an overpayment of per diems to McBreairty. She explained that it was around the end of March or beginning of April, 2005, and she was returning to Qatar after an extended period of sick leave. While she was out of the country, she ought not to

have been paid her per diem amounts. She recalled that either right before she left Canada or the day she was returning, she received notification from the College by email that she had been overpaid. McBreairty was advised by email on 29th March 2005 that there had been an error and there had been money deposited into her account that shouldn't have been deposited, and that they would be correcting the error and reversing the deposit. Instead of letting that happen, McBreairty withdrew that money from her account on 31st March 2005, in the hope that CNA-Q would not be able to reverse their error. What transpired instead was that she, somehow, went into arrears, which she noticed when she went to the bank machine on about 1st April 2005, upon her arrival in Qatar. She stated that she attempted to get money for a cab to get home, but that she received an "insufficient funds" message. She stated that she never would have imagined, without going through a legal process, that an employer could unilaterally reverse its error. The fact of the matter is that she withdrew funds that she was aware were deposited into her account in error. McBreairty stated that she felt she should have been consulted and that the money should been able to have been repaid by her over time. She insisted that they put the money back into her account and she would repay it over time. She stated that this left her in a very difficult position for a period of time with no money until her next payday, despite that she acknowledged that this was neither money she was expecting, nor was she entitled to it. As her evidence went on, it became clear that once she became aware of the College's error, she made a withdrawal so the College would not be able to reverse their error. She was pressed by Counsel for the College that this was entirely inappropriate action on her part; to take out money that didn't belong to her after she knew of the error. The College's position is that she had no entitlement to that money, so she should not have touched it and certainly should not have been upset that the bank reversed the error. McBreairty disagreed. In the end, McBreairty was successful in getting CNA-Q to re-deposit the amounts she had initially been wrongfully paid, and she was permitted to repay the money to the College over time. The degree to which this issue became exacerbated, and the debate over what was an appropriate way to handle this issue, involved far more people and much more time than any reasonable person would expect.

35. McBreairty was asked about specific examples of the alleged ill-will of the College and/or CNA-Q toward Peter McBreairty which flowed into its dealings with McBreairty. She began by describing that, following his termination, Peter McBreairty had been banned from the CNA-Q campus which presented a problem when he would be dropping McBreairty off for work. She described the physical building where they worked; a large building that housed approximately 300 students, and outside the building was a large parking area, and then outside that was an eight-ten foot concrete wall all the way around. She referred to it as a "compound" and Peter McBreairty was not allowed to go into the compound to drop her off at the door. She had to be dropped off at the security gate outside the compound and walk in. The extremely hot climate made this uncomfortable for McBreairty. Additionally, this was during the Gulf War, and the compound was their meeting place in case of emergency, so it was a problem that Peter McBreairty was

banned from going there. McBreairty ultimately resolved this issue, however, and Peter McBreairty was allowed restricted access going forward.

36. Another example she relied upon was when she took an extended period of sick leave, more than the 24 days of sick leave that was permitted. She was told her excess leave would be without pay, but McBreairty asserted that there were other employees who were entitled to use more paid leave than the 24 days of sick leave allotted. This was between the timeframe of December 2004 and March 2005. The discussion in December 2004 was that McBreairty was looking to have time off to go back to Newfoundland for Peter McBreairty's hearing in January 2005, and she had requested that the College provide her with some legal counsel, which request for the provision of legal counsel was denied.

37. She later took two days from work, on February 9th and 10th, 2005, and then requested an extended period of sick leave to go home to Newfoundland for medical investigations. There was an issue made of whether the investigations were medically necessary, and more particularly whether they warranted travel to Newfoundland. This also led into the issue of what CNA-Q would do to cover her classes if she were off for an extended period of time during the semester, as did in fact happen when McBreairty was off from February 2005 until April 2005. Discussion on this issue initiated a reply from Enid Strickland stating that because McBreairty would likely be missing time for the remainder of the semester, they would have to look at bringing in a replacement instructor, which would affect the students, and that they should consider putting her off on leave until the end of her contract. Strickland then wrote "I would go as far as give notice and have them leave the country, them staying here is only adding to the difficulties we are experiencing. She is constantly requesting documents from everyone that go bak [sic] to the first year. There must be some action we can take." An earlier email from Enid Strickland regarding faculty leave during the semester which stated that "Have [sic] any thought been given to the students and how this will affect them? We had an issue last fall when a faculty requested time off and Dr. Latifa was very upset in granting leave during the semester."

38. McBreairty also relied on an incident whereby she asserts CNA-Q tried to recover benefits overpaid to Peter McBreairty, specifically business class airfare, directly from McBreairty. She resisted and ultimately did not have to reimburse CNA-Q. Throughout the dispute on this issue, McBreairty was required to fund the cost of her own airfare, which was reimbursed to her upon resolution of this dispute.

39. Another issue related to her allegation that CNA-Q was deliberately slow in arranging her family sponsorship, which was disputed by the College, who asserted that the State of Qatar issues visas, not the College. While there was general agreement that on this particular occasion the process seemed delayed, there was nothing to suggest that CNA-Q did play, or even could have played, any role in that.

40. When asked to summarize how the animosity between CNA-Q and Peter McBreairty related to her failure to acquire contract renewals or new job acquisitions, McBreairty

answered that when you create a relationship between the employer and employee that is constantly adversarial, where she felt she was constantly having to stand up for herself, that resultant behaviour, she asserted, is what the College used to say that she was not suitable.

41. She summarized her claim against the College by stating that there was no doubt in her mind that the College wanted Peter McBreairty out of Qatar, and for all the things that the College did to them, they weren't able to do that. They couldn't get rid of him by firing him. They couldn't get rid of him by not permitting him to work. They couldn't get rid of him by banning him from the compound. So the only way, McBreairty asserted, that they would be successful in getting him out of there was to not renew her contract, and that is the effect that the animosity between the College and Peter McBreairty had on her.

42. During cross-examination, McBreairty was presented with an email dated 30th September 2002, that she wrote to Enid Strickland (Vice-President – Academic), and copied to Trent Keough (President CNA-Q) and Norris Eaton (Vice-President – Engineering), along with their ensuing responses. McBreairty was complaining of hot water issues. Ms. Strickland answered that she understood that one of the boilers would be up and running that day, which was confirmed by McBreairty. Two days later, McBreairty wrote to the same three individuals, but this time copied Pam Walsh, President, College of the North Atlantic; Larry Reid; and Roseanne Hammond. Hammond being the individual responsible for recruitment for the College. McBreairty advised that the repairs caused too much strain on the system, resulting in damage to the elevator and flooding in the stairwell, which "threatened our only other exit through the stairs". She confirmed that she and her family moved to a hotel as a result and that they were operating in "crisis mode". Having been made previously aware that, in the context of new operations and trying to get the College up and running, there were growing pains and infrastructure issues at CNA-Q, she was asked why she felt the need to email the President of the College and three Vice-Presidents about this, to which she responded that it reflected the level of unreadiness that CNA-Q was at in order to begin that venture, and that there should have been a housing coordinator.

43. McBreairty was then shown a string of emails from October 2002 wherein she was complaining of an issue with the photocopier. She received a reply naming the appropriate person, namely Shira, and outlining the method of addressing any issues with the copier. Despite this, McBreairty proceeded to email Enid Strickland, Vice-President – Academics about a different copier, instead of first checking with the person designated to address issues with the G20 copier. There were other emails dealing with copier and/or copier supply issues that date into February 2004 and March 2004. Counsel for the College asserted that this was an example of McBreairty unduly escalating matters.

44. Also in October 2002, McBreairty sent an email to an employee of the College, Corner Brook, stating that she was going to write and send updates but that she was "under a gag order".

45. In November 2002, McBreairty sent an email to another colleague stating that she was in Qatar and that “everything we receive is highly monitored”.

46. Right around that same time, McBreairty emailed the President of CNA-Q, two Vice-Presidents, among others, seeking updates about housing issues, by way of requesting to add agenda items to a formal meeting.

47. The next evidence related to leave sought by McBreairty in the days immediately following Peter McBreairty’s termination. McBreairty initially requested four days of “Special Leave” pursuant to the Faculty Leave and Benefits Package. The particular leave she sought was referenced in her request and fell under Article E – Special Leave 1.01, which stipulated “Any employee who can satisfy the President of CNA – Qatar that a personal matter requires time off and that it is not appropriate to grant any other type of leave or to re-arrange the teaching schedule, may be permitted to take up to a maximum of four (4) days per academic year with pay, provided an acceptable substitute arrangement can be made.” The President then responded saying that they would approve two (2) days of such leave, for 11th May 2003 and 12th May 2003. McBreairty then emailed on 12th May 2003 stating that she would “not be in tomorrow due to illness”. The response of CNA-Q was to request a medical note indicating the limitations she was experiencing as a result of her illness which prevented her from performing her duties. The medical note she did provide simply indicated “rest” but no specific illness. She seemed to take issue with being asked to provide a medical note. It was put to McBreairty that in the circumstances in which an employee requests special leave, four days off, and she’s denied those four days but given two, with specific reasons, and then on the second day that she is off she writes to the employer saying that she will not be at work the following day due to illness, would create a suspicious circumstance for the employer and that requesting a medical note in that circumstance would be reasonable. She simply answered that it was contrary to her contract. She maintained that CNA-Q was acting unfairly toward her, and asserted that the employer should follow the contract. It was then put to her on cross-examination that at C. Sick Leave at 1.08 – Entitlement, there is a section in the faculty benefit package which stipulates that sick leave should not be abused, along with C. Sick Leave at 2.02 – Medical Certificates, where it stipulated that employees accessing their sick leave entitlement, or using any other form of leave for reasons of illness, may be required by the President of CNA – Qatar to submit a detailed medical certificate. On re-direct, McBreairty was asked about C. Sick Leave at 1.06 which stipulated that medical notes are required for periods in excess of 3 days consecutively or 6 days in the aggregate. It appears that 1.06 is the default timeline, whereby periods in excess of 3 consecutive days or 6 days in the aggregate require notes, but this is not inconsistent with 2.02 which states that in any circumstance, or for any amount of time, an employee may be required to produce a medical note.

48. On the day of Peter McBreairty’s termination, almost immediately after she became aware of his dismissal, McBreairty went up to Judy Park and accused her of getting Peter

McBreairty fired, stating that she hoped Park was happy with herself and challenged her, saying that she hoped she could back up her allegations. McBreairty's confrontation was the subject matter of McBreairty's verbal reprimand.

49. Upon Peter McBreairty receiving his termination letter, McBreairty copied the letter, and began passing it out to employees of CNA-Q. The following day, on 12th May 2003, McBreairty wrote an email to twelve of her colleagues at the Corner Brook campus of the College which said:

> Subject: Qatar
>
> This has been a most unbelievable year here in Qatar.
>
> In case you have heard rumors, I can confirm for you that Peter was fired on Sunday for, as his dismissal letter reads, "flagrant and deliberate violation of the College's policies and procedures on your part regarding the improper admission of one or more student candidates at CNA-Qatar". (Signed by Trent Keough) In real language, according to Peter, of 1600 tested students and 300 current students, the college alleges that 4 students have incomplete files. You may ask what is going on over here. Good question.
>
> I am currently still employed. That doesn't diminish the stress that we feel. However, it is possible that I hold the distinction of being the only west coast employee who has not experienced some sort of disciplinary action.
>
> Laura left for Newfoundland today. She looks forward to being back with her friends in Pasadena.
>
> We will be heading home around the 19th. I thought I should inquire as to the year end party. If I am home in time, I am inviting myself! Sign me up.
>
> Regards,
>
> Eileen

50. In a letter dated 18th June 2003, McBreairty was notified that she was receiving a formal written reprimand regarding the above-reproduced email message she circulated to staff at the Corner Brook Campus of the College following Peter McBreairty's termination, which, the College asserted, threatened the reputation of its employees and CNA-Q. Rather than accept the reprimand, McBreairty challenged it, not only within the College's normal channels, but also through her union, as well as in a complaint to the Human Rights Commission (which complaint, it was decided, had no reasonable basis in evidence to be

referred to a Board of Inquiry). Ultimately, the College agreed to remove her written reprimand.

51. Additional information was then put to McBreairty regarding the long and protracted dispute regarding travel claims. The issue is that when the CNA-Q policy was developed, in respect of airfare to/from Qatar for employees of CNA-Q and their families, the intention was to ensure that each entire family would have a travel allowance to go home at the end of each school year and the family would have airfare to return in the fall to start the school year again, during the term of a contract. An issue, and subsequent dispute, arose regarding the unanticipated situation whereby there were spouses who were both employees of CNA-Q. The question was whether the benefit had been intended as a family benefit, as claimed by CNA-Q meaning that each family would get that benefit once per year, or whether each employee – the husband and the wife each – would get the benefit of travel home each year. This might not have been a problem that the travel allowance been specifically dedicated to travel to/from Newfoundland and Qatar, but it was acceptable for an employee to take the equivalent value of the airfare to/from Newfoundland to Qatar, and convert it into tickets for a different trip or purpose. For example, say a family did not want to return to Newfoundland during the summer months, they would be permitted to use the equivalent value of that airfare, to take flights elsewhere, for example Europe. So the issue became whether husband and wife employees could essentially have both the trip home to Newfoundland for the summer and a second other trip equivalent, because both spouses were employees. There were only two couples in that situation initially. Admittedly, the College had not contemplated that particular issue when developing the contract benefits. At the time of Peter McBreairty's termination, the policy remained that the benefit was a family benefit only to be used once per year, ie. there would be no double benefit for husband and wife employees. As a management-level employee, Peter McBreairty had entitlement to business class airfare, whereas McBreairty had faculty-level benefits which included economy class airfare. They therefore, would plan their flights using Peter McBreairty's business class allowance.

52. As it relates to McBreairty's complaint, on or about 21st April 2003, Peter McBreairty requisitioned airfare from Qatar to Newfoundland, departing June 2003 and returning August 2003. As we know, he was them terminated on 11th May 2003. The issue arose because the McBreairtys had converted that airfare which had been requisitioned on 21st April 2003, and changed their flights to take a vacation on or about 25th April 2003, just prior to his termination. It appears that CNA-Q was unaware of said flight changes, believing that the airlines tickets for June and August as were requisitioned by Peter McBreairty were still there waiting to be used. CNA-Q then said to McBreairty in May 2003, that because the McBreairtys' airline tickets for their trip home for summer 2003 were booked for business class, that McBreairty would have to choose whether to use her own economy benefit or whether they would pay the difference for Peter McBreairty's business class tickets. McBreairty ignored that email. She also ignored a second email on that same subject. McBreairty's evidence was that she verbally told Gerald Winsor of

the circumstances, though she was challenged on that during cross-examination, given her propensity to put these such disagreements in writing.

53. There was an effort by CNA-Q to investigate this matter, but as noted above, when McBreairty was asked to provide information regarding the booking/use of Peter McBreairty's flights, she ignored their request. There was much written back and forth between CNA-Q and McBreairty, including one letter from her on this subject that she copied to the Chair of the College's Board of Governors and to the Human Rights Commission.

54. McBreairty also indicated that this issue was causing her tremendous stress and that she would seek immediately intervention from outside the college system, though what she meant by that she said she couldn't recall. McBreairty's position was that if CNA-Q was seeking to recover a benefit wrongfully paid to Peter McBreairty, that they would have to deal with him directly and that she did not want to be involved. There was a separate email by McBreairty to Yvonne Jones on this issue dated 23rd April 2003 which, CNA-Q alleged, contains significant misrepresentations.

55. This was followed by a letter dated 30th September 2004, written by McBreairty and addressed to the General Counsel for the College, and copied to various people, including the entire Board of Governors, and the Auditor General for Newfoundland and Labrador. The first paragraph alleges fraud on the part of the College.

56. Another email by McBreairty to the Department of Justice followed on 14th November 2003, outlining a number of events that McBreairty alleges constituted harassment by the College. On re-direct at the hearing, there was much discussion over this issue, and the College's policy regarding whether married spouses were each entitled to certain benefits as independent employees or whether some benefits were essentially meant for a family purpose, such that there would be one set per family. What followed was that McBreairty's airfare allowance was suspended while the investigation into the issue remained underway. Ultimately, McBreairty was reimbursed with interest, so for the purposes of McBreairty's human rights complaint, the issue relating to airfare came down to whether the other married couple was entitled to each receive the benefit (receive a "double benefit") at a time that McBreairty was not, and if that related to the fact that she was married to Peter McBreairty.

57. To outline a summary of the adversarial matters between McBreairty and the College and/or CNA-Q, McBreairty initiated: a Supreme Court action; three separate Human Rights Commission complaints; an allegation of harassment by McBreairty against Kevin Baker, Enid Strickland, Roseanne Doody, and Brian Miller; a complaint to the Minister of Justice for the Province of Newfoundland and Labrador; a formal complaint to the Minister Responsible for the Status of Women; NAPE grievances; and complaints to the Public Service Commission, not to mention several internal CNA-Q disputes and/or expressions of displeasure.

58. Under cross-examination, McBreairty was asked about a situation whereby she accessed a number of student database files that she had no reason, or permission, to access, specifically the actual files that Peter McBreairty was taking issue with during the course of his action against the College for wrongful dismissal. McBreairty's evidence is that she coincidentally happened upon them while doing work toward her Oracle certification. This was a certification that she was pursuing independent of the College and which was unrelated to her work with the College, but which she was working on using her work computer instead of her personal computer. It was put to her that it was more likely that she was snooping around on the College system trying to find student databases, which she denied. So it was asked of her whether her position on this issue was that she was in on the College's system, without authorization, searching files with an SQL extension and it just happened to return a number of files that were CNA-Q student database files. McBreairty's answer was "yes". And it was suggested that these student databases would be particularly important in relation to Peter McBreairty's wrongful dismissal action against the College, and she again answered "yes". It was also asked of her how, when she made inquiries about specific students and whether or not they had certain credentials, how she knew to ask for the records of four specific students if she had not discovered them through her unauthorized search. Her evidence was that she had overheard a general conversation about admissions qualifications among students and non-students in her classroom during a break in her class, and that some of them happened to mention that they had not provided a letter of equivalency.

Testimony of Roseanne Doody Saturley

59. Roseanne Doody Saturley was, at the relevant times, Manager of Human resources for the Qatar campus of the College, having previously filled that role for the Newfoundland campuses. She went on to explain that she was primarily responsible for recruitment, and that other human resources matters relating to Qatar would likely be handled by the human resources manager there, and in conjunction with the appropriate Dean (head of department).

60. She discussed the protections afforded employees who took opportunities in Qatar, which is to say that they would return to their same or equivalent position at the same salary, adjusted for "step" increments on their salary scale for the years that they had served in Qatar. Additionally, they would get their pensions, benefits, seniority, among other things perhaps, all back into place as if they had not left.

61. When asked about contract "extensions" she stated that there was no such thing as an extension because each contract was very distinct and that continued to be the case up until her retirement. She went on to say that simply because an individual had one contract, that they should have no expectation that they could have another at any point in time.

62. In respect of what factors would be considered when assessing a candidate for a particular position, she stated that some considerations would be the qualifications required, skills required, demonstrated abilities, personal suitability, the merit principle.

63. Doody Saturley also discussed what was generally meant by the term “hard-to-fill” positions. She stated that throughout that period during the early days of CNA-Q, some of the sciences were always very difficult to fill, and offered examples, such as some engineering technology positions and health sciences positions were hard to fill, meaning that there were very, very few candidates available for those positions. When asked specifically about Computer Support Specialist, Programmer Analyst – Business, and Internet Applications Developer, whether any of those three positions were considered “hard-to-fill”, she answered that she did not think so. She also confirmed that the nature of a particular position being “hard-to-fill” was fluid and could easily change from time to time based on what candidates were available.

64. She went on to state that qualifications would be the number one factor in assessing a candidate, that it would be the baseline for assessment. Regarding what circumstances might arise where someone without the required qualifications might actually get a job, she answered that in her experience, she explained there were instructors hired in smaller campuses that were what she would consider to be underfilled; that it might have been a situation where they didn’t have many candidates in that location so they could consider someone who would technically be an “underfill”, which meant that the qualifications were deficient from the standard expected from a candidate, and that normally it would be noted that an employee was an underfill and that this was permitted until a candidate came along who could fill the position with the full credentials.

65. There was evidence that “appropriate degrees with relevant majors and designations as prescribed by industry” would mean that there should be corresponding degrees, and if there were professional designations, then that would be an asset, and in respect of “relevant industry experience is essential for all technical instructors”, specifically in the context of Programmer Analyst – Business, would mean that it would have been essential that the candidate would have worked in the industry, to bring to the table that skill set.

66. She then explained personal suitability, and Doody Saturley stated that such a concept is not very clear cut, that it would encompass how an individual conducts themselves; their behaviours; their working relationship with colleagues and managers; and how they liaise with the public on behalf of the employer. She stated that they would use interview techniques and situational questions to make a judgment on those factors.

67. When discussing the merit principle, she stated that it’s basically that the best person for the position will get the job; when all factors are considered, the best candidate should get the job.

68. Again, she attempted to clarify that “contract renewal” is an error. She remained adamant that there was never such a thing as a contract renewal; each new contract was a new contract. Despite that in common parlance people were saying “extension” and “renewal”, Doody Saturley insisted that there was no obligation, following the expiry of a term contract, to offer an employee a new contract.

69. She did go on to say that “Generally I think people thought that because they were there previously, and not just Ms. McBreairty, that they had rights to those jobs and that is incorrect.”

70. Doody Saturley denied any specific recollection of the conditions under which Peter McBreairty was terminated.

71. When asked about why, after 2005, the IT positions then required Computer Sciences degrees, Doody Saturley confirmed that there was an accreditation report that required CNA-Q to have a better mix of qualifications within faculty members. It was not impermissible to hire someone without a Computer Sciences degree in the circumstance of having to underfill a position, because having enough people with the minimum requirements would create an acceptable balance between the qualified and underqualified employees. However, the reason they were being so diligent regarding the qualifications was because historically, the College had been deficient in maintaining the balance on the side of qualified employees.

72. Doody Saturley did also recall an event whereby she was contacted about a complaint from McBreairty, wherein she requested an investigation be conducted under the Harassment and Discrimination-Free Workplace Policy of the Government of Newfoundland and Labrador, arising from an incident in which McBreairty claimed that Doody Saturley had harassed her. There was nothing further on this, other than Doody Saturley’s response to the investigator that the allegation was absurd. She seemed to not think much else of it. McBreairty did not acknowledge any police complaint, but did acknowledge the Public Service harassment complaint.

73. Under cross-examination, Doody Saturley went into details regarding the enormity of the scale of the CNA-Q project and how it was a living thing that required constant adjustment, not to mention the cultural differences and the need to be sensitive to them. She spoke of the necessity for the employees and administrators of CNA-Q to band together to work through issues, all the while conforming to the stringent State requirements and cultural differences of Qatar.

<u>Testimony of Enid Strickland</u>

74. Enid Strickland began her evidence by reviewing her employment history with the College; she worked there for 37 years until she retired in 2011 and at the relevant times she held the position of Vice-President – Academics.

75. She advised that while she was the initial point-person for faculty during the CNA-Q transition, soon after, sometime during the first semester, there was a "coordinator" appointed (later called "chair", and later again called "dean") who would be the department head who would act as a liaison between Strickland and faculty.

76. She focused quite a lot of her early evidence on trying to set the tone of the environment in CNA-Q at the time. Their primary focus was to get the students adjusted; the culture there was that at CNA-Q, male and female students would be in class together for the first time. And there was quite a lot of pressure to ensure that everyone involved was conforming to the cultural norms and not allowing fraternization outside class, for example. The partnership with the State was new and tenuous. That is to say, there was a lot going on other than simply opening the doors to the College. It was a pressure-filled environment and everyone, they hoped, would assist with, and tolerate, the growing pains associated with the transition.

77. Strickland's role in assessing performance or imposing discipline was explored. She stated she had little to do with that other than if the nature of the incident was strictly academic, as the usual process for faculty issues involved department heads for performance evaluation, or Human Resources for any other issues, including discipline. In respect of when a matter would be elevated to include the President's involvement, Strickland stated it would be only if the HR and VP representatives felt a situation warranted that the President ought to be notified about a particular incident, keeping in mind that the President would be responsible overall for CNA-Q and would also report back to the President of the College in NL.

78. In respect of direct dealings with McBreairty, Strickland stated that she didn't have much direct involvement with McBreairty. She did state the she was aware of issues that became evident after the firing of Peter McBreairty. McBreairty's behaviours escalated. Strickland said she was aware that McBreairty was speaking out to other people about Peter McBreairty's termination, along with her grievances with many aspects of CNA-Q, but the only thing that she recalls warranting her direct involvement was McBreairty's requests for leave. She did also recall McBreairty coming to her about Peter McBreairty not being allowed to come onto the campus, and that Strickland did arrange for Peter McBreairty to be permitted to enter the campus to drop off/pick up McBreairty, and Strickland informed McBreairty of that.

79. Regarding McBreairty's requests for leave, Strickland could not recall any specific incidents, only general recollections about McBreairty wanting to go back to Newfoundland for a number of reasons and that she wanted expedited leave though there was a process she had to go through, and to compound the issue of her extended leave in winter/spring 2005, CNA-Q wasn't given a definite time of how long she would be on leave, and that they needed information as her position would have to be replaced. She went on to state that to replace a position in Qatar with Canadian staff was not an easy chore, and it would

take maybe a month or more or two as they didn't have someone who could easily just come in. They would also have to offer a definite time in a contract to a replacement, which was hard when they didn't know how long McBreairty would be off. Strickland recalled that since McBreairty's contract would be ending that summer, that she recommended that they replace her in the classroom until the end of her contract so they could put a replacement instructor in there on a temporary basis until then.

80. Strickland was specifically asked about McBreairty's leave request to go home to Newfoundland for Peter McBreairty's hearing for a week in January 2005. In response to a question as to whether it would be easy or difficult to replace faculty at that time, Strickland stated that everyone that was working there was at capacity and if another instructor was not brought in, the other instructors would have to take on additional work. It would be impossible to have someone come in from Canada for a week or two. It took weeks to get anyone there, so there were no replacements at the ready. She was shown an email including a response by Strickland wherein she seemed surprised that the chair of the IT department was saying that they would be able to cover McBreairty's 5-day leave request (the request for leave January 2005). Strickland expressed that asking existing staff to accommodate McBreairty's leave request would entail having faculty who are already working 18 to 22 hours per week being asked to assume workloads of over 22 hours, and that she was concerned regarding overtime and how the students would be affected. She was asked at the hearing to explain why she felt disinclined to accept Glenn Thorne's recommendation that existing staff would cover for McBreairty, and she answered that 18 to 22 hours per week was a very heavy workload for Qatar when dealing with students whose first language was not English, and that normal teaching workloads in Qatar were normally a lot less than that, and to get other instructors to work overtime was not ideal, not to mention that to get an exit visa it would have to be approved by the State, and they frowned upon faculty leaving during the semester except in cases of emergency.

81. Strickland was then shown an email where she wrote, as a solution to McBreairty's extended leave in winter/spring of 2005, that "I would recommend that we put her off on leave until the end of her contract. I would go so far as to give notice and have them leave the country." When asked why she wrote "them" and not "her", Strickland answered that "Well, if Eileen left, her husband would have to leave with her. He wouldn't be able to stay there if Eileen wasn't there." and the email went on to say that "Them staying here is only adding to the difficulties we are experiencing." to which Strickland answered that she must have meant both of them, for the reason she previously explained. Her evidence was that putting McBreairty off for the remainder of the year was an attempt to provide consistency in teaching to the students and to not overload the other instructors, not to simply oust the McBreairtys.

82. There was a discussion then about the CRA requirements and whether employees could stay on in CNA-Q following the expiry of their contracts. She was aware that this was a concern and did recall something about having to consider those positions that were hard-

to-fill in assessing which CRA exemptions might be sought. She recalled that Engineering courses were hard-to-fill, and some Business courses.

83. She was then faced with the overpayment of per diems issue. Strickland's involvement was as one of the purported signatories to the authorization to the bank to reverse the error, though it was unclear whether she ever actually signed that letter; no signatures actually appeared on the exhibit. Strickland stated that she only ever signed financial documents if the President was unavailable. She stated that she, only after the fact, realized what she signed, having trusted the HR representative and controller who had brought it to her, and that in her opinion, it would have been more appropriate to withdraw an overpayment over a period of time. It was then put to Strickland something Pamela Walsh, President of the College, wrote in an email about all the back and forth to do with the per diem overpayment. Pamela Walsh wrote "We have to bring closure to this. As you may know we are tied up in knots dealing with requests for access to information to the privacy commissioner by these people. We either have to tell her what we are willing to do and suggest that if she does not agree, she can take further action (if we go this route we had better be really sure that we are right) or answer her questions and make a deposit back to her bank account. Deidre, in consultation with Brian (who will consult with Enid) please try to bring closure to this matter. Thanks Pam". Other than on the issue of having the reversal done in one transaction instead of over time, which was a matter of a difference of opinion among various people, Strickland agreed that McBreairty did not have any entitlement to that money. Strickland went further to say that she also thought it would not be appropriate to, in the circumstance of having been notified of a deposit error, for McBreairty to take that money out for her own use.

84. When asked to whom Pamela Walsh was referring when she said "these people", Strickland stated that she assumed Pamela Walsh was talking about the McBreairtys, though Pamela Walsh did not give evidence.

85. Regarding the issue about the airline tickets, Strickland had no direct involvement with this as it relates to McBreairty's issue, however, she did speak to the custom of it, and stated that she believed what they did at that time was to request the ticket for the purpose outlined in the policy, ie. summer travel home, and then change it themselves afterward. She did also say that she believed they changed the policy on that later. She explained that it was confusing and when they went to Qatar there were some things that were not taken into consideration, like spouses, husbands and wives, both working. That these issues hadn't been contemplated when the contracts were first prepared, and there was uncertainty regarding some benefits meant for a family purpose versus whether husband and wife employees were each entitled to benefits, effectively resulting in double benefits for some families. Arguably, this would also be unfair.

86. Also on cross-examination, she was questioned about certain circumstances related to Peter McBreairty, which she could not generally recollect. Even when presented with emails to which she was a party, wherein there was an assertion that someone "let the cat

out of the bag" regarding Peter McBreairty's termination, she stated that by and large, the issues related to Peter McBreairty were between the President and Human Resources and she did not play an active role in that.

87. Strickland did recall some of the issues that McBreairty had raised regarding housing. While she stated that the she tried not to get too involved, she did go on to say that there were many cultural restrictions and that not everyone perhaps understood when they chose to go to CNA-Q, exactly what they were getting into there. She recalled that McBreairty essentially wanted what she called double housing; to live in the villa (Peter McBreairty's management accommodations) and still be paid for the accommodations and the apartment. She was also aware of complaints regarding hot water and plumbing.

88. On the issue of sick leave immediately following McBreairty's denial of special leave, Strickland agreed that it would constitute a suspicious circumstances which would warrant a request for a medical note.

89. It was put to Strickland that on a number of issues, McBreairty seemed to have a pattern of going outside the usual chain of command regarding issues, for example correspondence and/or complaints copied to the President of the College; the Board of Governors for the College; the Auditor General for the Province. Strickland acknowledged that she was aware of this, and that thought it was an example of McBreairty being unrelenting and not accepting the position of the College and continually attempting to seek alternate answers, or to inflame a situation, when she would not receive the answer she wanted. She also agreed it was a pattern of behaviour with McBreairty throughout her employment with CNA-Q.

<u>Testimony of Peter McBreairty</u>

90. Peter McBreairty was not employed when the McBreairtys first moved to Qatar. He was on leave from his job in Newfoundland and Labrador. In or about October 2002, he accepted a position with CNA-Q as Director of Student Services.

91. He was asked about the dispute about airfare/flights situation in spring 2003. He was shown and then discussed the CNA-Q requisition form that he completed, dated 21st April 2003, wherein he requested tickets from Doha to Canada for himself, McBreairty and their daughter, for 21st June 2003. He explained that while it appeared that this was a request for their flights home in the summer, that an analogy would be that the value of the CNA-Q requisition basically would be put into an account for him with Qatar Tours and that he could then use that amount for travel however he pleased. He acknowledged that the McBreairtys did not, in fact, use those tickets to go home in June, but rather that he and his family used that airfare value to instead take a vacation to Italy on or about 25th April 2003. Once he was terminated on 11th May 2003, he acknowledged that he was no longer entitled to that airfare, but that he did not ever repay that amount to CNA-Q.

92. Regarding issues with housing, these were also pursued at length not only by McBreairty, but also by Peter McBreairty. There was a great deal of back and forth regarding his displeasure with the state of the faculty accommodation (West Bay), and alleging conflicting information about his ability to move into the management-level accommodations (Rose Garden).

93. It was then asked of him when he first had any inkling about issues with his duties. He stated that, based on information subsequently provided to him from the College, he would've had a discussion with Enid Strickland about some issues related to student admissions. When asked if he was aware at that time that there was some pressure on the College to ensure that students met the admission requirements before they got admitted to the College, Peter McBreairty acknowledged this to be true. He then had another meeting with Enid Strickland and Brian Miller during which he was advised of the particular circumstances regarding four specific students who appeared to have been admitted without the requisite criteria. Peter McBreairty asked for the student files for these particular individuals so he could review them. It is alleged that following that meeting he sent a letter to senior management within the College alleging discrimination or harassment by the College in relation to this issue. While unsure about the timing of his email, Peter McBreairty acknowledged sending such an email.

94. This was followed by a meeting on 11th May 2003, which meeting included Trent Keough and Brian Miller, when Peter McBreairty's employment was terminated. He reported that he then called McBreairty, whose office was in the same building, immediately upon leaving the President's office. He stated that McBreairty's reaction to his dismissal was that she was incredulous and overwhelmed.

95. Peter McBreairty confirmed that he returned to Newfoundland in June 2003, and that he did not return to Qatar until November 2003. He then stayed until the end of the school year in or about May 2004. After that he returned to Qatar for the 2004-2005 school year because McBreairty's employment contract continued, though he acknowledged he was in Newfoundland in January 2005 for the Public Service Commission hearing, and then in Newfoundland again with McBreairty from February until about the middle of March 2005. We know McBreairty returned on or about 1st April 2005. He acknowledged those were approximate dates, to the best of his recollection.

96. On the subject of his formal requests for information, it was estimated that between September 2003 until about October 2008, Peter McBreairty had made about fifty information requests.

<u>Testimony of Karen Seaward</u>

97. Karen Seaward was involved in the Public Service Commission complaint made by McBreairty and conducted an investigation into the complaint. Seaward prepared a report, or briefing note, for the Commission to review based on her investigation. It was explored

what avenues she investigated and what individuals with whom she spoke, in order to prepare her report.

98. She reported that she communicated with Roseanne Doody Saturley and perhaps Lavinia Sutton in fulfilling her assignment. She denied having any participation in the drafting of the Public Service Commission's decision.

Testimony of Brian Tobin

99. Brian Tobin indicated that he is Associate Vice-President for Campus Operations with College of the North Atlantic, a position he has held since about 2009. He operates from the campus in Grand Falls-Windsor, NL. Prior to that he was Senior Vice-President Academic and Student Services, from about 2006-2009. Before that he was Director of Academics and Student Services, which evolved from the title of Director of Student Services. He recalls that in or about 2003 he was in the position of Director of Student Services, though he had no responsibilities in relation to the Qatar operation. He had little evidence to give, other than his acceptance that he was a party to an email exchange that purported to discuss the timing of the termination of Peter McBreairty.

Testimony of Brian Miller

100. Brian Miller testified that from about March 2003 until about September 2006, he was the Manager of Human Resources with the College of the North Atlantic in Doha, Qatar.

101. There was a discussion about the issue of contracts beyond the initial three years. Miller understood that to be a CRA-related issue. When asked whether he knew if McBreairty was the only employee who didn't get an immediate subsequent contract, Miller stated that he believed there were others. In respect of what would happen beyond the expiry of a contract with CNA-Q, those permanent College employees who were repatriated back to Newfoundland would have their job to go back to.

102. It was asked of him about the circumstances relating to the overpayment and subsequent reversal of the per diem money paid to McBreairty. He was shown a letter that was sent to the bank authorizing the reversal of the per diem overpayment and asked if he recalled whether he was present when Enid Strickland signed it and he said he could not recall. It was put to him that Strickland's evidence was that this authorization letter was simply put in front of her for signature without an explanation as to what it was authorizing, and while Brian Miller stated that he had no specific recollection of such a meeting, he did say that he would not do such a thing.

103. When asked if he had any independent recollection regarding the circumstances surrounding the reversing of McBreairty's per diem overpayment, he stated that he did. He explained that he essentially wanted to get ahead of it. He recalled thinking that it would be a worse situation if McBreairty were to take that money and spend it and then

they would have to set up a repayment plan. He thought, rather, having worked in human resources, and knowing that overpayments are a nuisance for everyone, not the least of which is the employee, that because they found it out soon enough, if there's a way to immediately reverse it, then that would be his advice. He stated that he stands by his advice, and that it was not underhanded or hidden in any way; it was simply the least intrusive method for everyone. He stated that his intention was to make things a bit easier for everyone; to simply undo the error. In respect of why the College ultimately did re-deposit the money into McBreairty's account and let her pay it back over time, when asked if he could comment on why the College did that, Miller stated "I can only assume that they just wanted to stop the irritation and agitation associated with the whole bloody thing…" He outright stated that if he had been in McBreairty's shoes, he would have preferred for the College to have taken the money right back out. Regardless of the difference of opinion as to what was the most appropriate way to deal with the overpayment, one thing he was certain about was that it was not McBreairty's money. He maintained his disagreement with Deidre Dunne, that he did not think a repayment over time was appropriate in this circumstance.

104. Miller recalled the situation whereby McBreairty was alleged to have confronted Judy Park, which confrontation warranted a formal verbal reprimand in front of an independent third party, whom he recalled to be a representative chosen by McBreairty. That constituted what Miller referred to as a verbal reprimand and coaching session.

105. Soon after, McBreairty was issued a letter of reprimand as a result of an email she sent to College employees in Corner Brook following Peter McBreairty's termination. Miller confirmed that McBreairty was challenging her letter of reprimand by way of NAPE grievance. Regarding the email, in discussing appropriate action, Miller put his opinion in an email, which noted that "As a management team we feel it would be irresponsible to not discipline Ms. McBreairty for the email content and distribution. In the meeting which was held with her, it was explained that this letter represented a warning that we were trying to be helpful to let her know that it was not appropriate to damage her employer's reputation. Clearly she needed a crisp message that she has a duty of fidelity to her employer before she went any further with inappropriate behaviour." and then confirmed in his evidence that this was, in fact, his opinion on the matter. This email incident warranted a written reprimand. This was the second disciplinary incident between 12th May 2003 and 18th June 2003. However, McBreairty did not accept the written reprimand and challenged it.

106. Miller commented on his own opinion that her conduct on that particular occasion might have been influenced by stress caused by her husband's termination. Ultimately, the written letter of reprimand was removed from her personnel file, though it is unknown precisely why.

107. McBreairty challenged the written reprimand by way of NAPE grievance and also by way of Human Rights complaint. There might have been an attempt to also exercise the

contractual dispute resolution process for Qatar. Miller's opinion on that was that it is inappropriate in labour matters, to try to use different venues until you get the decision you want. They suggested to McBreairty that she ought to select one avenue for adjudication and to go with that, but she refused to choose a method of dispute resolution.

108. Miller was then asked about the circumstance of McBreairty's sick leave following a denial of special leave. He was the one who asked her to provide the medical note and his evidence was that he asked for the medical note due to the suspicious nature of her sick leave request. He went on to say that this was neither the first time, nor the last time, that he had made such a request for documentary support of leave, explaining that he was doing due diligence on behalf of the employer.

109. The issue of the airfare was put to Miller. He confirmed that there had been a requisition made by Peter McBreairty requesting business class tickets for return airfare for himself and McBreairty departing Doha on 21st June 2003 and returning 14th August 2003. Following Peter McBreairty's termination, Miller wrote to Gerald Winsor, Director of Finance, asking whether they were going to request that McBreairty return the business class tickets given the change in Peter McBreairty's status. McBreairty was given two options, based on the assumption that CNA-Q was not aware that Peter McBreairty's airfare allowance had, in fact, already been used. McBreairty was offered that she could either change the June flights to economy, or pay the difference between the cost of the business class tickets and the economy ones. Miller stated that he had no knowledge that the McBreairtys had used that airfare for any other purpose other than travelling home to Newfoundland.

110. On the issue then about whether McBreairty ought to have been responsible to cover the cost of their flights home for the summer, once Peter McBreairty was terminated and CNA-Q became aware that the McBreairtys had already used Peter McBreairty's airfare allowance, he was trying to communicate to McBreairty that as it stood then, there was only one family entitlement for summer travel, and that since the McBreairtys had already used theirs, she was not entitled to any further airfare benefits at all. McBreairty ultimately was reimbursed for the airfare. It appears from the evidence that some discussion ensued related to this issue. It seemed that at some point the College decided, on the basis that the Qataris would not be paying for what they considered duplicate benefits, that the College had the option of "eating these costs" rather than enduring long and protracted dispute resolution or litigation over them, and they would then begin rectifying contracts to specifically address this issue on a go-forward basis.

111. McBreairty did, however, challenge this issue for about a year, including in her correspondence: the Chair of the Board of Governors; the President of CNA-Q; the Controller of CNA-Q; and others. Miller was asked, from a human resources perspective, to comment on the fact that all these people were copied on McBreairty's correspondence. Miller answered that as an HR manager, and as someone who has worked in human resources for a long time, that when you see that someone has copied such individuals

on correspondence, you know you are dealing with someone who is terribly upset and wants everybody to know what's going on, and is wanting to escalate the issue way above any level where it belonged. He felt it would be an indication that the individual would not be accepting of any decision at the lower level. Not only did she not accept the interpretation of her entitlement, but rather she wrote that CNA-Q has "fraudulently assigned tickets to me…". Miller's reaction to this was that accusing the employer of fraud and the bypassing the usual channels of resolution in favour of sending it to the Auditor General for the Province, all members of the Board of Governors, among others, would be pretty serious behaviour that would undeniably put a strain on the relationship between the employee and the employer. That is a very serious allegation. He thought it might even be fatal to an employment relationship, though as Miller pointed out, that was not McBreairty's case, as she is still employed by the College.

112. Miller discussed his opinion on McBreairty's request for leave to attend Peter McBreairty's hearing in person, together with her request about whether legal counsel would be arranged for her, and Miller stated that he didn't think either was request was reasonable.

113. About another request by McBreairty for leave related to her request to attend for medical tests in Canada, as outlined in an email on the subject, he commented that they didn't have any medical opinion stating this is required, though he stated that he felt if they declined her request, that she would likely go to the media saying that she is ill and being held hostage in Qatar. He went on to say that he is not convinced there is a legitimate need for her to travel for that purpose, but that he could see trouble coming if it is not approved. When asked why he would have said such things, he answered that it was based on McBreairty's actions up to that point in time with regard to her escalating incidents and being generally adversarial in all aspects, not to mention her efforts to make all the world know what's going on between her and her employer. This led to a follow up questions about the nature of the relationship between the College and McBreairty, and he said that the relationship was fractured, and when asked what the cause was, Miller stated "Eileen's behaviour, simple as that."

114. It was discussed with Miller that McBreairty launched a complaint of harassment with the Public Service Commission against him and others. There was no finding of harassment by the Public Service Commission, and Miller was asked about the result. He summarized it by stating that his actions were within normal dealings in the course of employment. He stated that disagreements over contract entitlements and differing interpretations of contract language would, and should, be governed by the application of contract law and does not necessarily amount to harassment. He expounded upon that and stated that all the issues that were put to him in his examination and cross-examination regarding issues with McBreairty, Miller said that whether or not somebody is entitled to a travel benefit or an issue with leave, that most of those issues would be dealt with in the normal course of an employment relationship. He went on to say that if there was continued disagreement, there is a grievance process or other dispute resolution mechanism to sort it. That refusing to approve leave does not, in and of itself, constitute harassment; that reversing a deposit

error is not harassment; that interpreting the travel benefits of spouses under employment contracts, particularly when that specific circumstance had not been contemplated by the drafters, is not harassment. Whether any interpretations or opinions are appropriate and would stand the test in a tribunal environment or in a court, would be another question entirely.

Testimony of Donna Eldridge

115. Donna Eldridge is the Access and Privacy Coordinator, having assumed that position on 8th March 2006. Prior to that she was a Programmer Analyst with the College at its headquarters in Stephenville, NL, for about 5 years, teaching in the Information Technology department.

116. Eldridge explained that she did not work under the *Freedom of Information Act*, that her role has always fallen under the *Access to Information and Protection of Privacy Act*. She described her role in that when she would receive an access to information request, she would register it with the governmental department overseeing that subject matter so it would be assigned a case file number from the recording system in government; what is now the TRIM system. This was done by the Office of Public Engagement at one time and thereafter by, what is now, the Department of Justice and Public Safety. She would then work with the record holder to find the records for the request. Those would be recovered in whatever form they were in, ie. paper, electronic. Eldridge stated she generally tries to put them into Adobe. She would then work with the record owner and appropriate executive to turn it into a working copy, a document, so that she could take into consideration any exceptions that need to be applied. For example, identifying things that might be personal information of a third party; to look at the possible exceptions that might need to be applied.

117. Some of the more complicated analyses would include third party business information; solicitor-client privilege; policy advice; and then those that were different again such as information related to the State of Qatar. She stated that there are people in the organization that she would have to consult when applying these exceptions. And that the head of the public body, in the College's case would be the President.

118. In her subpoena, Eldridge was asked to provide a list of requests for information sought by either Peter McBreairty or Eileen McBreairty between 1st January 2002 and 31st December 2008. Eldridge had compiled a summary or index of the requests, and copies of the requests that she could access at this time. During that timeframe, there were 25 requests made by McBreairty and Peter McBreairty made 50 requests.

119. When asked to describe how much inquiry and/or the types of parties that would have to be contacted in order to respond to these sorts of requests, Eldridge answered that one of the first things would be to determine if anything in the request needs clarification. Then information gathering might start with a meeting with involved persons or an email request

or a search by the IT department. It might involve several requests to various people or departments depending upon the nature and scope of the request. These would also have to be done within the prescribed timeframes or as otherwise permitted in accordance with the legislation or regulations.

120. It was clear from her evidence that these requests could be extremely time-consuming and would entail a great amount of searching and vetting among many departments, people, and systems.

121. Regarding an assertion that Peter McBreairty did not receive certain emails as part of an access to information request, or at least that he did not receive them as early as he should have, it was asked of Eldridge whether there was any way to ascertain whether those emails were missed or deliberately omitted or fell under an exemption that was noted to Peter McBreairty in the reply to his request, Eldridge stated that she would not be able to make that determination. Upon further examination during a break in her evidence, it appears that she was able to state that in respect of the email that Peter McBreairty received in November 2007, Eldridge believes that the Office of the Information and Privacy Commissioner did an earlier review of that subject matter, around fall of 2005, and that these emails were an approved exclusion at that point in time.

Testimony of Deidre Dunne

122. Since November 2016, Deidre Dunne has held the position of Director of Human Resources, and she works out of the College's headquarters in Stephenville, NL. She began her work with the College in the capacity of Labour Relations Officer in about 2003, after which she became Associate Director of Human Resources in or about 2005 until 2006. After that, she assumed the position of Manager of Employee Relations from 2006 until her current position in 2016.

123. Given it was her role at the material time, she explained the duties of a Labour Relations Officer to include dealing with grievances; arbitrations; mediation between employees, management, and employees; dealing with work-related issues and conflicts. She was not responsible for these sorts of issue at CNA-Q. She did however, have some involvement in the original recruitment for CNA-Q. More specifically, she would sign off on Selection Board Reports. She denied having any involvement in the extension of employment for those who had originally been hired for CNA-Q.

124. In respect of her level of familiarity with McBreairty and/or Peter McBreairty, she would have been quite new to the College in April 2003 and only became aware of Peter McBreairty when his name came up regarding employment-related issues. She stated that she does not personally know McBreairty, though she has met her.

125. Dunne was then asked about the overpayment of per diems issue. She stated that she did not recall whether she was consulted in advance, but she does recall being consulted

at some point while the College was dealing with that issue. There was a discussion about there not being a policy in respect of that type of situation. In terms of appropriate action in such an event, absent a policy, she felt that as long as the action is reasonable and the error is corrected, that this would be their approach. Her opinion was that it would be appropriate in the circumstances of an overpayment to recover the amounts paid over time. She ultimately recommended that they communicate to McBreairty that, given there is no written policy on overpayments and these situations are reviewed on a case-by-case basis, and since you were out of the country and CNA-Q was unsure of your return date, a decision was made to advise you by email, which was the best method to reach you, that the bank would be correcting the error. She went on to recommend that because McBreairty had since returned to Qatar, they would work with her to determine a mutually agreeable payment schedule to deal with the per diem overpayment. She acknowledged this was due to a concern that McBreairty would perceive herself as being treated differently than other individuals. Ultimately, the money was re-deposited into McBreairty's account and she repaid it to the College over time.

126. It was put to Dunne that she made a comment in an email where she said "As an outsider looking in, I can't help but think that we are being tough on this individual because of the history." It is not clear what is meant by "the history", whether she means McBreairty's history alone or if there's some other reference, perhaps including Peter McBreairty. This goes for Bob Rideout's comments where he says Dunne's assessment is a good one; that we don't know what he's interpreting "the history" to mean. At first she stated that it might be because of issues related to Eileen's husband, but on cross-examination, Dunne was asked whether she had any first-hand knowledge of McBreairty's workplace conduct or behaviour between 2002 and 2005 in Qatar and she said she did not. She stated the same for Peter McBreairty, that she had no first-hand knowledge of his workplace conduct or behaviours. She was asked again, then, what she meant by "the history" and whether, given her comments about not having any involvement with the McBreairtys, anything she wrote would have been based on pure speculation. Her answer was "Absolutely, because I wouldn't know if that would be, if that's accurate or correct."

127. Some of the procedures regarding job competitions were reviewed with Dunne, though she was not directly involved in assessing applications or screening out candidates.

Testimony of Sandra Dodge

128. Sandra Dodge currently holds the position of Manager of Human Resources for CNA-Q since January 2018. Prior to that she was a Recruitment Consultant or Human Resources Consultant, a position she held since 2004.

129. During the material times, she was involved with recruitment and hiring for CNA-Q. She described the process by which a request for employment would be made and then what they would do throughout until the position was filled. This included screening candidates based on requirements; developing interview questions; creating job analysis worksheets;

interviewing candidates, evaluating them, scoring, ranking; preparing a Selection Report and Board Report that would then be sent to headquarters for final approval. Once the successful candidate was approved, they would notify the candidate and then go about assisting them with the requisite documentation and procedures that would be required for them to be onboarded, including visa processing. She described that it was a lengthy process.

130. There was a question for Dodge regarding the job competition at Tab 8 of the Consent Book of Documents. She confirmed that some people were screened out of that 2005 competition based on not having a Computer Science degree. At that time, a Computer Science degree was not a requirement. It was noted that the successful candidate also did not have a Computer Science degree and it was Dodge's evidence that it was likely that the successful candidate had qualifications and/or experience that were equivalent, including a Bachelor of Arts (Education), Graduate Diploma in Applied Technology, a lengthy period of teaching experience including not insignificant time at Memorial University where the candidate was involved in IT instruction and curriculum design. It was a similar situation for two other successful candidates in that same job competition. It is noteworthy that McBreairty was not screened out of this competition because of her lack of Computer Science degree, but rather she was screened out because her 3-year contract was ending. It is impossible to ascertain whether she otherwise would have been screened into consideration for this position based on her qualifications and experience.

131. Some other job competitions in evidence were reviewed with Dodge, along with the circumstances surrounding McBreairty's applications for jobs immediately following the expiration of her contract, and Dodge could assume certain things but otherwise had no direct knowledge of what had transpired.

132. Dodge confirmed that she had no involvement with the people wanting to stay past their initial 3-year contracts that ended in 2005.

133. Some discussion ensued around later competitions and that the requirements changed. Dodge did recall that there was a change in IT qualifications and the CIPS certification that also came into play with respect to faculty then.

134. There was some comparative analysis asked of Dodge; she was asked to compare resumes and/or otherwise assess qualifications for candidates for certain jobs. There were some jobs for which McBreairty applied where we saw that the successful candidate had similar credentials to those of McBreairty. In respect of those job competitions for which McBreairty was screened out due to her contract being ended, Dodge went so far as to say that, if McBreairty had been a new applicant at that time, she would think that she likely would have met the minimum criteria at that time.

<u>THE LAW</u>

Sections of the *Human Rights Act, 2010*

135. The relevant portions of sections 9 and 14 of the *Human Rights Act, 2010* state:

Prohibited Grounds of Discrimination

> 9. (1) For the purpose of this Act, the prohibited grounds of discrimination are race, colour, nationality, ethnic origin, social origin, religious creed, religion, age, disability, disfigurement, sex, sexual orientation, gender identity, gender expression, marital status, family status, source of income, and political opinion.

Section 2(k) of the Act defines marital status as follows:

> 2(k) "marital status" means the status of being single, engaged to be married, married, separated, divorced, widowed or 2 people living in the same household as if they were married.

Discrimination in employment

14. (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 on the basis of a prohibited ground of discrimination, or because of the conviction for an offence that is unrelated to the employment of the person.

(2) Subsection (1) does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

(3) An employer, or a person acting on behalf of an employer, shall not use, in the hiring or recruitment of persons for employment, an employment agency that discriminates against a person seeking employment on the basis of a prohibited ground of discrimination.

(4) A trade union shall not exclude a person from full membership or expel or suspend or otherwise discriminate against one of its members or discriminate against a person in regard to his or her employment by an employer, on the basis of a prohibited ground of discrimination.

(5) 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 based on a prohibited ground of discrimination; or

(b) an intent to

(i) dismiss from employment,

(ii) refuse to employ or rehire, or

(iii) discriminate against

a person on the basis of a prohibited ground of discrimination,

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

(6) The provisions of subsections (1), (4) and (5) 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.

(7) Paragraph (6)(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.

(8) This section does not apply to an employer

(a) that is an exclusively religious, fraternal or sororal organization that is not operated for private profit, where it is a reasonable and genuine qualification because of the nature of the employment; or

(b) with the exception of subsection (5) as it applies to advertising, in respect of the employment of a person to provide personal services.

(9) 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.*

(10) In paragraph (8)(b) and subsection 15(5),

(a) "employer" means a person who employs a person to provide personal services to him or her or to a member of his or her family; and

(b) "personal services" means work of a domestic, custodial, companionship, personal care, child care, or educational nature, or other work within the private residence that involves frequent contact or communication with persons who live in the residence.

136. The burden of establishing a *prima facie* case of discrimination is on the Complainant. If met, the onus then shifts to the Respondent to prove otherwise, as stated by the Supreme Court of Canada.

137. The standard of proof in a Human Rights complaint is on the balance of probabilities.

138. A *prima facie* case of discrimination has been described by the Supreme Court of Canada in *Human Rights Commission of Ontario and O'Malley v. Simpsons-Sears* [1985] 2 SCR 536 at page 558, where it was held that:

> A prima facie case in this context is one which covers the allegations and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer.
>
> Upon establishing a prima facie case, the evidentiary burden shifts to the respondent to provide a credible and rational explanation demonstrating, on a balance of probabilities, that its action were not discriminatory…

139. More recently, a description of the test for establishing a *prima facie* case of discrimination was set out in *Moore v. British Columbia (Ministry of Education),* 2012 SCC 61, where it was held that

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the code; that they experienced an adverse impact with respect to the service,; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

140. As set out in *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143, the meaning of discrimination has been widely recognized to mean the following:

> There are many other statements which have aimed at a short definition of the term discrimination. In general, they are in accord with the statements referred to above. I would say then that discrimination is a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal

> characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

141. It is recognized by many human rights tribunals, including in *Brooks v. Canada (Dept. of Fisheries and Oceans),* 2004 51 CHRR 60, that in the proof of discrimination there is rarely direct evidence that proves that discrimination, in fact, occurred. The proof of discrimination is often based on circumstantial evidence and the drawing of inferences.

142. It has also been held that a prohibited ground of discrimination need only be a factor in a respondent's decision or action in order to constitute a violation. In *Peel Law Association v. Pieter,* (2013) 363 DLR (4th) 598 (ONCA), the Court held that

> [59] While the word "nexus" is perfectly acceptable, I think it is preferable to continue to use the terms more commonly used in this jurisprudence. All that is required is that there be a connection between the adverse treatment and the ground of discrimination. The ground of discrimination must somehow be a "factor" in the adverse treatment.
>
> [60] I do not think it acceptable, however, to attach the modifier "causal" to "nexus". Doing so seems to me to elevate the test beyond what the law requires. The Divisional Court's requirement of a "causal nexus" of a "causal link" between the adverse treatment and a prohibited ground seems counter to the evolution of human rights jurisprudence, which focuses on the discriminatory effects of conduct, rather than on intention and direct cause.

143. In a case dealing with the meaning of marital status, *B. v. Ontario (Human Rights Commission)* [2012] 3 SCR 403 (SCC), the Supreme Court of Canada considered the breadth of the term "marital status" as found in human rights legislation to decide whether the term was broad enough to encompass circumstances where the discrimination results from the particular identity of the complainant's spouse or family member. They decided that adopting a broad meaning of "marital status" was supported by the words of the statute, the applicable principles of interpretation, and the weight of existing discrimination jurisprudence. Consideration was given to the fact that the complainant's termination had nothing to do with individual merit or capabilities, but instead was solely because of his marital or familial affiliations.

144. The fact that a respondent in a discrimination case puts forward non-discriminatory reasons for its decision does not end the inquiry. It is still necessary for the tribunal to determine whether a prohibited ground was a factor in the decision. In *Gazankas v. Red Lake (Municipality)*, 2013 HRTO 198 (CanLII), the complainant, Gazankas, claimed age discrimination when he was not offered a position of Fire Chief and the position went to a man twenty years younger. In response to the complaint, the respondent municipality set out four reasons why the successful candidate was selected over the complainant, which

the adjudicator found, at paragraph 40, to be "credible, non-discriminatory reasons for preferring the intervenor over the [complainant]." However, that did not end the inquiry, as can be seem from paragraph 47, wherein it was held that "I need to decide whether, even accepting that the Municipality has articulated rational and credible non-discriminatory reasons for selecting the intervenor over the applicant, the applicant's age nonetheless was a factor in this decision. In that particular case, the adjudicator was satisfied that age was not raised in the deliberations and that age did not indirectly become a factor based upon the Municipality's experience with the former Chief.

145. In *Blakely v. Queen's University*, 2012 HRTO 1177 (CanLII), the tribunal found that it is not at all unusual that cases alleging discrimination in relation to a hiring decision proceed on the basis of circumstantial evidence, as applicants generally are not privy to the discussions held by the persons who made the hiring decision and as it is not uncommon that unstated and sometimes even unconscious biases may affect a hiring decision. In respect of the circumstantial evidence test, as set out in *Blakely,* it has widely been held that:

> Traditionally, this Tribunal has applied a three-part test in circumstantial evidence cases, namely:
>
> a. Whether the applicant has established a *prima facie* case of discrimination because of the ground alleged;
>
> b. If so, the evidentiary burden then shifts to the respondent to provide a credible, non-discriminatory explanation for its decision; and
>
> c. Ultimately, the question for determination is whether discrimination on the ground alleged is more probable than the actual explanation offered by the respondent.

146. To lay out the test in the most basic of terms, to be successful before a Board of Inquiry, McBreairty will have to establish on the balance of probabilities that her marital status was at least a factor in the reason why she was unsuccessful in getting a subsequent contract at CNA-Q.

147. If the College can provide an equally consistent, non-discriminatory reasons for failing to extend her contract, then her complaint will fail.

148. The test generally applied to establish a *prima facie* case of discrimination in promotion/hiring cases as set out by the tribunal in *Shakes v. Rex Pak Ltd.* (1981), 3 CHRR D/1001 was more recently applied in *Reiss v. CHH Canadian Limited,* 2013 HRTO 764 (CanLII), at paragraph 61:

> The issue of the relative qualifications of the people who applied for the job is of relevance because if the applicant were clearly less qualified than the

> other job applicants it would be hard to establish that the reason he wasn't interviewed was age discrimination. In *Clennon v. Toronto East General Hospital*, 2009 HRTO 1242 (CanLII) described the test for establishing a *prima facie* case of discrimination in a case such as this, at paragraph 75:
>
> The classic statement of what is required to establish a *prima facie* case of discrimination in a circumstantial evidence case pertaining to hiring or promotion was articulated by this Tribunal in *Shakes v. Rex Pak Ltd.* (1981), 3 C.H.R.R. D/1001 at para 8919. Essentially, in these kinds of cases, a *prima facie* case is established by proving the following:
>
> a) that the applicant was qualified for the particular employment;
>
> b) that the applicant was not hired; and
>
> c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

ANALYSIS

149. McBreairty brought her complaint under sections 9 and 14 of the *Human Rights Act, 2010*, on the basis of discrimination relating to marital status, specifically that she was married to Peter McBreairty. That is to say, it must be determined whether McBreairty was excluded as a candidate for employment because of the particular identity of her spouse.

150. I find the allegation by McBreairty, that there was a factual basis to suggest that her marital status to Peter McBreairty was a factor in her not being considered for a subsequent contract with CNA-Q, constitutes a *prima facie* case of discrimination within the threshold required of a human rights complaint.

151. The burden then shifts to the Respondent. The College asserted throughout that the decision not to offer McBreairty a subsequent contract in or after 2005 was not due to the particular identity of her spouse, rather, it was due, as it relates to the job competitions in 2005, to her contract ending and her not being approved to stay beyond her initial three-year term in Qatar pursuant to Canada Revenue Agency regulations. After that, any decision not to offer McBreairty a subsequent contract in Qatar was either because she lacked the required skill, ability, or qualifications for the position(s) to which she applied, or because of her own personal behaviour.

152. The test to apply is that marital status need only be a factor or operative element, and not the sole or primary cause of discrimination. That even where there are non-discriminatory reasons, this is not enough to end the inquiry, it must be examined whether the prohibited ground was a factor.

153. There was a discussion regarding the application of the legal principles of *res judicata* and/or estoppel. Whether there would have been matters already adjudicated in respect of would have been considered at the stage of whether to refer this matter to a Board of Inquiry, and given that it was referred, I will proceed to make a determination on the Human Rights Complaint.

Direct Evidence

154. The absence of direct evidence will not, in and of itself, be fatal to a human rights complaint. Circumstantial evidence will often suffice. Counsel for McBreairty asserts that there is, in fact, direct evidence in this case, by way of emails. He argued that the direct evidence should meet the complainant's burden, specifically Enid Strickland's email referring to "them" and Pamela Walsh's email stating "these people". These were senior administrators in executive-level roles, one of whom was in the highest office in the College, and that their sentiments ought to be given significant weight.

155. The email from Strickland was explained by her that she was speaking factually. She stated that it was a simple fact that if McBreairty left the country, Peter McBreairty would also have to leave the country.

156. Pamela Walsh made a reference to "these people" in her email, however she was not called to give evidence about what she meant by that. While it would appear on the face that she was referring to the McBreairtys, it would certainly have been helpful to have had her explanation about it. Curiously, neither party chose to call Pamela Walsh to give evidence on this issue.

Circumstantial Evidence

Airfare

157. McBreairty argues that the fact that the College was pursuing her for a benefit given to her spouse was improper. And by "assigning" those benefits to her, as she characterized it, she states that she was clearly seen as a package deal with her husband.

158. The evidence suggests that this was initially an issue of a miscommunication that spiraled into a far greater conundrum than it ever should have.

159. Pursuant to the employment contract, employees had specified entitlements to airfare. The premise was to facilitate travel home during off periods, like summer. By custom, employees did have the ability to reserve airfare on a requisition form, which form did actually indicate destinations and dates, and then later change the airfares, unbeknownst to CNA-Q.

160. I accept that CAN-Q representatives were not aware that the McBreairtys had changed, and in fact used, their airfare at the time of Peter McBreairty's termination. Given that, according to CNA-Q records, their airfare home was scheduled for 21st June 2003, McBreairty was asked whether they wished to keep Peter McBreairty's business class tickets and pay the difference, or whether she wished to change them to economy class tickets. She ignored their inquiry. Why would she do such a thing? The answer would have been easy; the tickets have already been used, so I cannot change them. She could have said that she therefore would like to avail of her own economy flights in June 2003 for summer travel home, and they could have sorted the earlier flight issue directly with Peter McBreairty. Instead, despite being asked that question again in June, she remained silent. McBreairty's evidence was that she verbally told this to Gerald Winsor, but I do not accept that, given her propensity to deal with such issues in writing. Not to mention, if that were true, why would she not remind him of that when he asked again in June. Why she would not respond is not clear; could it be because she was concerned that they might not get another set of airfare benefits, given that the policy at the time was that this was to be a family benefit and they had already used Peter McBreairty's for a family purpose? It is unclear whether that is what she thought. What is clear, is that this needlessly became a long and protracted debate, resulting in McBreairty having to personally fund the cost of her airfare, when it easily could have been sorted at the outset had she answered their question.

161. Not only did McBreairty not assist in resolving the issue early on, but she fanned the flames by alleging that the College "fraudulently assigned" these tickets to her. That was an unfair characterization of the issue. The policy at the time was that airfare was a family benefit and, where a family had husband and wife employees of CNA-Q, they were still only entitled to one set of family airfare, not two sets. This allegation against the College, dated 30th September 2004, was sent to Kevin Baker, General Counsel and Corporate Secretary, and was also copied to the following individuals:

> John Noseworthy C.A., Auditor General for the Province of NL
> All members of the Board of Governors, College of the North Atlantic
> Dr. Trent Keough, President, CNA-Q
> Ms. Pam Walsh, President, CAN
> Ms. Enid Strickland, Vice-president of Business and IT, CNA-Q
> Mr. Brian Miller, Manager of Human Resources, CNA-Q

162. It does seem excessive and unnecessary to include these individuals. The purpose could only have been an attempt to embarrass, or to intimidate the College into resolving the matter in her favour. I can see no other purpose. The College alleges that McBreairty was constantly "agitating" and needlessly escalating matters. This would appear to be an example of that.

<u>Per diem overpayment</u>

163. McBreairty received an overpayment of her per diems. Employees are entitled to receive per diem amounts while they are in Qatar. While McBreairty was in Canada, she received a deposit of per diems that were paid to her in error. There is unanimous agreement that she was not entitled to receive these amounts in the first place.

164. McBreairty, however, took the position that because they had been deposited into her bank account, albeit in error, that this made it her money, and she would be entitled to do with it what she pleased. In fact, she did just that. Upon receiving notification in writing on 29th March 2005, that an error had occurred and that the bank would be reversing these deposits, she promptly withdrew that money from her account. It was an attempt to prohibit the College from effecting the reversal transaction. She was unable to provide an explanation otherwise as to why she did it, only that she felt entitled to do so. She withdrew money which was not hers, and to which she had no entitlement. She then blamed the College when she arrived back in Qatar on 1st April 2005 and could not withdraw more funds.

165. At that point, McBreairty had two options: she could accept that this was not her money and let the matter go, or she could insist on having the reversal re-deposited into her account, and then she would pay it back over time. Only one of these seems to be a reasonable action.

166. Brian Miller's evidence was that they discovered the error and notified McBreairty while the issue could still have been reversed. He thought that by notifying her that this would happen and doing it in one transaction would be the most efficient and least intrusive for everyone involved. Representatives of the finance department were similarly minded.

167. There was no specific policy on this issue at the time. There were differences of opinion among human resource administrators within the College as to whether it was more appropriate to correct the error in one single transaction or whether it should happen by repayments over time. McBreairty relies on the fact that Deidre Dunne and Robert Rideout felt that the repayments ought to have been able to be made over time.

168. Whether she agreed with the method or not, is one thing. But once it had been reversed, I question why McBreairty would escalate this issue to the degree that she did. And then to have them re-deposit money into her account which was never hers, only to let her pay it back makes little sense. It is a further example of the power struggle that was ongoing between the College and McBreairty.

<u>Information requests</u>

169. There was a suggestion that McBreairty was making excessive requests for information. McBreairty relies on an email from Enid Strickland, wherein she discussed, as a solution to McBreairty's extended leave in winter/spring of 2005, that "I would recommend that we put her off on leave until the end of her contract. I would go so far as to give notice and

have them leave the country." When asked why she wrote "them" and not "her", Strickland answered that "Well, if Eileen left, her husband would have to leave with her. He wouldn't be able to stay there if Eileen wasn't there." and the email went on to say that "Them staying here is only adding to the difficulties we are experiencing." to which Strickland answered that she must have meant both of them, for the reason she previously explained. Her evidence was that putting McBreairty off for the remainder of the year was an attempt to provide consistency in teaching to the students and to not overload the other instructors, not to simply oust the McBreairtys. McBreairty was not telling them when she might be in a position to return and they were in a difficult position of having to fill her classes in that uncertain situation.

170. I do not see this one comment as sufficient evidence to establish discrimination on the basis of marital status. CNA-Q did, in fact, have to get a replacement from Canada for McBreairty due to her extended leave in 2005. This shows that there was a legitimate purpose to Strickland's suggestion. McBreairty did, in fact, return to complete the end of her contract. They weren't trying to get her to leave Qatar and simply stay out. There were emails from other individuals asking what to do about McBreairty's classes upon her return on 1st April 2015, given that they had already hired a replacement instructor for her classes, and Mary Vaughan told Glenn Thorne that "It would be my recommendation to keep going as if she was not back. These students have been through enough unsettlement in their courses."

171. As for the email from Pamela Walsh, wherein she refers to "these people", I am in the unfortunate position of not having her evidence on that subject.

172. The text of the email dated "We have to bring closure to this. As you may know we are tied up in knots dealing with requests for access to information to the privacy commissioner by these people. We either have to tell her what we are willing to do and suggest that if she does not agree, she can take further action (if we go this route we had better be really sure that we are right) or answer her questions and make a deposit back to her bank account. Deidre, in consultation with Brian (who will consult with Enid) please try to bring closure to this matter. Thanks Pam"

173. While it does not appear that McBreairty had made any formal access to information requests at that point, I do not feel that this singular comment from Pamela Walsh, is enough to establish discrimination against McBreairty on the basis of marital status. The message in the email is ultimately that she wants McBreairty's banking issue resolved. And it was indeed resolved in the manner that McBreairty insisted upon. I fail to see any prejudice there.

Job Competitions

174. I accept the evidence of several witnesses that confirmed that, during the relevant timeframe, there were Canada Revenue Agency ["CRA"] regulations that impacted the

ability of employees to remain employed in Qatar for period. I accept that there was a possibility of applying for exemptions for a limited number of individuals. I also accept that there is no expectation of further employment following the expiry of a fixed term contract.

175. The fact, then, that McBreairty was screened out of job competitions beginning in 2005, on the basis that her contract ended, was valid. She was not the only "Year One Employee" who was required to be repatriated back to Canada after the expiry of the contract. The evidence suggests that since that time, the tax regulations have changed, such that this is no longer the case. McBreairty does acknowledge that there were indeed CRA regulations at play during that timeframe. She takes issue with the fact that CNA-Q did not put her name forward for consideration for an exemption, and asserts that the only reason she was not put forward for exemption was because of her marital status to Peter McBreairty. I am not satisfied that this was the case.

176. Counsel for McBreairty argued that she was entitled to a consideration of her request to be extended, that was not influenced by a factor of discrimination. I don't see any basis upon which she can claim such an "entitlement" in the circumstances of the CRA regulations. Her grievance was that her name was not put forward for exemption, however, I accept the evidence that CNA-Q had to strategically determine which positions/individuals would need to be protected given that there were a limited number of exemptions available, and that the nature of McBreairty's employment was that it did not meet the criteria applied for consideration for exemption status.

177. It should be noted, however, that upon the expiry of her contract at CNA-Q, McBreairty was entitled to return to Newfoundland in the same or equivalent job, with corresponding benefits, and seniority, among other things, as if she had never left. A return to Newfoundland, would be certainly less detrimental in those circumstances, than if her contract expired at CNA-Q and she was left with the task of seeking alternate employment.

178. Regarding what circumstances or positions or individuals met the criteria for applications for exemption, the evidence from many people was that CNA-Q had reserved their limited number of exemption applications for positions that were considered to be "hard-to-fill". There was evidence from Roseanne Doody Saturley, who was responsible for recruitment, and Enid Strickland, Vice-President – Academics, that some areas that were certainly hard to fill included Engineering Technology and Health Sciences. Their evidence was that they did not feel that the positons in Business and Information Technology were as hard to fill.

179. It was also my understanding from the evidence that once an employee had been back in Canada for a year, their tax status would qualify them to return to Qatar, should they choose to do so. When we move beyond 2005 for subsequent job competitions in 2006 and 2007, McBreairty again asserts that her failure to be screened into these jobs was due to her marital status to Peter McBreairty.

180. We heard evidence that in or about 2006, there was an accreditation report in relation to CNA-Q which identified deficiencies. They recommended that in order to meet the accreditation guidelines, CNA-Q was required to have a better mix of qualifications within faculty members. It wasn't impermissible to hire someone without a Computer Sciences degree in the circumstance of having to underfill a position, because having enough people with the minimum requirements would create an acceptable balance between the qualified and underqualified employees. However, the reason they were being so diligent regarding the qualifications was because historically, the College had been deficient in maintaining the balance on the side of qualified employees.

181. It was on this basis that the Computer Science degree qualification was added to the requirements for IT jobs on a go-forward basis. McBreairty did not have a Computer Science Degree at that time.

182. McBreairty did discuss her applications for jobs between 2005 through 2007 and how she felt qualified for those jobs. The test here is that she should not have been passed over by someone less qualified who also did not have the distinguishing feature of being married to Peter McBreairty.

183. She did acknowledge that she would not have known who the other applicants were in respect of what her actual chances at acquiring the position(s) would be, considering that, as she said, the College was going to choose the most qualified candidate. She was clear that she felt her Education degree, together with her teaching experience, ought to have fulfilled the job requirements and/or equivalencies in respect of the jobs for which she applied.

184. There was a discussion about whether, at that time, her enrollment in the Masters of Science – Information Systems Program at Athabascan University would qualify as an equivalent for a Computer Science Degree. The screening notes for the job competitions in the vast majority of the job competitions for which she applied but was unsuccessful, noted "3-year contract ended" (2005 applications) and "no Computer Science degree" (2006 and 2007 applications). There was at least one that specified "lack of relevant experience" but that was not an instructor position. McBreairty took issue with the screening decisions.

185. There were two positions for which McBreairty applied in 2005, which did not list Computer Science degree as a pre-requisite, and she was screened out of those on the basis of "contract ended", not because she did not have a Computer Science degree.

186. Summaries of the qualifications of the successful candidates in the later job competitions, 2006-2007, where Computer Science degree was stipulated as a pre-requisite, showed that the successful candidates in those competitions did in fact have Computer Science degrees. McBreairty was also not the only candidate screened out on that basis. In fact there were many.

187. There was a discussion of "suitability" as it relates to McBreairty's job applications. I find this to be somewhat of a red herring since she was not expressly ruled out of any job competitions on this basis. The evidence was that candidates for job competitions were first screened on the basis of the requirements, and that they would then assess candidates based on the merit principle, which essentially meant that the best candidate would become the successful candidate. Some of the witnesses gave their opinion that McBreairty would likely have in fact been screened in on some of these job competitions but for the "contract ended" element or the fact that there were candidates with Computer Sciences degrees when she did not, particularly in the climate post-accreditation report.

Other Evidence

188. There was an email dated 23rd April 2003 to Yvonne Jones, Minister for the Status of Women, alleging gender inequity against the College in relation to its policy regarding family benefits. She was asserting that she was being denied certain benefits because of her family status.

189. Another email by McBreairty to the Department of Justice followed on 14th November 2003, outlining a number of events that McBreairty alleges constituted harassment by the College.

190. Email correspondence to colleagues stating I am "under a gag order" and a separate one wherein she indicated "I am becoming paranoid ;-) but with good reason". These messages do carry an ominous tone in respect of what was going on at CNA-Q.

191. The most egregious example of email content disparaging to the College was her email to her colleagues in Corner Brook following Peter McBreairty's termination. The result was that she was issued a verbal reprimand and then a written reprimand within a very short time. It should be noted that the written reprimand was ultimately removed from her file.

192. McBreairty states she did not want to be tarred with the same brush as Peter McBreairty, yet she continuously inserted herself into his situations. For example, when she confronted Judy Park about his termination and then copied his termination letter and began distributing it to CNA-Q employees.

193. She also happened upon student files as part of her research for her Oracle certification; the precise files that formed the basis of Peter McBreairty's dismissal. The circumstances of that are indeed suspect.

194. What was also argued by the College as suspicious was the time she was denied special leave. The contract states an employee can request up to four days of special leave, and upon receiving such a request from McBreairty, CNA-Q stated that in the circumstances,

she could have two days. They maintained their position on leave even after they were pressed by McBreairty to conform to her recitations of the faculty contract. She then emailed on the third day, advising CNA-Q that she was sick and not coming in. She became offended when, in those circumstances, she was asked to produce a medical note. Such a request was indeed within CNA-Q's discretion to request.

195. There was another issue related to extended leave. McBreairty's interpretation of the benefits, together with her understanding of what had transpired in custom at CNA-Q, was that the 24 days of sick leave per year could be accumulated and carried over from year to year. CNA-Q initially advised that there was intended to be no carry over of sick leave from year to year. McBreairty's evidence was that she believed there were other employees who did carry over sick leave and therefore CNA-Q was dealing with her unfairly and discriminating.

196. Extended leave of any sort was frowned upon by the State of Qatar, and by extension, CNA-Q. One of the reasons for this, which was another issue related to McBreairty, was that the faculty there were at maximum capacity as it was. To put them in a situation to ask them to carry additional workloads in the event of an instructor being off on extended leave was both unfair to the instructors and unfair to the students, who needed consistency in their studies. The climate was that the students were having to make significant adjustments as it was, and to upset things further was unacceptable. For example, males and females had not previously been in class together, and for many students, English as a second language was not particularly strong. It was also next to impossible to find replacement instructors on short notice because of the travel, accommodation, and visa requirements, to name just a few. There weren't any extra instructors on hand in Qatar. Not to mention that the State frowned upon faculty leaving in the middle of a semester, which was a real concern for the administrators at CNA-Q who were already dealing with extreme changes in cultural norms on both sides, Canadian and Qatari.

197. This led into another issue, related to accommodations and other cultural complications. Enid Strickland spoke at length on that issue in her testimony as she said it was important to understand the cultural underpinnings, and the tenuous nature of the upstart relationship between the State of Qatar and CNA-Q. She explained that everyone was being asked to be patient and tolerate various issues during the transition. Not to mention that there were different standards of living over there.

198. When assessing the evidence as a whole, and considering the large number of other documents and emails that were tendered into evidence that might not have been referenced within the decision, I find that McBreairty's actions on the whole, and as a rule, go beyond what one would reasonably expect from an employee to an employer. It seems that many of these issues were such that they could, and should, have been resolved with far less hostility than what transpired. I do not find that such hostility was attributable to her marital status to Peter McBreairty, but rather that any animosity created between McBreairty and the College is as a result of her own actions.

CONCLUSION

199. I am not satisfied that the evidence supports that the College of the North Atlantic discriminated against Eileen McBreairty on the basis of marital status.

200. The complaint is dismissed.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 11th day of October, 2019.

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Kimberley Horwood
Chief Adjudicator