

IN THE MATTER OF a Complaint
Pursuant to section 9 of the *Human
Rights Code*, R.S.N.L. 1990, c.H-14

File No. 2627

BETWEEN:

SANDRA MCDONALD

COMPLAINANT

AND:

DENTAL AND HEARING CRAFTS LTD.

RESPONDANT

Jamie Merrigan (Chief Adjudicator)

Heard: September 23-26, October 10, 2008

Decision: October 30, 2009

Appearances:

On Behalf of the Complainant:

Appeared Personally

On behalf of the Commission:

Helen Conway

On Behalf of the Respondent:

Glen Belbin

DECISION OF THE ADJUDICATOR

INTRODUCTION

1. The Complainant Sandra McDonald was employed in the Respondent's dental laboratory from November, 2002 until the time of the termination of her employment in April of 2005.
2. Sandra McDonald has led a difficult life and has suffered from time to time from depression and other mental health issues. In April of 2005 for various reasons that will be discussed in more detail below Ms. McDonald's mental health deteriorated to the point where on April 13th, 14th, 15th, 2005 she was unable to attend work. On April 16th, 2005 she sought medical attention from her general practitioner and was provided with a doctor's note indicating she was unable to

work and would be off work from April 18th to 29th, 2005. That same day she was referred to a psychiatrist, Dr. Lori Potter who provided a note indicating she would be off for the same period, but also stating that she would be reassessed in follow up with respect to her return to work date. These notes were provided to the Respondent and its then president Mr. James Finch was aware of them.

3. On April 25, 2005 Mr. Finch called the Complainant at her request. A conversation ensued some of the contents of which are in dispute. The following day Respondent terminated the Complainant's employment.
4. On June 23, 2005 the Complainant made a complaint to the Human Rights Commission alleging that she had been discriminated against on the basis of her mental disability contrary to section 9 of the *Human Rights Code*, R.S.N.L. 1990, c. H-14 and that this denial was not based upon a good faith qualification. The *Human Rights Code* will be referred to in this decision as the *Code*. The Respondent disputes these allegations.

ISSUES:

5. As a result of this dispute a number of issues must be decided. These are:
 1. Is the Complainant able to establish a *prima facie* case that the Respondent dismissed the Complainant because she suffered from a mental disability?
 2. If this is established by the Complainant, is the Respondent able to establish on the balance of probabilities that the Complainant was not dismissed because she suffered from a mental disability?
 3. Assuming that questions one and two are answered in favour of the Complainant, is the Respondent able to establish on the balance of probabilities that this was a breach which is permitted as a result of a good faith qualification within the meaning of section 9(1) of the *Code*?
 4. If there was a breach of section 9(1) of the *Code* that is not based on a good faith qualification what is the appropriate remedy under s. 28 of the *Code*?

EVIDENCE

Sandra McDonald

6. The Complainant testified first in the hearing. The Complainant was 41 years old at the time of the hearing and commenced her employment with the Respondent in November of 2002.
7. The Respondent is a company that operates a dental laboratory. Ms. McDonald's duties in this job included office work, courier duties and some cleaning. She was responsible for picking up and delivering packages from dentists and orthodontists. She would also do filing. When packages were received from dentists and orthodontists she would remove them from the box, read the prescription and enter information into the computer system. A ticket would be generated which was placed in a tray with the contents of the package and the original prescription. She would determine where in the laboratory this would be routed. When things were slow she was also tasked with cleaning including windows and at times the staff kitchen. She did not work in the laboratory except occasionally to clean windows.
8. Her work was supervised by Mrs. Carol Finch, the wife of Mr. Finch. On one of her first days at work the Complainant was telling her fellow employees about how she could eat a lot without gaining weight. Mrs. Finch advised her that "we hate skinny people." The Complainant testified that she chose to believe this was intended in a joking manner but this made her nervous and uncomfortable. Comments about her weight were made about every three months by Mrs. Finch, but the comment about hating skinny people was made only once.
9. Other comments were made by Mrs. Finch about how thin the Complainant was, about her hair and clothing. She did not smile a lot because of a problem with her teeth. She was told by Mr. Finch and Mrs. Finch that she was "crooked looking".
10. She recounted a situation in which she overheard Mrs. Finch blame her for failing to pass on a message. There was a confrontation. It was clarified that Ms. McDonald was not the employee who received the message, but Mrs. Finch only said "Oh" when this was clarified by the other employee. Other examples were given of situations in which she felt she was wrongly blamed for another person's error.
11. There were two occasions on which Mrs. Finch slapped her backside for errors. This was not done hard enough to cause pain, but she felt as if she was being treated as a child. She was embarrassed.
12. She recalled a meeting for all office staff regarding overtime. The meeting was called in response to a complaint by Peggy Coughlin over the amount of overtime

another employee, Joan Sanderson, was receiving. After the meeting she was called to Mr. Finch's office and asked if she had put Ms. Coughlin up to making the complaint.

13. She felt she was treated differently from other employees. She gave examples of this including what she perceived as a reluctance to give her the gas card for the company vehicle. She related that she had had a bad experience running out of gas and this was a particular concern for her. She was not permitted to make personal calls during work, a source of some stress when she was re-financing her house. She related that most days she was told abruptly by Mrs. Finch to take lunch at noon. The exception to this was on payday when she noticed she was being sent out to do errands just before noon. This was problematic as she wished to get a ride with a co-worker to deposit her paycheck. She felt this was deliberate and resulted in her missing her ride.
14. Her boyfriend at the time, Mr. Jeff Puddester was referred to as "ET" due to his habit of picking her up from work while wearing a hoody. She told him about this and he did not like it. When she subsequently began seeing Mr. Carl White (her current fiancé) she felt he was not treated well either. She recounted an occasion on which she told Mrs. Finch she hoped to marry him some day and being told by Mrs. Finch he would never marry her. As a result she teared up and left the room.
15. She was told by Mrs. Finch that Mrs. Finch had not liked her predecessor Ms. Michelle Paul at all. Over time Mrs. Finch came to make comments about how the Complainant reminded her of Ms. Paul in work performance and physical appearance. The Complainant drew the conclusion that Ms. Finch did not like her either.
16. She recounted an occasion on which she had to stand on a counter to clean windows in the dental laboratory and laboratory technicians made "cat calls" and other inappropriate comments.
17. She recounted another occasion when Ms. Tina O'Brien (the Finch's daughter) and Ms. Sanderson placed photograph in her locker. It was a picture of a co-worker with a caption that read "Give me some tongue". This was a reference to beef tongue she had brought to work to share with co-workers at lunch the previous day. She recounted an incident in which she was given clothing by Mrs. Joan Sanderson and this was brought up by Ms. Sanderson to Mrs. Finch in a manner that embarrassed the Complainant.
18. Another employee at the lab, a nephew to one of Mr. Finch or Mrs. Finch began asking her to show her breasts. She laughed at it the first time but he kept doing it and it made her uncomfortable. She did not report this to her employer.

19. There were numerous allegations of unpleasant incidents, which I have considered carefully but which I will not set out in detail. They are set out in detail in Appendix A to Consent Exhibit 1. Ms. McDonald was not entirely certain of the order of these incidents.
20. All of this made her nervous and anxious. Ms. McDonald felt she was disliked and singled out for ill treatment, mainly by Mrs. Finch, but also to varying degrees by many of her co-workers. Eventually she was throwing up about three out of five days before work. She felt trapped because this was a family business and there was no one to go to with her complaints.
21. She met with Mr. Finch to discuss these issues on two occasions. The first arose about eight months after she was hired when he asked her how she was doing. She answered that she was "not good". They went to his office where she reluctantly advised that her problem was Mrs. Finch. Among other issues she mentioned she was being compared to Ms. Paul. He said he was aware of this. She asked him not to speak to his wife about this. He said he would speak to his wife, that things would get better and in any event she would eventually retire. The Complainant left that meeting feeling as if a load had been lifted off her shoulders.
22. Instead of improving, things worsened. Mrs. Finch became more distant and angrier. Mr. Finch was not as bad, but he was less friendly than before. He did not make eye contact or smile as much. He greeted other employees in the morning but not her. She felt he was mad at her. She followed some advice he had given her about letting the others get to know her. She felt judged for the fact that her daughter was not living with her and felt that some things she disclosed to others were used against her.
23. The second meeting with Mr. Finch occurred seven to nine months after the first. She advised Mr. Finch that things had gotten worse. He did not want to hear about this and became angry with her. She advised she had been to her doctor to discuss stress. He said he would talk to Mrs. Finch again. This meeting was uncomfortable and nerve wracking. At the end of it she was exhausted, anxious and shaking. She advised him she was not the only person feeling stress and he became angry, demanding to be told names. She testified that these people were Mark Faour and Joel Keefe. Mr. Faour eventually went off on stress leave.
24. She does not know if Mr. Finch discussed this meeting with his wife, but things got worse again. For two months he did not say good morning to her. There were no more smiles or friendliness.
25. She recounted an incident at the second company barbecue she attended. She and her then boyfriend, Mr. White arrived at the Finch's summer home around two in the afternoon. Mr. Finch noted that she was late and asked if they were late because they had been screwing. Mr. White said no, they were drinking. Mr.

- Finch then asked what the Complainant was like in bed after a few drinks. Mr. White replied that Mr. Finch would never know. I note that the description of this incident provided by the Complainant at page 14 of Consent Exhibit 1 is different in sequence of events and as to whether Mr. Finch was advised if they had been drinking. The Complainant testified that she and Mr. White felt isolated and uncomfortable and left the party after approximately three hours. Mr. Finch spoke to her on the following Monday and advised he was really disappointed in her. After an uncomfortable day he explained that the disappointment was because she was late and did not help in the kitchen. At the end of the conversation she was shaking and crying. She realized that this was not going to get better. She went home, cried and threw up. Mr. White advised her to quit.
26. After this there was a confrontation with Mrs. Finch in which she asked the Complainant if she was trying to start an argument. The Complainant stated that she would never try to start an argument and they went into Mr. Finch's office to have a discussion. Again the Complainant was shaking and crying. She told Mrs. Finch she could not take the treatment she was receiving. Mrs. Finch said that she was exaggerating and paranoid and asked for specific examples. She was given examples. She did not become angry but listened. At the end of the meeting Mrs. Finch said they would both have to try harder. Ms. McDonald felt better after this meeting. She felt that Mrs. Finch was better after this, but not Mr. Finch.
 27. Ms. McDonald reported that she had been to her doctor in late 2004. She recalled being to her Doctor three times on this matter. The first meeting was in 2003 and was primarily about gynecological matters. She brought up her issues with stress at that time. The second was in 2004 and pertained to her work and stress issues. She was advised both times to get another job. She told her doctor she did not have the strength mentally or physically to pursue it.
 28. On Wednesday, April the 13, 2005 she woke up at 4:00 or 5:00 in the morning throwing up and crying. Mr. White suggested that she call in sick. She was afraid to call in sick. She went to work and met Ms. Coughlin in the parking lot. Ms. Coughlin said that she looked sick. When she went into the office Ms. O'Brien looked at her and said "whatever you have we do not want it, go home." She did not punch in but went home. On Thursday morning she did not feel any better and was once again shaking and vomiting. There was supposed to be a potluck that day and she had made meatballs for it. She asked Carl to deliver them and tell them that she was sick. She later found out that he simply gave the meatballs to a co-worker in the parking lot. She said she would have called in herself if she had known he was not going to tell them that she was sick.
 29. On Saturday, April 16, 2005 she went to see Dr. McGrath. At that meeting Dr. McGrath said she was going to make an emergency appointment for her with a psychiatrist. Dr. McGrath was of the view that she needed to take two weeks off. She said she was afraid she would lose her job and Dr. McGrath assured her that

she could not lose her job while she was on a doctor's note. The note stated "This lady is unable to work April 18 to 29/05".

30. The Complainant saw Dr. Laurie Potter that same day. Dr. Potter also gave her a note. This note was headed "Medical Certificate" and read "This is to certify that Sandra McDonald was seen by me on April 16, 2005 and advised to be off work for the period April 18/ 05 to April 29/05. Patient can return to work on – I will be seeing her in follow up to assess her condition". This note is on letterhead for the Healthcare Corporation of St. Johns and is signed by Dr. Potter over a signature line annotated "Doctor's signature". A phone number is written in by her signature.
31. The Complainant contacted Ms. Coughlin to pick up the doctors' notes. She says she was told by both doctors she could go to the Employment Insurance office and open a stress leave file and she did so. On the following Saturday she called Mr. Mike Lantos and asked what she should do. He suggested she should go to Mr. Finch and explain that she was going off work. She called Mr. Finch at home and left a message to contact her. She believes that was on a Sunday. Looking at the calendar this would have been the 24th of April. Mr. Finch called her back on Monday, April 25th. She started to explain how she was feeling. She stated that he did most of the talking. She explained why she was off work. At one point he said she had missed more time off than all the other staff combined. He said he could prove it. She said she thought she would like to see the proof. She explained that at the time she was off she thought she had cervical cancer. He stated that he "did not give a shit" why she was off work. She told him she was afraid to pick up her pay cheque and afraid to come back to work. She said she told him she was seeing a psychologist and possibly a psychiatrist to help her get better so she could come back to work. He said if she was afraid to come back to work she was no good to him anymore and he would take that as her resignation. She said he could not take it as her resignation as she was not resigning but was trying to get herself well by seeing doctors. She said she was crying during the phone call.
32. The next day she received a record of employment indicating that she had been fired. There was no cover letter. She was devastated by this as she had been told that she could not be fired. She said that she had also obtained this understanding from her meeting at the Employment Insurance office which had happened on the previous Monday. She was particularly hurt that she was fired by a courier envelope and felt that it should have been done in person. She stated that if she had been invited to go into the office would she have gone but later testified that she could not say she would have gone but that she felt being asked to come in would have shown her more respect. She indicated that she loved her work, she was good at it, and it was the work environment that she did not like. She indicated that she did not know of any grounds to fire her other than the personal problems with the family. She then had to go back to the Employment Insurance office and tell them what happened. They said they had to do an investigation

- before they could give her any money. She understood from them that it was good that she had been in to see them prior to being dismissed.
33. As a result of this termination she got behind in her bills and low on groceries. She could only be on sick leave for so long and then she had to go on regular EI. She was drinking, smoking, was an absolute wreck and ultimately broke up with Mr. White.
 34. In 2005 she was making \$9.00 an hour. She seemed to recall that it went up to \$9.55 an hour prior to her being terminated. Her take home pay was as little as \$500.00 every two weeks. While she was off she met with counselors. She went on Employment Insurance and received less than she was previously making. She was taking home between \$350.00 and \$370.00 every two weeks. She entered into a program called the WISE program (women interested in successful employment) through Employment Insurance. This program had the benefit of extending her Employment Insurance but she also felt it prepared her to return to the workforce. One problem that she encountered in this program was determining how to explain to prospective employers about how her last position ended. After completing the WISE program she did a couple of interviews and told the interviewers that she was wrongfully dismissed from her last job. After a few times she realized that being vague was not helping and began to tell them that she had been wrongfully dismissed and had a human rights complaint filed. At this point she was successful in gaining employment. She was employed at the Woods Golf Course as a waitress at the rate of \$8.00 an hour. She applied for a job with Mini Maid and did both for a while. She was getting \$7.50 an hour at Mini Maid. Both of her employers were pleased with her and when she went to them and indicated she would prefer to work for only one employer both of them offered a raise and a promotion. She ultimately went with Mini Maid and was making \$8.50 an hour. She finished working there in January of 2008.
 35. The Complainant started out her own cleaning business in February of 2008. The business is successful and she is now fully booked. She does all of the work herself with no employees and has approximately 16 clients in total. She is now making \$25.00 an hour. The ultimate impact of this is that she is now doing very well. She has not been treated for depression or stress and she is not currently on any medications. She indicated that the last time she saw a psychiatrist or psychologist was in the summer of 2005. When asked what she expected in the way of a remedy she said that she did not expect an apology but she would like a change with respect to her work history. She would also like to be compensated for the \$2.00 per hour less in pay for the years that she suffered to get through the hardship. She wants somebody to say she did not deserve this.
 36. Ms. McDonald admitted while Mr. Hubley requested that she show her breasts on numerous occasions she never mentioned it to the laboratory manager or any member of the management of the Respondent. She did not do this because she thought Mr. Hubley was a good fellow with a good sense of humor and that he

- did not mean any harm. She just did not like it. Likewise she only spoke to Mrs. Finch about the comments made when she was cleaning windows but did not ask her to do anything. She liked the men in the laboratory and felt this was just men being men.
37. The Complainant was asked if someone brought a mistake to her attention did she consider it a hostile act? She answered no and stated that the only time she felt this way was when Mrs. Finch asked if the Complainant was trying to start an argument. A number of discrepancies were brought up between the statement that she gave to the Human Rights Commission which is contained in Consent Exhibit 1 at pages 13-16. In particular she was confronted with a number of discrepancies on her description of the barbeque incident. It was drawn to her attention that in the earlier version she had said they were not drinking, and that the word "screwing" was not used. Ms. McDonald indicated that she felt she had made a mistake then, i.e. when she drafted the letter.
38. The Complainant admitted that when she was slapped on the backside by Mrs. Finch it did not in fact inflict pain and it was merely a tap. She agreed that she had signed herself into the psychiatric unit at the Health Sciences Centre briefly in 2002.
39. She was asked did she have any personal relationship issues outside of those at her work with the Respondent. She indicated that the issues that she had with her daughter had been dealt with before she was working there and that she was working her through it. She admitted that she was dismissed at Marie's Mini Mart for being unable to work when she had checked herself into Health Sciences Centre. After she worked at Marie's Mini Mart she worked with Service Master cleaning toilets before she got the job with the Respondent. She subsequently admitted that there were problems with her daughter while she was working at Respondent as well as problems with her then boyfriend Mr. Puddester. She admitted that she was having financial problems. She admitted she was looking to refinance her home when she was living with Mr. Puddester. He refused to work and she was the sole earner. She ultimately told him to leave. She was asked at around the time she had her breakdown in relationship with Mr. Puddester did she tell anybody about her problem? She indicated that she told Mark Fowler but that the others were not aware.
40. The Complainant testified that she had a good relationship with Tina O'Brien as she was a great teacher. She recalled the time when either Mr. Puddester or Mr. White left home but in any event both times she was without a bed. She indicated that she had two breakups with Mr. White and one with Mr. Puddester while she worked with the Respondent. Later on in questioning she said that it was when Mr. Puddester moved out that he took a lot of household items including the bed and computer.

41. She testified that the pace at the office was sometimes frantic and on other days it was a slow trickle which is usually when she would clean. She admitted it was fair to describe the work as challenging and she said it was very important work, frantic at times. She indicated that she did not find the pace of work stressful but it kept her busy and engaged. She indicated that she discussed the beef tongue incident with Ms. O'Brien and Ms. Sanderson and that they admitted that they had done this. She indicated that she was angry about the incident and that she had kept asking about it all day.
42. In cross-examination Ms. McDonald said that she had two meetings with Mr. Finch. The first occurred about eight months after she started which would make it approximately July of 2003. The second meeting occurred seven to nine months after that which would make a meeting which occurred in February to April of 2004. In the second meeting she advised that she had been to see her doctor. It was pointed out to her that according to Consent Exhibit 2, a letter from Dr. McGrath she was seen by Dr. McGrath on November 19, 2004 with respect to acute stress and difficulty coping and problems she was having with her supervisor at her place of work. She indicated that she had first told her doctor when she went there for gynecological reasons. After an exchange with respect to times Ms. McDonald asserted that she told Mr. Finch about seeing a doctor regarding stress at the second meeting. This is consistent with in her testimony in direct.
43. I note at this time that when Dr. McGrath testified (as set out below) she indicated that there were only three recorded doctor's appointments with Ms. McDonald in 2003 and that there was no record of stress or depression noted in any of those meetings, although Dr. McGrath was the doctor for only one of those appointments. In 2004, however, she met with the Complainant on June 15th at which time a gynecological issue as well as stress and depression over the previous weeks was discussed. At a subsequent appointment in November of 2004 stress and gynecological issues were discussed again.
44. With respect to her final day at work she indicated that she could not remember if she got a cab or if Ms. Coughlin had driven her home. On April 16, 2005 she went to Dr. McGrath. On April 18 she went to the Employment Insurance office and handed in her notes. She indicated she had only ever received regular Employment Insurance benefits. She indicated that she was not aware of why the doctors chose the two-week period for her to be off. At the Employment Insurance office she explained her fear of losing her job and filled out forms. There was no discussion of the processing period as this was done as a precaution so that it would be on file in case she lost her job. I note that according to her testimony an absence from work for this illness had resulted in the loss of her job on one prior occasion.
45. To the best of her recollection she believes she had Ms. Coughlin pick up the notes to bring into the Respondent. She spoke to Mr. Lantos after she had

- attended the Employment Insurance office. To the best of her recollection when she called Mr. Lantos she did so because he was a part of management but a person outside of the family she could call for advice. To the best of her recollection she called him at the office because she did not have his home number at that time. His advice was to phone Mr. Finch. She said he mentioned the pay cheque but she was afraid to come and pick it up. She said she did not feel comfortable telling anyone the circumstances except that she was afraid to come in. When Mr. Finch returned her call she does not recall telling him about the Employment Insurance claim. When asked why she did not tell him about the Employment Insurance claim she said there was no reason. She wanted to talk about her feelings, not what she had done with regards to the Employment Insurance claim. In cross examination it was put to her that she had told him she was seeing a psychologist or psychiatrist to get well. She changed her testimony to say that she told them she was seeing doctors. It was pointed out in her letter, consent 1 page 16, she said doctors. When cross-examined about the delay in processing her Employment Insurance claim she asserted that there had been an initial two-week delay because she was fired.
46. In redirect she was asked why she admitted herself to the psychiatric unit in March of 2002. She indicated that Mr. Puddester was accused by her daughter of inappropriate touching. Her daughter admitted to being a compulsive liar. She did not know who to believe and stated that she needed a safe place to figure things out. At the end of her time in hospital she felt ready to face her issues again. When asked if she considered the hospitalization a major illness she said no. According to Ms. McDonald by the time she had the job with the Respondent her daughter had dropped the charges. They had decided that her daughter would start living with Ms. McDonald's sister. The relationship had gotten better. While she still had problems with her daughter she feels it did not impact her work.
47. She stated that she stayed with Mr. Puddester until approximately seven months after she had started the job. Her breakup with Mr. Puddester had no impact on her job because even though the charges were dropped she felt this was not someone she wanted to spend the rest of her life with.
48. Her breakup with Mr. White was different. There were no legitimate reasons to break up with Mr. White. At the time of their second breakup she said she did not trust anyone. She thought that people hated her and that people were out to get her. When asked who, she said "the world."

Michelle Paul

49. Michelle Paul was employed by the Respondent from August 1999 until September of 2002. Her job description was essentially the same as that of Ms.

- McDonald. During her job interview with Mr. Finch she was asked if she was married and had children. She indicated that this made her feel uneasy, however, she accepted the job as she needed work. While she was happy to get the job she had understood she would essentially be a secretary and was surprised with the duties entailed in the job when she started work. She testified that Mrs. Finch did not like her and she did not know why. Mrs. Finch commented that she did not like skinny people. Such comments were made approximately once a week and made her feel paranoid and self-conscious. She did not mention it to Mrs. Finch. Mrs. Finch also told her she was taking too many notes and using too much paper and pens so she started to use her own paper and pens to take notes about her problems. She did not speak to Mrs. Finch about how she was being treated. When she became pregnant Mr. Finch ignored her for about a week. They had a meeting in his office in which he said he was disappointed as a businessman with her pregnancy and thought she should have mentioned it to him. After that he would arrive in the morning and speak to everyone at the office but not to her. This made her feel like she had done something wrong. Right before her wedding she did not attend the company barbeque. The following Monday she was called into Mr. Finch's office and was told that he was disappointed she did not attend the barbecue. He said it was showing disloyalty to him and the company and again she felt like she had done something wrong.
50. Over time she began to feel anxious and did not like her job. As she had a one-year-old child she needed the money and it paid well. She felt depressed and trapped. She did not discuss this with her employer as she felt in this atmosphere she was not about to complain.
 51. The year after her wedding she went to the barbeque. She was seven months pregnant and felt she was being ignored. She found the barbeque to be uncomfortable and awkward.
 52. When she was pregnant Mrs. Finch said she was getting nice and big and round. They had a discussion about stretch marks. When Ms. Paul showed that she did not have any stretch marks Mrs. Finch stopped talking to her for the day. When asked if this refusing to speak to her was typical she said yes it depended upon Mrs. Finch's mood. She said that the treatment became more intense when she returned from her maternity leave. She stated that it was "tenfold." It got her to the point where she broke down and cried in the office. On September 30, 2002 she broke down crying. This was the third time she had broken down. When time came to go home she walked out the door and started to cry again. She simply could not bring herself to go back to the office. Three weeks later she saw a doctor but she was terminated for not returning.
 53. When asked why she did not tell Mr. Finch she said she could not bring herself to speak to him. She did get a letter saying that if she did not return by a certain date she would be terminated. She was out of work two months before she got another job.

54. In cross examination Ms. Paul conceded she was not the only person to clean the kitchen but was the main person asked to do it. She understood that Mrs. Sanderson was hired as a maternity replacement. She indicated she had only spoken to the Complainant on one occasion approximately three years ago. This conversation was between half an hour and forty-five minutes long. She told Ms. McDonald about her experience but she did not recall Ms. McDonald telling of her experiences with the Respondent. She admitted she did return to Respondent after her maternity leave but she did not feel comfortable. She agreed that it appeared she came from her maternity leave in early August of 2002 and left on September 30, 2002 so she was only back for a period of two months. She denied any issue with post partum depression. There was a car accident during that period in which she had backed into the Finch's car. There was no damage to her car but there was damage to the Finch's car. She made a deal with Mr. Finch to pay the damage out over time rather than involve her insurance. The damage to the vehicle was under \$500.00. Nothing in the cross-examination caused me to doubt in any way the accuracy or truthfulness of Ms. Paul's evidence, although I note that her testimony did not bear directly on any of the facts in issue in this hearing.

Carl White

55. Carl White is 52 years old and lives with Ms. McDonald. He is the head gardener at the Memorial University of Newfoundland botanical garden. As of the date of the hearing they were engaged to be married.
56. Mr. White testified that not long after they began dating he started to notice that when he picked her up from work she was agitated and sad. After some time she confided that she was under a lot of stress and she felt like she was being picked on. He told her to forget about it and if she could not she should quit her job. Her response was that she had just refinanced her house and renovated it and this was the best money she had ever made. She would look for something else but maybe things would get better. Things did not get better. He would hear her throwing up in the morning before work approximately two or three times a week. One week it was everyday. He noticed that she would begin to get agitated beginning at suppertime on Sunday.
57. Mr. White attended two barbeques while the Complainant worked at with the Respondent. When they attended the first one he felt that people were friendly. When they attended the second one things were not going well at work. Ms. McDonald said she did not want to go and to be social with these people. She also said she had been ordered to go so he had to take her. When they arrived Mr. Finch looked at his watch and said "Why are you so late? Were you screwing?" Mr. White testified that he was so taken aback he held up the beer he had brought

- (this was a gesture that accompanied his testimony at the hearing) and said “no, we were drinking.” He was then asked what Ms. McDonald was like in the bed after a few drinks. He answered that Mr. Finch would never know. At that point he told Ms. McDonald they were leaving. She said she could not leave because she would be fired. They stayed approximately three hours and left. The only thing that Mrs. Finch said to him the whole day was “you are in the way”.
58. Mr. White recalled the day Ms. McDonald received notice that she had lost her job. He came home and she said she had been fired. He said that could not be but she showed him the termination slip which said fired on it.
 59. In June of 2005 they broke up again. After they broke up she became virtually reclusive and would not go out. Since she has left her employment with the Respondent he feels that she is essentially a different person. She is not jealous like she used to be. She is now comfortable socializing with his friends.
 60. In cross examination it was pointed out that there is no mention of the barbeque incident in his statement provided to the Human Rights Commission on March 29, 2006. Mr. White testified that he told the Commission about that but it did not go into the statement. He thought Ms. McDonald should take the matter to civil court. He did not tell her to go to the Human Rights Commission. When asked about the barbeque, he stated that he drove them to the barbeque. They had a half dozen beer with them. Ms. McDonald drank four of the beer and he drank two. When asked if they drank before they went to the barbeque he said that this was an off the cuff answer to Mr. Finch’s question which he did not know how to handle. He had not been drinking as he was driving. When asked if Ms. McDonald was drinking he said she may have had a beer or two at the campsite. They left the campsite around 2:00. He did not drink because he was not sure what would happen at the barbeque.
 61. When asked about other issues that could be placing stress on the Complainant he noted that she had never been well off financially.
 62. He stated that the Complainant was concerned about going on stress leave as she thought she might be fired. Her doctors said that she could not be fired while on sick leave. He was not home when Ms. McDonald called Mr. Finch and did not hear the conversation. His reaction when she was fired was one of relief. He thought it was for the best that she was at least out of there.

Peggy Coughlin

63. Peggy Coughlin has been employed with the Respondent for thirteen years. She is a pickup and delivery driver so she is in and out of the office. Accordingly it is reasonable that she would not have much direct knowledge of what was

- happening in the office. She testified that she had no problems getting along with the Complainant. She does recall explaining to Ms. McDonald who Ms. Paul was and telling her that they were similar in height and stature. This was in response to a request from Ms. McDonald. She does not recall seeing anybody compare the Complainant to Ms. Paul.
64. Ms. Coughlin testified primarily about the “overtime incident.” She said the issue of overtime was brought up by her. She says when Ms. McDonald started working it was a fast paced environment so she had to learn quickly. She noticed one day that Ms. Sanderson had put in for fourteen hours of work. She went to Mr. Finch and called a front staff meeting. She felt that Ms. McDonald could have used the overtime to stay and learn. She was just trying to help her out. During the meeting somebody asked her if Ms. McDonald had “put her up to it”. She was not certain if it was Mr. Finch, Ms. O’Brien, or Ms. Sanderson. Ms. Coughlin did not suffer any reprisals for the meeting.
65. The last time that she saw Ms. McDonald at the company was when the Complainant went off sick. She spoke to Ms. McDonald on the phone. The Complainant advised that she had a doctor’s note to bring in and she was scared to bring it in. Ms. Coughlin said she would bring it in for her. She did not actually see the notes as she brought them in an envelope. There was no discussion regarding the notes except that she told Ms. McDonald to go to work and not to be afraid. She did not go so Ms. Coughlin brought the note in for her.
66. Ms. Coughlin’s demeanor, facial expressions and the tone of her voice when speaking of Ms. Sanderson conveyed an antipathy if not outright dislike of Ms. Sanderson when she spoke of her. As can be seen from the testimony of Ms. Sanderson it is likely these feelings are mutual and from the testimony of Ms. O’Brien, it was not a secret within the office that these two disliked each other.

Michael Lantos

67. Michael Lantos is a manager with the Respondent. He was asked if there had been any incident where female staff was subject to “cat calling”. He denied that there was and said if there was it would have been brought to his attention by other female employees present. He testified that his employment relationship with Ms. McDonald was fine. There were no disagreements and he treated her like everyone else.
68. He recalls being contacted by Ms. McDonald at home on a Friday night. He was confident that the call from Ms. McDonald had happened late in the evening because he had picked up his children. Ms. McDonald stated she was uncomfortable with coming back to work. She stated she was not coming back into the building. He could not recall her exact words but the gist was that she was

afraid, she was uncomfortable and did not want to come to work or be at the front office. He was not sure if she actually used the word afraid. She was uncomfortable but did not explain why. This was not an area he had authority to resolve. He said to her not to just stop work. He suggested that she speak to Mr. Finch. He asked for and received her permission to approach Mr. Finch on her behalf.

69. He contacted Mr. Finch and said that he should make arrangements to see Ms. McDonald outside of the building. Mr. Finch said he would take care of the matter. Mr. Lantos does not recall if he said anything else.

Dr. McGrath

70. Dr. McGrath is a doctor with a general practice. She graduated from Memorial University in 1987 and started practice in 1988. Ms. McDonald has been her patient since April 1989. She reviewed the Complainant's charts from 2001 onward, although she did note that in 1996 Ms. McDonald was referred to a psychiatrist Dr. Tony Walsh. At that time she was complaining of depression and other difficulties.
71. A note was made on the Complainant's chart on June 28, 2001 that the Complainant was admitted to psychiatry at St. Claire's between June 23 and June 25. At that time she was diagnosed with adjustment disorder with depressive mood. This was a discharge summary from Dr. Kim.
72. The dates that Dr. McGrath met with Ms. McDonald in 2002 were March 4, 18, 19, April 29, June 10, July 10, September 12, and October 31. She stated that many visits related to stress and depression. There were some relating to gynecological issues. It is worth noting that all of these visits occurred before she started work in November of 2002.
73. At the March 4th, 2002 visit the doctor wanted to start her on medications for depression but Ms. McDonald did not start medication at that time. On March 18th and 19th, 2002 financial issues, issues with her daughter, depression and suicidal thoughts were discussed. She was referred to St. Claire's emergency to see the psychiatrist on call. At that time she saw Dr. Wyner. She was diagnosed with adjustment disorder with depressive features. With respect to the 2002 admission the discharge summary notes the following "initially upon presentation Sandy was very anxious and felt the ward was not the place to be initially stating she did not belong there". She was convinced to stay and became more relaxed.
74. On April 29, 2002 Dr. McGrath was advised of the Complainant's previous admission. At that time Ms. McDonald disclosed that she was still feeling unwell and had issues with her boyfriend and daughter.

75. In 2003 there were three appointments. These were August 23, November 19, and December 13. The chart shows that none of these visits included any mention of depression or stress. Only one of these appointments was with Dr. McGrath. She said it is possible that stress or depression was mentioned, however, if it was in a meeting with her she would have documented it given her knowledge of the Complainant's history.
76. In 2004 there were appointments on June 15, July 31, October 27, November 8, and November 13. Only the meetings of June 15 and November 13 discussed stress and depression. The other appointments included discussion of gynecological issues and the meetings of July 31, October 27, and November 8 were primarily about those.
77. The June 15th visit included discussion of stress and depression which had been present for several weeks. She stated that she was stressed and could not cope and that she was socially isolated. She had problems with her boss at work. Recently she and her boyfriend had broken up and she had financial issues as well as issues concerning her daughter. At that point she was diagnosed with stress and depression.
78. The November 13, 2004 visit was discussed in detail. Ms. McDonald had feelings of stress and difficulty coping. She had taken two days worth of a medication for depression which was prescribed on a previous visit in June of 2004. She stated that her manager at work was demeaning to her and she needed to talk to somebody. She was referred to the Start clinic (a clinic for semi-urgent cases) at that visit.
79. In 2005 she met with Ms. McDonald for an unrelated matter on March 21st and saw her for stress and depression on April 16th. At that visit Ms. McDonald said work was very stressful. She could not sleep. She was referred immediately to a psychiatrist on call at the Health Sciences Centre. She was seen for depression and stress again on May 3, May 26, and June 27. There was a meeting of July 20 for an unrelated matter and she was seen for depression on August 9 and 25, and September 8. She was seen on a number of occasions after that.
80. With respect to the April 16th visit Ms. McDonald advised her of significant problems at work. She was suffering verbal abuse from management. She stated the manager's son caused her to feel stupid, she suffered from low self esteem and was quite depressed. Dr. McGrath was concerned for her mental state. She called the psychiatrist on call, discussed the case, and sent Ms. McDonald right in. Ultimately the psychiatrist at the Health Sciences Centre referred Ms. McDonald to the Start clinic.
81. Dr. McGrath was asked why she wrote the April 2005 note. Dr. McGrath stated she knew Ms. McDonald was not going to be able to work. She was sending her

- to emergency because of her level of stress and she would not be able to work for at least two weeks. This would give Dr. McGrath some time to do follow up. She felt that the Complainant suffered from depression, adjustment disorder, situational anxiety and that this was related to stress in the workplace. Dr. McGrath went on to state that adjustment disorder is due to acute situational anxiety and is not necessarily the same as depression.
82. On the visit on May 3, 2005 Ms. McDonald indicated that she was attending the Start clinic but she was not receiving any medications. At that visit she did start medication. When asked if she recalled giving Ms. McDonald advice about her job Dr. McGrath said she would have given her the note to take her off of work. She indicated that she does not write such notes except at the patient's request. When asked if she could recall whether or not Ms. McDonald asked her to write the note she said she did not specifically recall but based on her practice Ms. McDonald must have. Most notes are written like this with a time frame and no specific diagnosis. Occasionally patients want the diagnosis written in. This is not something she would do without the patient's consent. She indicated some employers have functional limitation forms but not all employers do. What usually is required is a description of the functional limitation, i.e. what parts of the job they are unable to perform. In Ms. McDonald's case it would have been psychological issues. When asked if it was her recommendation that the Complainant be off work she replied firmly "Oh yes."
83. The actual chart entry for April 16 reads "very stressed, problems at work, stress, verbal abuse of management, dental and hearing craft, son calls her stupid, makes comments about her clothes, can't cope, can't sleep depression, adjustment disorder, depression referred to Health Sciences emergency, Dr. Martin is on call."

Tina O'Brien

84. Ms. O'Brien is an owner of and front office manager for the Respondent. She has been with the Respondent for eighteen years. She is the daughter of Mr. and Mrs. Finch. She worked in the front office with Ms. McDonald. At the time Ms. McDonald was employed the other employees in the front office were Peggy Coughlin, Joan Sanderson, and Mrs. Finch. When asked if she disliked Ms. McDonald Ms. O'Brien said not at all. She said they got along fine and there was never an issue between them. When asked if she had any problem with skinny people she indicated she had just lost 35 pounds and her plan was to continue to lose the weight. She said that she has nothing against skinny people or fat people. She indicated that she felt Ms. McDonald fit in well, they laughed and carried on, they always had fun.
85. She testified that Fridays were a slow day as they had to get materials to the dentist's offices before 12:00 or 1:00 as the offices were usually closed Friday

- afternoons. The first half of the day on Friday was busy trying to get rush pickups done before everyone else closed. On a busy day they would have 65-75 cases as well as 70-80 invoices. Each package had to be wrapped up and sent by driver or courier. In addition to this there would be 200-300 calls. This could be very hectic. They would look forward to Fridays as it was less busy. She said that Ms. McDonald was a good employee who was always on time and was never a problem. They worked side by side and in fact she helped train Ms. McDonald. When Ms. McDonald started she learned the basics of upper and lower models and how to read prescriptions including dental terminology. Then she learned how to book in cases. This was not a position somebody could walk into on the first day and would take six to nine months or as much as a year to feel comfortable. They checked everybody's work as an employee error could be very damaging. It could cost thousands of dollars as these were custom products. Towards the end of her employment she was being trained on selecting teeth which is demanding work. Ms. McDonald was eager to learn and she constantly took notes. She was very good about asking the right questions.
86. Even Mrs. Finch's work was checked before it left the office. Ms. Coughlin who is responsible primarily for driving picks up mistakes that Ms. O'Brien makes. Mrs. Finch's role was the same as hers. She was not aware of any personal attacks against Ms. McDonald and stated that none came from her.
87. She testified that Ms. McDonald was not treated any different than any other member of the staff. When a mistake was made it was explained, they were told how to correct it and what the effect of it could have been. Ms. Coughlin is the main driver but other drivers can be used when necessary. There are occasions on which rush pickups and deliveries are required while Ms. Coughlin is already out on the road. Ms. McDonald, herself, and Ms. Sanderson did the driving. It came down to whoever was free. Even Mr. O'Brien has done some deliveries. Sometimes they have all three drivers on the road. Due to warranty issues and other events sometimes they are required to return a repaired appliance within a single day. They can get as many as 10-15 repairs to be done in the same day.
88. She was asked if Ms. McDonald discussed her life outside of work. On one occasion Ms. McDonald confided that her lights were going to be cut off. She asked if there were any payroll advance companies in the area. Other issues included breakups with boyfriends and people moving out. She recalls that at one point Ms. McDonald had to take boarders to pay the mortgage.
89. With respect to cleaning she said each employee would take a turn watering plants, cleaning the workspace, and the glass window in the lobby as well as the sliding glass doors in front of the office. She stated that cleaners would do the floors and washrooms but not the work space as they did not want the cleaners to go near the pans containing models. It is very bad if they damage the models and the models damage easily. The cleaners did the floor, the washrooms and the lunchroom. In the laboratory each technician was responsible for cleaning their

work area. All of the front office staff would take turns doing the stove, fridge, etc. and wiping down the coffee pot area. Ms. O'Brien and Ms. Finch did this cleaning as well.

90. Ms. O'Brien was asked if she had anything to do with the incident involving Ms. McDonald's locker door. She said she did not. She indicated she has some idea who did. Given the seriousness of these questions I found it somewhat incongruous that Ms. O'Brien smiled at various inappropriate points in her testimony, including when answering this question. Prior to this incident a Ms. Anne Marie Joy had come to Mrs. Finch and asked for group photos of the staff. People came to Ms. O'Brien and said something was happening. They told her something was going on back in the locker room. She said that she brought this up to Craig Finch (her brother and ultimately a part owner of the Respondent) and that such things were not tolerated. They did not find out who did it. There was an investigation conducted by Mr. Jim Finch and Mr. Craig Finch in which they went to each person. She named the individual she thought did it and denied that she had any involvement. She also said that Ms. Sanderson was not involved. She thought that this was not appropriate but later said that she thought it was just carrying on in fun.
91. She indicated that the workplace was never tense and they always had fun. Ms. McDonald appeared happy and contented. She never saw the Complainant upset in the workplace. She said no tension or stress was ever mentioned. She was never advised of any problems by her parents, however, she was aware that Ms. McDonald had spoken to Mrs. Finch at one point and that they had resolved an issue around training. She would describe this discussion as a meeting. The first time she became aware of any true workplace issues was when she got the letter from the Human Rights Commission. This was in approximately July of 2005. She stated that at the time Ms. McDonald left she had no idea why she left. While she did not discuss this with Ms. McDonald she understood the Complainant was not quitting but she was not coming back to work. When asked if she thought that was odd she said yes.
92. Ms. O'Brien was asked if she recalled a staff meeting with respect to overtime. She recalled that this meeting was called over other issues not just overtime. Ms. Coughlin did not like Ms. Sanderson. She understood that it was Ms. Sanderson who went to Mr. Finch and he called the meeting. Ms. Coughlin was rude to Ms. Sanderson, never spoke to her and was getting on her nerves. As far as she was concerned this was just between Ms. Coughlin and Ms. Sanderson. The issue of overtime did come up as she saw someone looking at someone else's punch card. She understood it was a woman identified as Gail. It was suggested to her that it was really Ms. Coughlin who called for the meeting regarding overtime. Ms. O'Brien denied this and said Ms. Sanderson came to her and then went to Mr. Finch. It was Ms. Sanderson who had issues with Ms. Coughlin and she does not remember an overtime issue coming up although it may have.

93. She denied that anything was said to Ms. McDonald. She never witnessed any comments about Ms. McDonald and the fact that she was skinny. She never witnessed any arguments between Ms. McDonald and her mother and never saw Ms. McDonald cry. The only time she saw the Complainant upset was when her sister was ill. She did admit that she witnessed Ms. McDonald being compared to Michelle Paul. She said this was just in the way she worked around the office and carried on with them. She noted that Ms. Paul used to make fun of her husband and that Ms. McDonald used to make fun of her boyfriend, Mr. Puddester. When asked if she remembered any comments about Mr. Puddester looking like ET she said that she does recall such statements but they were made by her cousin Roger Hubble. Mr. Hubble was called into the office and spoken to about name-calling and told it was not tolerated. Again, despite her evidence that this was dealt with in a prompt and serious fashion Ms. O'Brien smiled as if amused while recalling this incident.
94. Ms. McDonald had been coughing and sneezing the day before her last day in the office. She did not look stressed but she looked ill. She asked if she could go home because she was sick. Ms. O'Brien thought that she asked Ms. Coughlin to drive her home.

Joan Sanderson

95. Ms. Sanderson testified that she had started with the Respondent in April of 2001. She described her duties and essentially her position was the same as that of Ms. Paul and Ms. McDonald. Ms. Sanderson recalled that a person named Michelle worked with the Respondent, however, she was not sure if Michelle was there at the same time as Ms. McDonald. She described the pace of the workplace depending on the work that was being done. Some days they were flat out and there were time limits as well. A lot of dentists had specific times and that was "crucial." She denied disliking Ms. McDonald and stated that they got along very well. She was asked if she disliked skinny people, she denied this and stated that she had been skinny most of her life and she was not overweight when Ms. McDonald was there or now. She stated that it did not take long to get to know Ms. McDonald or to carry on a conversation with her. She felt that the Complainant was comfortable, friendly, and interested in the job.
96. She stated that Ms. McDonald got along well with Mrs. Finch. There was no hostility. She did not think that Ms. McDonald liked Mrs. Finch to point out mistakes. She would turn to Ms. Sanderson and say "I don't not think Carol likes me". In response Ms. Sanderson would say she is just trying to help you and you are not here to win a popularity contest. When asked if based on her observations Mrs. Finch did dislike Ms. McDonald Ms. Sanderson answered not that she knew of. When asked if Ms. McDonald talked to her about her personal life she said not only her but all of the people in the front. They talked about her ex-fiancé, Mr. Puddester. Ms. McDonald did not say much about her daughter beyond that

- her daughter was now living with her sister. The Complainant was always talking about her financial problems. She knew Ms. McDonald was having trouble with payments on her house and it was Ms. Sanderson who suggested that she take in boarders. She recalled one day in which Ms. McDonald was very upset and was going to get a cash advance to help pay the light bill.
97. With respect to the issue of the baked goods she denied that there was any pressure on Ms. McDonald to bring baked goods. When Ms. Sanderson was read a portion of Ms. McDonald's letter which referred to personal attacks and gave example of the words used she denied that there had been personal attacks on Ms. McDonald and she never heard any of those words used. She denied that Ms. McDonald was left out of social events, social activities but that in reality there were not a whole lot of them other than the barbeque and the Christmas party.
98. With respect to the clothing that was given to Ms. McDonald she says that she remembers Ms. McDonald saying to her that she must have lots of sweaters and tops. Ms. McDonald said when she got her money sorted out she would get herself some new outfits. Once a year Ms. Sanderson would clean out her closet and give clothing to goodwill. She had given some to another employee previously and she said to Ms. McDonald that she had a bag of clothes out in her car. She did not bring the bag into the office but told Ms. McDonald she could take what she wanted from it. At the end of the day the bag was gone so she assumed Ms. McDonald had taken it. A couple of weeks later the Complainant had on a top and she asked Ms. Sanderson if she recognized it. Ms. Sanderson said she did not know if it was one of hers or her nieces but that it looked really nice on Ms. McDonald.
99. Ms. Sanderson was initially hired as the maternity replacement for Ms. Paul but she did ask what would happen when Ms. Paul came back and was told that if it worked out she would continue to be full time. They expected an expansion in the near future. She stated that when Ms. Paul returned from maternity leave there was more than enough work for both of them. She did not feel they were competing for work.
100. Ms. Sanderson stated that Mr. Finch had wanted Mrs. Finch retired long before now. She does not recall Mrs. Finch ever saying that she did not like Ms. McDonald. She never observed any arguments between Ms. McDonald and Mrs. Finch. The only time she could recall seeing Ms. McDonald upset was the occasion on which she recalled that her lights were going to be cut off. She was going to go to a place on Freshwater Road for a payroll advance.
101. With respect to the beef tongue incident she was aware that there was a note on Ms. McDonald's locker. She denied being involved. She said that Ms. McDonald was laughing at it herself and she was not upset. She thought of it as a kind of little practical joke. According to her there was never an investigation. At that time she thought it was Ms. McDonald's friends at the lab who did it.

102. When asked a series of questions about the staff meeting on overtime Ms. Sanderson stated that she was given a hard time by Ms. Coughlin from day one. She said she was actually physically pushed by Ms. Coughlin and had models taken out of her hand if Ms. Coughlin thought she was too slow. She has witnessed the same treatment of Ms. O'Brien and Mrs. Finch. – Ms. Coughlin would simply grunt in response to their greetings. She could not believe that she would do that to her boss. She stated that Ms. Coughlin could go three weeks solid without speaking to her.
103. When asked if she had ever heard Ms. McDonald compared to Ms. Paul she said that she was tall and had the same build and could eat anything and not gain weight. She said she probably said that herself. She noted that Ms. McDonald did thank her for the clothes.
104. According to Ms. Sanderson referring to Mr. Puddester as “ET” was something that Ms. McDonald used to do and then the others got into it. When asked if she heard Ms. O'Brien call him ET she said “we all did, even Tina”. She testified that she still has issues with Ms. Coughlin.
105. In response to an unrelated question from the chair she went on for some time about the thoughts that she had after the “overtime” meeting and her theory as to who was responsible for the meeting being called. Despite her description of the workplace as a happy one it is clear that Ms. Sanderson has ongoing and serious issues with Ms. Coughlin.

Carol Finch

106. Carol Finch is one of the owners of the Respondent and the wife of James Finch. She essentially confirmed the duties of Ms. McDonald. She also confirmed that the workload varied. She denied that she dislike Ms. McDonald. She admitted she did say that she hated skinny people. She says it to friends of hers and she intends it jokingly not in a serious manner. When asked if she hated skinny people she said maybe hate was a bit of a strong word. She was jealous or envious of people who could eat all they wanted without gaining weight.
107. She felt that Ms. McDonald fit very well in the front office. Her work ethic was good and she tried hard and she was competent. She denied that she had tapped Ms. McDonald on the backside. She does recall an incident where she tapped Ms. McDonald on the hand after she had failed to cross off an item on a list meant for tracking deliveries. She stated this was meant as a joking gesture. She agreed that she did not feel that she had Ms. McDonald's consent but felt it was just something that happened. She reluctantly agreed that it was an expression of disapproval and could not recall having done that to anyone else who did not

- follow her instructions. She said it was done instinctively and that she did not hurt Ms. McDonald's hand.
108. Mrs. Finch admitted there was a meeting between her and Ms. McDonald. She said Ms. McDonald seemed to think that Mrs. Finch was picking on her. Mrs. Finch felt that was "her context". Mrs. Finch felt she was supposed to tell Ms. McDonald if she made a mistake. She did not think she had done so rudely. She thought the meeting went fine and when it ended she thought they would both try harder. Mrs. Finch was not offended by the meeting. With respect to Ms. Paul she stated that Ms. Paul's job was really a new full time position. She denied disliking Ms. Paul and denied telling Ms. McDonald that she disliked Ms. Paul. With respect to saying she hated skinny people she said she might have said it three to four times. She admitted saying so in front of Ms. Sanderson and Ms. McDonald. She said that it was said jokingly and no one ever said to her that it was not a proper thing to say. She does not remember Ms. McDonald's reaction when she said that. She said she was not present when Ms. Sanderson commented on Ms. McDonald's hair.
109. She recalled the incident in which Ms. Sanderson forgot to pass on a message and that she actually blamed Ms. McDonald for failing to do so. Ms. McDonald was a little upset and seemed agitated. She denied that Ms. McDonald was crying. She stated she did not apologize even though Ms. McDonald was upset and agitated. It was suggested to Mrs. Finch that on another occasion Ms. McDonald had made a mistake and when she tried to explain Mrs. Finch accused her of trying to start an argument. Mrs. Finch agreed that this event did happen. She called her into the office and they had a discussion. She did not agree with what Ms. McDonald had done and she had to correct her. She felt Ms. McDonald was disagreeing with her authority. They had a talk and they agreed they would mutually try to get along. She felt they left on good terms. It was put to Mrs. Finch that Ms. McDonald was shaking and crying during that meeting. She stated she did not recall the shaking but she was crying. Later in cross examination it was put to her that Ms. McDonald was upset and crying and shaking and she agreed with this statement. She agreed that Ms. McDonald said to her in that meeting "Carol I hate the way you treat me." From that point on she was very cautious of what she said to Ms. McDonald and how she said it. She felt things improved as Ms. McDonald did not seem to be as moody. When asked if she was aware that Mr. Finch had two meetings with Ms. McDonald she said yes. She also agreed that Mr. Finch told her that Ms. McDonald was having problems. She agreed she knew about this before her meeting with Ms. McDonald. She agreed that she was not surprised with Ms. McDonald's allegation that she had been mistreated when it came up in her meeting.
110. When asked what she was told about the conversation between Mr. Finch and Ms. McDonald she said that Ms. McDonald had come in and had some concerns with

- how she was being treated and she agreed she would try to watch herself. From her perspective she did not “own up” to doing what Ms. McDonald alleged. She denied that Mr. Finch told her that Ms. McDonald was crying at that meeting. She agreed that it was fair to say that she was aware of Ms. McDonald’s vulnerability because of her life issues and that Mr. Finch was aware of it. As far as she could recall this was the only time she saw Ms. McDonald crying in the workplace. She agreed it was safe to say that Ms. McDonald was stressed at that meeting. When asked if she had compared Ms. McDonald to Ms. Paul saying that Ms. McDonald was skinny like Ms. Paul she stated she did not recall if it was more than once but on at least one occasion it was said jokingly.
111. Mrs. Finch stated that the staff meeting was not called by Ms. Coughlin. She said it was Ms. Sanderson that called the meeting. It was an issue with respect to overtime and someone looking at someone else’s punch card. She agreed that tempers flared at that meeting but denied that Ms. McDonald got blamed for the overtime issue being brought up at that meeting. She said she did not recall seeing Ms. McDonald cry but stated that would be something she would remember if it occurred. She stated that the relationship between Ms. Sanderson and Ms. Coughlin was professional with no animosity as far as she could see.
112. With respect to the beef tongue incident she stated that she does not know if she was there when it happened. The first she heard of it was in the Human Rights complaint documentation. She stated that there was no investigation she was aware of prior to the Human Rights complaint.
113. She recalled that there was a message left on their answering machine at home on a Sunday night asking one of them to call Ms. McDonald. Mr. Finch spoke with Ms. McDonald on a Monday morning. When Mr. Finch got off the phone with Ms. McDonald he came out and told her Sandra was not returning to work due to illness. The decision to terminate Ms. McDonald was made by Mr. Finch. He said she was not returning to work and they needed someone to fill her position. The position was filled by a lady named Linda who had been working part time. She moved from a part time position to a full time one.

James Finch

114. The last person to testify in the hearing was James Finch. Mr. Finch is one of the owner/operators of the Respondent. He is now semi-retired. He identifies Carol Finch, Craig Finch, Tina O’Brien, and Blair O’Brien as the co-owners. He outlined the history by which he came to start up the Respondent and his history of community service including involvements with the Rotary Club, Masons, and Shriners. He became the president of the Shriners in 2003 and indicated that in the years 2002 and 2003 he did a great deal of traveling. He is semi-retired partly as a result of health trouble that he had three years ago. Between 2002 and 2005 he said that when Mrs. Finch was in the office she was a supervisor. He stated

that there was not a lot of turnover in the company and stated that 60% of his employees had been there seven years plus and most of that 60% are employees who have been there for 12-27 years. He outlined the steps that he has taken to accommodate a number of employees with disabilities. I accept his evidence that he has employees with disabilities and that he has taken reasonable steps to accommodate them.

115. He testified that he took a three-day course at Memorial University on how to conduct a successful interview. He indicated that the application form filled out by Ms. McDonald and Ms. Paul was one drawn up from that course. The course included discussion of the *Code* and what they could and could not ask in an interview. He said for him it was an eye opener. He understood that he could not even ask if somebody was male or female until after you had hired them. He indicated that the third page of the interview is completed on hiring and is for insurance purposes. I accept this evidence. He indicated that the Respondent has medical and long-term disability insurance but they do not have dental as they are usually able to work something out with their connections in the dental community. He indicated that Ms. McDonald had these benefits. He denied asking about children or pregnancy in job interviews and said even he knew the difference of that. He would never ask such a question in an interview. He indicated that any suggestion that he would dismiss employees who got pregnant was ludicrous.
116. With respect to social functions he indicated that they were not mandatory. If employees did not come it was their loss as they were the ones missing out on a good time. He indicated that the social functions are covered by a payroll deduction from the staff of \$3.00 which is matched by a contribution of \$1.50. The sign up sheets for the Christmas party and the barbecue for various years were entered into evidence as Exhibit JF1.
117. With respect to the remarks he is alleged to have made at the barbeque he adamantly denied having made these remarks. He stated that these allegations were why he was at the hearing – it upset him that anyone would tell such lies. He stated would not even tell an off colored joke.
118. When asked what he said to Ms. McDonald in the parking lot the day after the barbeque he recalled saying he was disappointed she did not stay longer and that she should enjoy the fruits of her labour.
119. He indicated that his impression of Ms. McDonald was that as a worker and as a human being she was a very nice girl. He said he never had any issues with respect to her ability and she was very enthusiastic. Every January they have a staff meeting. At those times he would look for suggestions on ways to improve the lab. Ms. McDonald was always very enthusiastic and she spoke up about how happy she was to be there in the two successive Januarys that she was there. She

had just begun to learn to pick teeth, a more advanced task than those she had been doing.

120. He tells his people they work 8 to 10 hours a day which is a long time out of their life. He hoped they were happy. If they were not happy they should look for another job or see what they could do to become happy. Later in his testimony he gave examples of the things he had undertaken to assist employees with personal problems over the years.
121. He was asked about the two times that he spoke with Ms. McDonald. He said that he remembered the first time. One day he came to the lab and noticed that instead of Ms. McDonald's usual cheerfulness she was not too happy. He believed at the time that it had to do with her dog running away or her pet rat dying. He took her into his office and asked her what was wrong. He says that she told him she was having a difficult time with Mrs. Finch and Ms. Sanderson as they were being too hard on her. They were nitpicking every little mistake she made. When asked if she was upset at that meeting he said she was down. In cross examination he said that Ms. McDonald definitely did not cry during that meeting. Immediately after the meeting he called Mrs. Finch and Ms. Sanderson into his office and said essentially Ms. McDonald is going through a tough time, go easy on her and help her out.
122. He testified that he had a hard time trying to get his head around the second meeting. He could not recall the second meeting between himself and Ms. McDonald but agreed that there might have been one. He really could not remember what had happened at the second meeting or why it was called. It was drawn to his attention that his wife had testified that he had two meetings with Ms. McDonald and that he had discussed these meetings with his wife. He responded that pretty well everything was discussed if there is a problem. If it involved his wife, or anyone in the lab, it would be discussed with them.
123. When asked if she told him about seeing a doctor regarding stress in the workplace he stated that never once was the word stress used. When asked if she referred to doctors he said the only time she referred to doctors was "in the April meeting". He did not make it clear what April meeting he was referring to. Looking at Ms. McDonald's testimony the second meeting could have been in April 2004. Their final conversation also occurred in April, 2005. He denied that she had ever mentioned Michelle Paul.
124. When asked about the type of work Ms. McDonald did he said that prescriptions are detailed and terminology has to be followed carefully. He indicated that a mistake would be disastrous for the patient, the doctor, and the lab. If they put the wrong tooth in the product or made any other error both the doctor and the lab would be sued.

125. He said that with respect to the beef tongue incident he said that Ms. McDonald never brought it to his attention. He found out about it when the Human Rights complaint came in. It was put to him in cross examination that his daughter had indicated an investigation happened. He agreed that Ms. O'Brien said that but it did not take place at the time of the incident. It occurred after the Human Rights complaint was received. His comments indicate that he felt the time line was not clear in Ms. O'Brien's testimony. He indicated that he and Craig Finch went through the entire lab and nobody admitted to posting the picture. He called in Ms. Sanderson and Ms. O'Brien and asked them if they did this. Ms. O'Brien was sort of upset because it seemed as if he thought she was lying. He was told whose picture it was and went and spoke to that person. That person denied being upset. I note that this last conversation is hearsay and I give it little weight.
126. With respect to the overtime meeting he said that Ms. Sanderson asked to see him. Ms. Coughlin's recollection that she called the meeting was incorrect. He denied suggesting that Ms. McDonald was responsible for the meeting or blaming her for calling it. He indicated that he thought it was "one of those girl things" and listed some of the complaints discussed. He advised the staff that punch cards and payroll are private. He called the meeting to get rid of petty stuff. He does not recall seeing Ms. McDonald cry and felt that the issue was between Ms. Sanderson and Ms. Coughlin. To his recollection when the overtime topic came up Ms. McDonald indicated she did not care whether she got any overtime or not. In cross examination he denied laying blame for the meeting on Ms. McDonald.
127. Mr. Finch agreed that he was aware of the two notes when Ms. McDonald called him in April of 2005. He said a message was on his phone when he got home late on a Sunday. It was from Ms. McDonald and she asked him to call her. He did so Monday morning. That morning Mike Lantos told him he had spoken with Ms. McDonald on Friday and advised that he had a paycheque for her. According to him Mike Lantos said that Ms. McDonald had told him "they can stuff the paycheque." He indicated that she had not advised him as she had applied for EI sick leave. He stated that if she had told him about seeking EI sick leave he would have reminded her that the Respondent had long-term disability coverage for its employees. He stated that she never mentioned psychiatrists or psychologists care. He repeated emphatically that the word stress never came up once. Had it come up there was long-term disability and EI available for her. He stated that she really should have explained her condition. When asked if he was trying to get rid of her he indicated that she was doing good work, a busy time was coming up, they spent two and a half years training her and they did not want to lose Ms. McDonald.
128. According to Mr. Finch what was stated in this call was "I am not coming back to work". His response was are you quitting? She said "no, no I am not quitting". He said that he told her "It can't be both ways, so either you are coming back to work, because your doctor's note says the 29th, so you know if you have to get

another doctor's note or whatever, no problem". She insisted that she was not coming back to work. Then he said "you must be quitting".

129. When asked if she said why she would not be back, he said as far as I knew, as far as the doctor's note told him, she was off sick. Ms. O'Brien figured it was a bad cold. He indicated he had no idea and he could not diagnosis the Complainant over the phone. When asked how the conversation ended he said that she insisted she was not coming back to work. He said "If that is the case I will pass it on to Blair and tell him you are not coming back to work." She said "but I am not quitting". He said "It cannot be both ways".
130. It was put to him in cross-examination that the front office had a high turnover. He said definitely not. It was pointed out to him that the Respondent had lost Michelle Paul, Sandra McDonald, and Linda Hayward within a short period. He stated that Linda was laid off in January month, she did not leave. They paid her two weeks notice and they wanted her to come back. When she left she said "I don't need to come back here anymore" and "walked off nonchalant". He stated he was "so disappointed" by this.
131. He was asked about the course he took at Memorial University. He said he learned about the *Code* and what he could and could not ask. It was suggested that he had asked Ms. Paul about her pregnancy and he said he did not. He denied asking Ms. McDonald about pregnancy. He indicated over the years that the Respondent had four girls on maternity leave that had all returned and everyone was given something for her shower. If they were in town his wife would go to the shower. He indicated he was "delighted for children".
132. With respect to the barbeque incident he denied making any derogatory or lewd remarks to Mr. White and the Complainant. He said based on past practice he normally poured the first drink for a guest so the first thing he probably asked them was if he could get them a drink. He recalled asking Mr. White about fertilizer. He could not say if he had a conversation with Ms. McDonald but pointed out that there were a lot of guests at the party. He estimated she stayed for three or four hours, he knew that she stayed long enough to have supper before they drove back to the park. He indicated that driving at these events was always a worry for an employer. He said there were a lot of people at the party and that the party was what people make of it. With respect to the suggestion that he was upset that she did not get there earlier he pointed out that the party usually starts between 2 and 3 and that to his recollection that is not only when they arrived but when they said they arrived. This fits with the evidence provided by Ms. McDonald and provided by Carl White on direct examination. He denied saying he was upset she did not stay longer and denied saying she did not help in the kitchen.
133. In cross examination Mr. Finch adamantly denied Ms. McDonald mentioning stress, psychiatric care, psychiatrists or psychologists. When asked if he had

asked anyone to contact Ms. McDonald he said he did not. When asked why he didn't call to see what was wrong he said "Now, I'm treading on thin ice. I have no authority to call somebody and say why are you sick or what kind of sickness [do] you have." He agreed that he did not want to lose her as an employee.

134. He stated that Mike Lantos said Sandra McDonald called on Friday night wanting to know what to do. Mike asked her about her pay and she said "you can tell them to stuff that cheque". When asked what Mr. Lantos recommendation was Mr. Finch testified he recommended that Mr. Finch give her a call and "find out what was wrong and when she was coming back".
135. Mr. Finch stated did not ask the Complainant about her pay cheque because the conversation was about coming back to work. According to him the gist of the conversation was that she was afraid. He said to himself what is she afraid of? The work loads? He asked her what she was afraid of and she said "everybody dislikes me". He said "My god don't talk like that, people will think you are paranoid." When asked if she was coming back to work she said no, but the last thing she said was I am not quitting. He felt this was very odd. In his mind this was "an oxymoron".
136. He was reminded that one of the doctor's notes said she would not be back to work until the 29th of April because of illness, yet he still terminated her employment. He indicated that he had no choice as it was a busy season she is not coming back and they had to make arrangements. He went to Mr. O'Brien and said Ms. McDonald said she is not coming back to work, please take care of this. He stressed that he did not know why she was afraid and gave an example of a fellow employer with a similar problem. This employer's employee had developed a fear of crossing a particular overpass. On questioning from the chair he said all he said was Ms. McDonald will not be coming back to work and did not specify that she was being terminated as opposed to quitting. The implication that Mr. O'Brien took it upon himself to state in her record of employment that she had been dismissed as opposed to quitting.

THE LAW

137. Having canvassed the evidence at the hearing it is appropriate to review the applicable law. The starting point is section 9(1) of the *Code* which states:
- "9.** (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of

- (a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability; or
- (b) that person's age, if that person has reached the age of 19 years,

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

138. The test for determining if there has been prohibited discrimination in employment was stated by the Supreme Court of Canada in *British Columbia (Public Service Employees Relations Commission) v. British Columbia Government and Services Employee's Union (Meiorin grievance)* [1999] 3 S.C.R. 3. First, the complainant must establish a prima facie case that an impugned standard (in this case it is an impugned act) is discriminatory. Once this is established the onus shifts to the respondent to establish on the balance of probabilities that that the standard is a bona fide occupational requirement. This test is set out at paragraph 54 of that decision where the court stated:

“54 Having considered the various alternatives, I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.”

139. A complainant is not required to establish that the only factor in a termination is one that violates the *Code*, rather it is sufficient that a prohibited ground for discrimination was a causative factor. To meet the initial “*prima facie* case” they need only establish that the complainant's evidence, if believed, and without further evidence, supports an inference that it is more likely than not that the conduct of a respondent was discriminatory. The burden then shifts to the respondent to provide evidence that the prohibited ground was not a factor in its actions or that there was a *bona fide* occupational requirement (as

described above) for its actions. See *Human Rights Commission v. Newfoundland and Labrador (Minister of Health and Community Services)* [2009] N.J. No. 34.

140. Our Court of Appeal had occasion to consider a case in which an employee refused to provide medical information regarding a disability in *L.B. (Committee of) v. Newfoundland (Human Rights Commission)* [2002] N.J. No. 187. The court stated:

“23. It seems to me that the premise of the Commission places employers who wish to comply with the law in a difficult situation. There is a series of cases which suggest to employers that the duty to accommodate includes investigating with the employee his capabilities. In *Conte v. Rogers Cablesystems Ltd.*, [1999] C.H.R.D. No. 4, T.D. 4/99, the Canadian Human Rights Tribunal, applying *Meiorin* stated "at the very least, the employer is required to engage in an examination of the employee's current medical condition, the prognosis for recovery and the employee's capabilities for alternative work." In *Willems-Wilson v. Albright Drycleaners Ltd.*, [1997] B.C.H.R.T.D. No. 26, 32 C.H.R.R. D/71 (B.C.C.H.R.) it was the failure to make any inquiries with respect to accommodation that led to a finding that there had been discrimination. (See also: *Rozon v. Barry* (c.o.b. "Barry Marine"), [2000] B.C.H.R.T.D. No. 18.) In the context of a condition involving paranoia, however, the employee may be refusing to provide information or, indeed, taking steps to ensure that the employer learns as little as possible of his or her illness. Here, whether because of the illness or otherwise, M.J. stated that she believed the employer was not entitled to know anything other than the fact that she was ill and that she continued to hold that view for some time.

29 The sixth question of McLachlin J. in *Meiorin* raises the duty of an employee to inform the employer of the existence of the disability or that accommodation is required if that is not evident. In *Belliveau v. Steel Co. of Canada* (1989), 9 C.H.R.R. d/5250, damages were limited because of failure to advise of disability. In *Toronto Board of Education v. Canadian Union of Public Employees, Local 4400*, [2000] O.L.A.A. No. 326, in the context of an arbitration, the arbitrator considered the employer's obligation to accommodate relating to dismissals for innocent absenteeism. The arbitrator, in discussing the employee's obligations, stated the employee was obliged "to identify his/her restrictions, and the need to be accommodated, and must include keeping the employer apprised of one's status and ability to perform work, or modified work." He added: "it is difficult to see how the employer can meet its duty to accommodate, or determine if the

employee can be accommodated without undue hardship ... if the employer is not aware of the needs of the employee which must be accommodated." (s. 115) The duty to bring to the attention of the employer the facts relating to discrimination was also stated by Sopinka J. in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 994:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this court in *O'Malley*, [1985] 2 S.C.R. 536. At page 335, McIntyre J. stated:

Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operations of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take such reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all of the circumstances is turned down, the employer's duty is discharged."

[emphasis added]

141. Our Court of Appeal considered what constitutes a disability in *Evans v. Healthcare Corporation of St. Johns* [2003] 223 Nfld. & P.E.I.R. 1 where it stated:

“22. Before turning to the substance of the Commission's argument on the first ground of appeal, with some temerity I wish to briefly address the meaning of the word "disability" for it seems to me that any dialogue about the subject must start with the acknowledgment that there is no consistent view of what is encompassed. This is illustrated by the submission of counsel for the appellant who says that the adjudicator and the judge of the Trial Division erred in limiting their concept of disability to a search for a bio-medical condition. Indeed, he says that the complainant herself made the same error when using the word "disabled" and that consequently her statement that she was not disabled must be viewed as a statement that she was not then suffering from a bio-medical condition. As the earlier description of the decisions of the adjudicator and the Trial Division judge shows, the appellant is not correct when he says that they considered only the bio-medical nature of disability but that does not gainsay the point that there is often confusion as to what is encompassed in the term disability.

...

24 In the Quebec Charter, the word used is "handicap" rather than "disability." The approach enunciated in *City of Montreal* is, however, relevant to the application of the Newfoundland and Labrador Code. This was recognized by the adjudicator. In *City of Montreal Justice L'Heureux-Dubé*, for the Court, stated, commencing at paragraph 79:

Thus, a "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the Charter.

Courts will, therefore, have to consider not only an individual's biomedical condition, but also the circumstances in which a distinction is made. In examining the context in which the impugned act occurred, courts must determine, inter alia, whether an actual or perceived ailment causes the individual to experience "the loss or limitation of opportunities to take part in the life of the community on an equal level with others". ... The fact remains that a "handicap" also includes persons who have overcome all functional limitations and who are limited in

their everyday activities only by the prejudice or stereotypes that are associated with this ground

25 In *City of Montreal*, the Supreme Court of Canada acknowledged that factors external to an individual could define his or her disability. The broad purposive approach requires a recognition that discrimination may be based on perception, myths and stereotypes as well as on functional limitations (see: s. 39). In *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at p. 724, Binnie J. said, in the context of s. 15(1) of the Charter:

It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks.

In that same case, Justice Binnie, at paragraph 40, notes that the "different elements or aspects of the disability analysis are relevant to human rights legislation as well as to Charter scrutiny."

26 There is, however, a cautionary note which must be sounded in this. The definition of disability should not be so broad as to be counterproductive to the purpose of the Legislation. Justice L'Heureux-Dubé said in *City of Montreal*, at paragraph 82:

These guidelines are not without limits. Although I believe that health may constitute a "handicap" and thus be a prohibited ground of discrimination under s. 10 of the Charter, the same cannot be said of personal characteristics or "normal" ailments. There is not normally a negative bias against these kinds of characteristics or ailments, and they will generally not constitute a "handicap" for the purposes of s. 10. As the emphasis is on obstacles to full participation in society rather than on the condition or state of the individual, ailments (a cold for example) or personal characteristics (such as eye colour) will necessarily be excluded from the scope of 'handicap', although they may be discriminatory for other reasons.

[emphasis added]

Accordingly, transient illness which may result in an employee accessing available sick leave will not ordinarily constitute a disability,

though it may be possible that use of sick leave demonstrates a frailty of health which may result in a disability.

27 As the above discussion indicates, normally, disability is proven in one of two ways: 1) by establishing that the complainant has some physical or mental impairment and functional limitation, matters which, absent exceptional circumstances, would be known to the complainant but may not be known by the employer; or 2) by proving that the employer believes, albeit wrongly, that the employee has a physical or mental impairment and has or will have in the future a functional limitation. “

[emphasis added]

142. I note that it is a long established principle of human rights law that there is no *mens rea* component to the test in a human rights complaint and the respondent need not have any ill will or discriminatory intent towards the complainant in order for the complaint to succeed, nor is the absence of such intent a defence.

SUBMISSIONS OF THE PARTIES

143. The Complainant did not make any closing submissions. She was unable to attend the last day of the hearing, when argument was made due to work commitments.
144. The Commission submitted that the Complainant’s depression, situational anxiety and adjustment disorder constituted a mental disability within s. 9 of the *Code*. The Commission further submits that the Respondent dismissed the Complainant when the Respondent knew the Complainant was medically unable to work, and this is in and of itself sufficient to meet the test of a prima facie case. The Commission further submits that the Respondent knew the Complainant suffered a mental disability when she was dismissed and it was a factor in her dismissal. Finally, the Commission submits that the Respondent ought to have known that the Complainant suffered a mental disability when the Respondent dismissed the Complainant. The Commission submits that there was no attempt to accommodate this disability whatsoever.
145. While much of the evidence lead dealt with the workplace environment prior to the diagnosis of clinical depression and prior to dismissal no claim was or is made for work place harassment or a poisoned work environment under s. 12 of the *Code* or any other section. This is a straightforward complaint for discrimination in employment on the basis of mental disability contrary to section 9 of the *Code*.

146. The Commission did not provide any detailed position on the amount of damages that ought to be awarded to Ms. McDonald for loss of wages and left this to the discretion of the board of inquiry.
147. The Respondent does not dispute the Complainant's diagnosis of clinical depression nor is it disputing that this constitutes a mental disability within the meaning of s. 9 of the *Code*. The Respondent also acknowledges that the dismissal of the Complainant is an adverse treatment. The Respondent contests whether disability was a factor in this dismissal. The Respondent takes the position that the Respondent did not know and could not reasonably be expected to have known that the Complainant suffered any disability or a mental disability in particular. There is no suggestion that attempts to accommodate the disability were made as the Respondent was unaware of any disability. The Respondent's position is that the Respondent would have accommodated the Complainant's disability had it been aware of it. This would have been relatively easy as the accommodation the Complainant required was time off work. Between Employment Insurance and Long Term Disability this would have been easy to accommodate.
148. The Respondent did not provide detailed submissions on the issue of damages.

FINDINGS OF FACT AND ANALYSIS

Findings of Fact:

149. Having set out the applicable law I will now consider the facts that are established on the evidence led at the hearing.
150. The Respondent does not dispute that the Complainant suffered depression as described by Dr. McGrath nor does the Respondent dispute that this constitutes a disability. I find that the evidence of the Complainant and Dr. McGrath is sufficient to establish on the balance of probabilities that the Complainant suffered a mental disability within the meaning of section 9 of the *Code* and that this evidence is not contradicted by any other evidence at the hearing. Ms. McDonald suffered a mental disability within the meaning of section 9 of the *Code*.
151. A great deal of evidence was lead regarding various incidents and interactions in the office and outside between Ms. McDonald and her co-workers, including Mr. and Mrs. Finch. None of this evidence went to prove or disprove elements of a breach of section 9 of the *Code* but was lead by counsel for the Commission to provide context and to go to the general issue of credibility. Likewise, evidence of the same incidents and interactions was lead by the counsel for the Respondent in order that this evidence not go unaddressed and to challenge the credibility of

- the Complainant. As counsel have lead substantial evidence on theses incidents for purposes of context and credibility I will deal with some of these incidents and their effect on credibility in detail. While I have considered all of the evidence it is not necessary, nor is it particularly useful, to determine what happened in each and every incident in order to assess who is telling the truth with respect to the real issue, what factors went into the termination of Ms. McDonald's employment.
152. According to Mr. Finch, Carol Finch and Tina O'Brien, the employees of Respondent are like family. They work hard but have a lot of fun. The management is sensitive to and concerned with the well being of its employees. Any suggestion of improper behavior or problems in the work place is met with a blanket denial. This is not in and of itself problematic. What is problematic is how this contrasts with the totality of the evidence presented at the hearing.
 153. Ms. McDonald's evidence of her treatment by management was disturbing. Ms. Paul reports a similar experience. She has only spoken to Ms. McDonald on one occasion. Her evidence was not shaken on cross-examination and I see no monetary or other gain as motivation to fabricate her testimony. I accept her evidence as truthful and accurate. Even accepting it, I am not prepared to simply conclude that what happened to Ms. Paul must have also happened to Ms. McDonald. I am not accepting her evidence as any form of character evidence, evidence of propensity or similar fact evidence, although such distinctions are of less concern in the context of this hearing.
 154. This evidence does establish that Ms. Paul left the same position as Ms. McDonald in what can only be described as strange circumstances. According to the management of the Respondent they all liked Ms. Paul and got along well with her and then one day, with no explanation she just stopped coming to work. Likewise, Ms. McDonald's successor, Ms. Hayward, was laid off due to a downturn in work but was expected to return. She indicated on the day of her lay off that she did not need to come back. This is similar, from the Respondent's position, to the strange and unexplained refusal of Ms. McDonald to attend work. Three successive employees in this position, in one way or another, simply stopped coming to work or declined to return, with no substantive explanation.
 155. Despite the description of a cheerful work place provided by management, the testimony of Joan Sanderson and Peggy Coughlin shows significant ongoing animosity between them. Ms. Sanderson spent a long time explaining her theories as to who was looking at her punch card and the various incidents of ongoing animosity between her and Ms. Coughlin. Contrary to the evidence of Mrs. Finch, the evidence of Ms. Sanderson makes it clear that her relationship with Ms. Coughlin is not professional. It is barely civil. Ms. O'Brien admits to being aware that Ms. Coughlin did not like Ms. Sanderson and was rude to her. Two current and two former employees in the front office who were not a member of the management of the Respondent testified. The overall impression they give is

this was a very unhappy work place for them. This is the complete opposite of the description of the work place provided by the Mr. Finch, Mrs. Finch and Ms. O'Brien.

156. Mr. Finch admits that Ms. McDonald approached him on one occasion, perhaps two, to discuss what she viewed as ill treatment by Mrs. Finch. Mrs. Finch admits that these same concerns were raised with her on at least one occasion and that she said on a number of occasions that she hates skinny people and that she was jealous or envious of people with Ms. McDonald's metabolism and slender build. She stated that no harm was intended. Mrs. Finch admitted that Ms. McDonald cried in one of their meetings. Tina O'Brien admits that an incident occurred, which, on its face would amount to sexual harassment in the workplace, which she regarded as inappropriate and not to be tolerated and which she testified she brought to the attention of Craig Finch who, with Mr. Finch, did an investigation. Her description of the workplace is that even name calling is not tolerated. Ms. Sanderson testified that Ms. O'Brien participated in name calling. The testimony of Mr. Finch was that the beef tongue incident was not brought to his attention until it came up in the human rights complaint. The evidence of Joan Sanderson strongly suggests no investigation was ever done. I believe she would remember being called into her boss's office and questioned about her involvement, especially if this was in the context of a human rights complaint. Three of the Respondent's witnesses provided contradictory and yet exculpatory versions of this event. They can't all be true and the incident clearly did occur.
157. The various management witnesses were aware of significant financial and personal stresses on Ms. McDonald and that there were interpersonal issues between Mrs. Finch and Ms. McDonald. Ms. O'Brien was aware of a significant incident of harassment which, given her views on appropriate behavior in the workplace, would have been viewed as a serious incident. I have difficulty believing that an employee making such allegations and breaking into tears was not the topic of significant discussion between Mr. and Mrs. Finch, let alone the entire management of the Respondent. Mr. and Mrs. Finch and Ms. O'Brien deny any knowledge that Ms. McDonald viewed herself as under significant work place stress and express surprise at the allegations now coming out. Given the information in their individual and collective possession this is at the very best willfully blind. While I do not believe that Mr. Finch, Mrs. Finch or Ms. O'Brien were deliberately cruel or unkind to Ms. McDonald they were aware that she had ongoing interpersonal issues at work, particularly with Mrs. Finch and substantial pressures outside of work. I am sure the word stress was used by Ms. McDonald on more than one occasion and I am unable to accept Mr. Finch's statement that it was not used even once.
158. Objectively the description of the work duties for front office staff is one of a stressful and demanding job. They handle fragile models on tight timelines. Relatively small errors in reading prescriptions and preparing the "ticket" can lead to costly errors and delays and according to Mr. Finch, lawsuits. Every person's

work is checked repeatedly and corrected as needed, which is fairly regularly. It is to be expected that when volumes of work are up, errors would increase and "corrections" would be necessarily quick and perhaps cursory. The information that Ms. O'Brien and Mrs. Finch would convey at such times would include the error and the possible effect of that error. Any objective observer would say this is stressful work.

159. On the whole I am unable to accept the evidence of Mr. Finch, Mrs. Finch or Ms. O'Brien that this was a harmonious work place and they had no idea what a difficult time Ms. McDonald was having with work. Looking at the totality of the evidence I believe that in their testimony they deliberately sought to minimize the conflict between Mrs. Finch and Ms. McDonald, the general stressful nature of the workplace and also that they sought to minimize their awareness of both of these issues.
160. This does not lead instantly or necessarily to the conclusion that I should reject Mr. Finch's recollections of the telephone conversation with Ms. McDonald on April 25, 2005 or that I should accept hers. There are also problems with Ms. McDonald's testimony on incidents described for the purpose of context and credibility. The best example of this is the incident that Ms. McDonald and Mr. White described occurring at the company barbecue.
161. Mr. White testified that he and Ms. McDonald left the campsite around 2:00 to go the barbecue. By all accounts it is a short drive to the cabin. He testified that he brought half a dozen beer with him. Both Mr. White and Ms. McDonald testified that upon arrival Mr. Finch asked why they were so late "were you screwing". He testified that they had in fact had not been drinking, although in cross examination he stated that Sandy may have had a drink or two prior to going. He stated he did not drink as he was worried about what he might say or do. They both testified that Mr. Finch went on to ask what Ms. McDonald was like in bed after a few drinks, to which Mr. White replied "You will never know".
162. The sign up sheets for four social events were entered as Exhibit JF-1. These were for the Christmas parties for 2002 and 2003, and the barbecues for 2003 and 2004. The 2004 barbecue is indicated as being on August 14. The sign up sheet states that the barbecue will begin "about 2:00 and runs through the night". The sheet states "barbecues and booze provided." There is a spread sheet set up beneath these details with each employee's name and adjacent cells to indicate if they will attend, if they are bringing a partner or children, what their choice of drink and mix are and what they are bringing to the potluck. The cells adjacent to Ms. McDonald's name indicate she will attend, she will be bringing a partner and under the drink heading it indicates "Canadian Reg Both".
163. Ms. McDonald's letter to the Commission dated June 23, 2005 was entered as page 13 of Consent Exhibit 1. In this letter she indicates that she spoke to Mr. Finch on April 7, 2004 about not attending the barbecue. She states they arrived

at the barbecue around 3:00. The letter states that Mr. Finch first asked why they were so late and if they were drinking. They said no. He then asked if they were having sex and proceeded to ask Mr. White what Ms. McDonald was like in bed after a few drinks. The minor differences in time and sequence of the conversation are not in and of themselves significant. It does not make sense, however, that Mr. Finch would ask why they were so late for a party that started “around 2:00” and ran through the night if they arrived between two and three. It makes no sense that two people who did not intend to drink would bring their own beer to a party at which they had already requested beer be provided. It makes no sense that Ms. McDonald would bring up attendance at the barbecue four months in advance. The Complainant’s version of events surrounding the alleged statement does not make sense. The words alleged to have been spoken were lewd, inappropriate and derogatory. Based upon his demeanor and what was said about his behavior on other occasions by all the witnesses, including Ms. McDonald, I am not inclined to believe that Mr. Finch said them. Coupled with the above noted material inconsistencies in the testimony of Ms. McDonald and Mr. White around this incident I conclude on the balance of probabilities that these words were not said at the barbecue.

164. Setting aside some of the issues and incidents with Mrs. Finch and Mr. Finch other incidents that Ms. McDonald reported as traumatic and humiliating appear to be well intentioned acts which Ms. McDonald honestly, but mistakenly perceived as slights or attacks on her. For example Ms. McDonald was encouraged to participate in the exchange of baked goods. She testified she felt pressured to participate and embarrassed when her failed attempt resulted in chastisement from her co-workers. Being encouraged to participate in social events and enduring related mild teasing from co-workers is a normal part of most office environments. Most people would think nothing of it. Likewise Ms. Sanderson’s gift of clothes and subsequent inquiry could easily be seen as simply a good deed and an attempt to receive some recognition for it. Ms. McDonald, however, was no doubt intensely embarrassed by these events. Many of the interactions Ms. McDonald found so traumatic are, viewed objectively, not events that would traumatize the majority of people.
165. Ms. McDonald however has lead a different life than the majority of people. According to the report of Dr. Weiner Ms. McDonald described herself as having a good childhood “until age of 9, when her family went bankrupt”. Subsequently she describes her childhood as “terrible”. She describes a childhood which included emotional, physical and sexual abuse by peers. She also describes a history of troubled personal relationships including physical abuse and disappointment with friendships. In cross examination and redirect details emerged about troubled relationships with her daughter, Mr. Puddester and Mr. White. Her financial difficulties and worries emerged at a number of points in direct and cross examination. In the psychiatrists report she identified relationship difficulties with her boyfriend and daughter and financial problems as stressors. Likewise, Dr. McGrath’s testimony indicates that the non-work stresses

- including her relationship her daughter and financial worries and indeed a diagnosis of depression which pre-date her employment with the Respondent. Keeping this history in mind, her struggles to pay her mortgage, the loss of her bed and the threat of having her lights cut off were extremely traumatic events. Given that she needed this job to maintain even this precarious financial circumstance her ongoing personality conflict with Mrs. Finch and the failure of Mr. Finch to adequately resolve the same would be far more stressful to Ms. McDonald than the average person. It is not surprising that her interpretation of these workplace events is different than that most people would place on them.
166. While no doubt Ms. McDonald accurately reports the way that she perceived events and the way they made her feel, I must conclude they were not, for the most part, intended in the cruel and callous fashion that she believes.
167. Counsel for the Commission indicated that it was the position of the Commission that the work environment contributed to Ms. McDonald's problems. I do not believe much turns on this point as the question of whether Ms. McDonald was subject to harassment in the workplace because of her sex, marital status, family status, age or mental disability would all be issues for a section 12 *Code* complaint which is not before me. I appreciate that counsel's submissions were to the effect that such harassment would be evidence that could support an inference that her termination was occasioned by similar considerations. It is a perilous enterprise to make findings of fact on a matter not before me (a hypothetical section 12 complaint) in order to weigh the credibility of witnesses on issues before me.
168. While Ms. McDonald and Mr. White identified work as the source of most of her problems I find that work was merely one of a number of stresses in the Complainant's life and that these stresses, her history and ultimately her clinical depression made it more difficult for her to cope with her work problems. I conclude that the Finch's and their staff members did not target, harass or intend to cause distress to Ms. McDonald. She and Mrs. Finch clearly had ongoing issues and the work place was far from perfect, indeed it was a stressful work environment, but that is as far as the evidence permits me to go. The bulk of the material lead at the hearing establishes only that the evidence of Mr. Finch and that of Ms. McDonald as to the contents of their telephone discussion on April 25, 2005 is to be approached with caution.

The conversation of April 25, 2005

169. While a great deal of evidence was lead over what amounts to allegations of work place harassment, the issue in this matter is first whether a prima facie case for discrimination on the basis of mental disability has been made out by the Complainant. Following the conversation of April 25, 2005 the Complainant was dismissed from her employment.

170. On April 14th, 2005 the Complainant attended work and, after speaking with Ms. O'Brien, went home sick. On April 18th, 2005 two doctors notes were provided to the Respondent. One was from Doctor McGrath and stated "For Sandra McDonald – This lady is unable to work April 18 to 29/05". The second was a standard form medical certificate which read as follows:

"This is to certify that Sandra McDonald was seen by me on April 16 / 05 and advised to be off work for the period April 18 / 05 to April 29 / 05. Patient can return to work -> I will be seeing her in follow up to reassess her condition"

171. On April 25, 2005 the Complainant and Mr. Finch spoke. He was returning a call from her. According to the Complainant's letter of June 23rd 2005 (found at page 13 to 16 of Consent Exhibit 1) she advised Mr. Finch that she was afraid to come in to work. He advised if she was afraid to come in she was no good to him and he would take that as her resignation. She stated she had not resigned and she was seeing doctors to get well. Her version of events in direct testimony was essentially the same, except she recalled stating she was seeing a psychologist and psychiatrist in order to return to work.

172. Mr. Finch was aware of the medical notes when he spoke with the Complainant. According to his testimony he raised the fact that the doctor's note referred to April 29th. In his version of events the notes were discussed. He felt he had no authority to inquire into what type of sickness she had and so he did not. His recollection was that the gist of the conversation was that the Complainant was afraid. When asked what she was afraid of she stated that everyone dislikes her. She stated she was not coming back to work but she was not quitting. According to Mr. Finch there was no mention of doctors or seeking treatment in this conversation although there was in an April meeting. He advised Mr. O'Brien she would not be returning to work. He had no choice in the matter as it was a busy season and if she was not coming back he would have to make other arrangements. He assumed Mr. O'Brien took it upon himself to code this in her Record of Employment as being dismissed as opposed to resigning.

173. Mr. Finch also signed a Respondent's Response form on July 25, 2005. It is found at pages 31 to 33 of Consent Exhibit 1. According to this statement:

"After a twenty minute conversation with Sandra the end result was that she was not quitting, however she wasn't coming back to work either. She gave me no indications of an expected date of return or of any intentions to try and return to work, she simply wasn't coming back yet wasn't quitting. I have a business to run and the best interests of 25 other employees to consider.

On April 26th, 2005 after much thought I decided it was in the best interests of the Dental & Hearing Crafts Ltd. to terminate the employment of Sandra McDonald, her ROE was prepared as at that date, two weeks pay in lieu of notice and her pay

cheque from April 22nd, which she still had not asked for were all forwarded to her by courier.”

174. Mrs. Finch testified that after speaking with the Complainant on the Monday morning Mr. Finch stated the Complainant was not returning to work due to illness. He also stated they needed someone to fill her position. It is clear from this statement that Mr. Finch understood from his conversation with Ms. McDonald that illness was the reason Ms. McDonald was not returning to work. This is more consistent with Ms. McDonald’s version of the conversation than that of Mr. Finch.
175. Coupled with his statement to Mrs. Finch I find that Mr. Finch was aware that Ms. McDonald was not returning to work due to her illness. He also knew she had been to two doctors and that both doctors were of the opinion she was unable to work for the period April 18 to the 29th, 2005. He knew no return to work date was given in Dr. Potter’s note and that the Complainant had made it clear she was not resigning her job. Given that the Complainant had disclosed this much I see no reason why she would not have disclosed that the doctors were treating her condition in order to help her recover from it, especially as that is the reasonable inference to be drawn from the fact that she was seeing them. I conclude on the balance of probabilities that Ms. McDonald told Mr. Finch that she was seeing doctors in order to recover from her illness.
176. Generally, employees provide medical notes explaining their absence from work because they wish to retain their job and they are attempting to demonstrate that their absence has a reasonable explanation. The Complainant stated she was not quitting her job. She had previously lost a job as a result of an absence from work. The Complainant had not made any secret of the fact that she was seeing doctors and that this illness was related to her absence from work. I accept the evidence of the Complainant that she advised Mr. Finch that she was seeking medical treatment in order to return to work. Although not pivotal I conclude she most likely said doctor as opposed to specifying the type of doctor. She could not provide a return to work date as her physicians were unable to specify one at that time.
177. Based upon the information that he had Mr. Finch could not reasonably have concluded that this was a trifling or transient illness such as a common cold. Ms. McDonald had provided medical information stating that in addition to the two days she had already missed she was going to be absent a further 10 business days and no return to work date was known. She was being treated by two physicians. If he felt more information was required he could have asked for it. It does not matter whether Mr. Finch understood or believed this illness to be a mental illness or a physical one. It is more likely than not that he believed her fears and concern that she was not liked were related to the ongoing conflict with Mrs. Finch and that he was accordingly reluctant to ask too many questions. The Respondent was

coming into a busy time and needed someone performing Ms. McDonald's duties. Mr Finch felt from a business perspective he could not wait beyond this two week period for her return. This was a factor, and I find on the balance of probabilities the factor, in the termination of Ms. McDonald. The Respondent states that Ms. McDonald's unexplained refusal to attend work meant that she was either unable to perform her work duties or she in effect resigned. I find that Mr. Finch knew that Ms. McDonald's inability to return to work was due to an illness because she told him so, that it was not a trifling or transient illness but was something serious enough that at that point no return to work date was known. He dismissed her because from a business perspective he needed to resolve the question of who would be performing her duties by either having her return to work or by replacing her.

178. There is very little in the way of fact finding to do with respect to accommodation. Ms. McDonald sought no accommodation beyond her absence from work. It was never clear how long this absence would be or whether she hoped to be paid for all, some or none of it. No discussion occurred of how many sick days she had left to use, if any, whether unpaid leave was possible or when or how she could access the long term disability program. Mr. Finch made no offer of accommodation on behalf of the Respondent. The Complainant was replaced by having a part time worker assume her duties on a full time basis.

ANALYSIS

179. Having made these findings of fact it now follows that the law must be applied to them.

Has a Prima Facie Case been made out?

180. As noted above I find that the Plaintiff did suffer from a mental disability within the meaning of section 9 of the *Code*. At the time of her dismissal this disability prevented her from returning to work. It was not known when she would be able to return to work. She sought treatment from two physicians and got medical notes from both of them, which she provided to her employer. The Respondent knew that she had an illness that rendered her unable to work for at least 12 business days. The Respondent knew that she would be reassessed and that there was not, at that time, a known return to work date. The Respondent knew she suffered from a medical disorder which was not trifling or transient and that she was seeking treatment in order to return to work. The Respondent chose not to seek any additional information but summarily dismissed the Complainant. This is sufficient for me to conclude that the Complainant has established a *prima facie* case that her disability was a causative factor in her dismissal.

Has the Respondent rebutted the prima facie case?

181. The Respondent's evidence does not lead me to conclude on the balance of probabilities that Ms. McDonald simply refused to work without adequate or any explanation or that she effectively resigned. The Respondent has not suggested that there was any problem with the Complainant's work that warranted dismissal. The information she provided to the Respondent advised the Respondent that she was unable to work due to an illness recognized and being treated by her physicians and that her physicians would have to reassess her condition before a return to work. The information provided was sufficient to put the Respondent on notice that it was not a normal ailment but was something that was disabling and would be for some period of time. If the Respondent felt this was inadequate the Respondent could have sought more information. The Respondent chose to terminate her employment rather than seek further information as to the nature and effect of her illness.
182. As noted above, our Court of Appeal had occasion to consider the issues surrounding an employee who refuses to provide medical information regarding a disability in *L.B. (Committee of) v. Newfoundland (Human Rights Commission)* [2002] N.J. No. 187. The court stated:

“23. It seems to me that the premise of the Commission places employers who wish to comply with the law in a difficult situation. There is a series of cases which suggest to employers that the duty to accommodate includes investigating with the employee his capabilities. In *Conte v. Rogers Cablesystems Ltd.*, [1999] C.H.R.D. No. 4, T.D. 4/99, the Canadian Human Rights Tribunal, applying *Meiorin* stated " at the very least, the employer is required to engage in an examination of the employee's current medical condition, the prognosis for recovery and the employee's capabilities for alternative work." In *Willems-Wilson v. Albright Drycleaners Ltd.*, [1997] B.C.H.R.T.D. No. 26, 32 C.H.R.R. D/71 (B.C.C.H.R.) it was the failure to make any inquiries with respect to accommodation that led to a finding that there had been discrimination. (See also: *Rozon v. Barry* (c.o.b. "Barry Marine"), [2000] B.C.H.R.T.D. No. 18.) In the context of a condition involving paranoia, however, the employee may be refusing to provide information or, indeed, taking steps to ensure that the employer learns as little as possible of his or her illness. Here, whether because of the illness or otherwise, M.J. stated that she believed the employer was not entitled to know anything other than the fact that she was ill and that she continued to hold that view for some time.

29 The sixth question of McLachlin J. in *Meiorin* raises the duty of an employee to inform the employer of the existence of the disability or that accommodation is required if that is not evident. In *Belliveau v. Steel Co. of Canada* (1989), 9 C.H.R.R. d/5250, damages were limited because of failure to advise of disability. In *Toronto Board of Education v. Canadian Union of*

Public Employees, Local 4400, [2000] O.L.A.A. No. 326, in the context of an arbitration, the arbitrator considered the employer's obligation to accommodate relating to dismissals for innocent absenteeism. The arbitrator, in discussing the employee's obligations, stated the employee was obliged "to identify his/her restrictions, and the need to be accommodated, and must include keeping the employer apprised of one's status and ability to perform work, or modified work." He added: "it is difficult to see how the employer can meet its duty to accommodate, or determine if the employee can be accommodated without undue hardship ... if the employer is not aware of the needs of the employee which must be accommodated." (s. 115) The duty to bring to the attention of the employer the facts relating to discrimination was also stated by Sopinka J. in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 994:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this court in *O'Malley*, [1985] 2 S.C.R. 536. At page 335, McIntyre J. stated:

Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operations of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take such reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all of the

circumstances is turned down, the employer's duty is discharged.”

[emphasis added]

183. Ms. McDonald’s case is different from that of the complainant in *L.B.* in a number of significant ways. The complainant in *L.B.* refused, despite a number of requests to provide a doctor’s note or a medical report to explain a prolonged and (to that point) unexplained absence from work which had already occurred. She disclosed only that she “may have been suffering from a chemical imbalance.” The nature of the imbalance was not explained. She was dismissed for an unexplained absence from work. She did not indicate that she had been diagnosed with a serious medical problem, did not advise she was in treatment and did not provide any evidence of this to her employer.
184. In Ms. McDonald’s case there is no suggestion that she refused to provide any information requested by the Respondent, rather the Respondent was deliberately careful not to request information about her illness. Ms. McDonald provided the very information that *L.B.* refused to. The Respondent felt this was insufficient but chose to dismiss her rather than seek further information. The multi party inquiry that the *Code* requires did not occur because of the actions of the Respondent at the first suggestion of disability. If the Respondent’s actions are acceptable the safest response for an employer who suspected a disability was at root of an employee’s difficulty would be to cease inquiry and terminate the employment. This would obviously frustrate the purposes of the *Code* in the same fashion as the actions of *L.B.*

Has the Defendant demonstrated a good faith qualification?

185. The Respondent’s position is that not being aware of any disability prevented it from offering accommodation and so no offers or suggestions of accommodation were put forward. While this has been dealt with by the finding of fact that in effect the Respondent was aware of a disability if not the exact nature of it, the defence of a good faith qualification may also be engaged by the assertion that the Complainant’s attendance at work was a good faith qualification within the meaning of section 9(1) of the *Code*.
186. Considering the *Meiorin* criteria I find that attendance at work is rationally connected to the performance of the job and that insofar as Mr. Finch felt that attendance was the issue, this requirement was made in an honest and good faith belief that it was necessary to the fulfillment of a legitimate work related purpose, in this case, that someone fulfill Ms. McDonald’s assigned duties which are vital to the running of the Respondent business.
187. Where this defence fails for the Respondent is on the third criteria, that the standard is reasonably necessary to the accomplishment of that legitimate work related purpose. To show that the standard is reasonably necessary, it must be

demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. The evidence at the hearing shows that the Respondent has accommodated at least one maternity leave in the same job description as that of Ms. McDonald – that of Ms. Paul. Ms. Sanderson was initially hired as a maternity replacement for Ms. Paul. The Respondent also has long term disability insurance for its employees, the general purpose of which is to ensure that employees are able to make ends meet in the event they become ill on a prolonged basis. Among the benefits to an employer of such a program is that such employees may be able to rehabilitate and return to the workplace, potentially enabling the employer to retain valuable employees despite prolonged but temporary absences from the work force. There is nothing to suggest that the employer was contractually obligated or otherwise required by circumstances to pay Ms. McDonald's salary in such a prolonged period of time off work such that a temporary worker would have been an excessive expense. A part time worker accepted a full time position to replace Ms. McDonald. On the evidence before me I conclude it is more likely than not that Ms. McDonald's absence from the workplace could have been accommodated without imposing an undue hardship on the Respondent by the Respondent hiring a temporary worker to fill Ms. McDonald's position. While there may have been some complications in filling this position the evidence before me at the hearing does not establish on the balance of probabilities that it was impossible to fill the Complainant's position on an interim basis without undue hardship to the Respondent.

DAMAGES

188. Generally, the loss of employment as a result of a breach of the *Code* will result in an award of damages for lost employment income. The Complainant can also seek an order for reinstatement. Ms. McDonald has indicated she does not seek reinstatement but has indicated she would like to be repaid for the difference between what she did earn after losing her job and what she would have earned had she kept it. Ms McDonald quantified this as \$2.00 an hour less pay for the years that she suffered to get through the hardship.
189. Normally, this would be an exercise in comparing two numbers - the amount the Complainant earned after she was dismissed, and the amount she would have earned had she not been dismissed. These two numbers were not stated by Ms. McDonald or the Commission, rather the determination of these was left to the board of inquiry.
190. What would Ms. McDonald have earned if she had not been dismissed? According to her testimony she was not able to work at the time of her dismissal and in all likelihood the accommodation required would have been to hold her job

- until she was able once more to work. Based on the evidence before me, she could have applied for long term disability benefits through the Respondent's insurance. I have no evidence to suggest whether her application for benefits would or would not have been accepted, what waiting period (if any) would have been required before benefits began or what amount she would have received. Her other alternative would have been to apply for sick leave benefits through Employment Insurance, which she ultimately did do and was accepted for. According to her testimony the payment of benefits was delayed because the fact that her Record of Employment stated she had been terminated. It is not clear how long she was in receipt of sick leave benefits and / or regular benefits.
191. While I have been provided with Ms. McDonald's hourly rates I have not been provided with the date she commenced and finished work with each employer or the hours she worked. This is information that should be readily available in the form of T4s, Records of Employment and Income Tax Returns and would have given me a basis upon which to consider her actual employment income loss.
192. Ms. McDonald testified that she last saw a psychiatrist in the summer of 2005. If I assume that she would have been able to return to work full time in September of that year she would have suffered the \$2.00 per hour wage differential for 28 months when she started her own business in February 2008. Assuming that she worked 52 weeks a year for 40 hours a week that two dollar an hour wage differential would be \$4160.00 a year for a total loss of \$9706.00. Of course when she worked with Mini Maid she ultimately made \$8.50 an hour and her loss could have been as little as half this number. Other assumptions can be made all of which are largely speculative and generate different wage loss numbers. Ms. McDonald might have a greater loss if it took her longer to find the employment than I have assumed. The evidence for wage loss, a loss that should be quantifiable, is unsatisfactory.
193. I note that under section 28(1)(b)(iv) of the *Code* I may order the Respondent to "provide compensation to the person discriminated against, including compensation for all or a part of wages or income lost or expenses incurred because of the discriminatory action". I am satisfied that the amount of \$2500 will provide Ms. McDonald with compensation for part of the wages or income she lost, although I am equally satisfied that it does not compensate her for all of her wage losses.
194. I am awarding Ms. McDonald the amount of \$4000 for general damages.

CONCLUSION

195. Ms. McDonald was dismissed from her employment because of her mental disability which rendered her temporarily unable to work. Up until her disability rendered her unable to work she was an excellent employee. She did not deserve to be dismissed. If the Respondent was not satisfied with her medical notes and explanation the Respondent could have sought further information but chose not to do so on the mistaken belief of Mr. Finch that it could not. The Respondent is ordered to pay the Complainant a total of \$6500.00. There will be no order as to costs.