

ref.#

Work Assignments
Discipline
Management Rights

FINDINGS AND DECISION
IN A DISPUTE
between
WORKPLACE HEALTH, SAFETY AND COMPENSATION COMMISSION
(the Employer)
and
NEWFOUNDLAND ASSOCIATION OF PUBLIC & PRIVATE EMPLOYEES
(the Union)

Grievor: Mr. Brian Woolfrey

APPEARANCES:

For the Union:

Presenter: Mr. Fred Oates, Employee Relations Officer
Advisor: Mr. Wade White, Shop Steward
Witnesses: Mr. Wade White
Mr. Charlie Young
Mr. Eric Bartlett
Ms. Glenda Peet
Ms. Kay Mullins
Mr. Brian Woolfrey

For the Employer:

Presenter: Mr. Scott Kelly, Staff Relations Specialist
Advisor: Ms. Kay Mullins, former Director of Human Resources Services
Witnesses: Ms. Val Royle
Ms. Jennifer Parsons
Ms. Nadine Devereaux
Mr. Derek Murphy
Ms. Kay Mullins

The Board: Mr. Bob Diamond, for the Union
Mr. Denis Mahoney LLB, for the Employer
Mr. John A. Scott, Chair

The Grievance was heard on October 25-26 and December 7-8, 2006 in St. John's and on January 4-5, 2007 in Corner Brook.

The Statement of Grievance: The March 23, 2004, decision denying return to permanent case management position violates the Collective Agreement in general & more specifically violates Articles 35, 51, 52, 53 and all other applicable articles. No authoritative basis for displacement. (Decision made by Glenda Peet, Dir. H.R.)

The Requested Adjustment: Restoration of Permanent Case Manager position (Corner Brook) & full rights and benefits associated with same.

THE PARTIES AGREED THAT:

- the Arbitration Board was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were properly observed or are waived;
- there are no points to be raised as to arbitrability or other preliminary objections;
- all witnesses were to be excluded until all their testimony had been heard;
- issues of quantum, if any, would be considered separately, and if the parties do not reach agreement within sixty (60) calendar days after publication of the award they will be referred to the Board for determination;
- the Board will remain seised of the matter for sixty (60) calendar days after publication of the award to deal with matters of interpretation should they arise.
- the witness would be excluded until their testimony was completed.

Documents taken into evidence:

- Consent #1 WHSCC Collective Agreement April 24, 2002 to May31,2004
- " #2 the Grievance dated March 25, 2004
- " #3 *Mandavia v. Central West Health Care Institutions Board et al.* 2003NLSCTD 129
- WW #1 March 23, 2004 letter Ms. Glenda Peet to Mr. Woolfrey
- " #2 copy of e-mail Mr.Wade White to Ms. Glenda Peet
- EB #1 "Minutes" June 12, 1998
- " #2 Letter Mr. Eric Bartlett to Complainant
- GP #1 April 1, 2004 Registered letter Mr. Fred Oates to Ms. Glenda Peet
- " #2 April 29, 2004 letter Ms. Glenda Peet to Dr. Jerome Davis
- " #3 May 28, 2004 letter Ms. Glenda Peet to Mr. Woolfrey and copy of Appeal Decision
- " #4 Copy of May 17, 2002 Decision of LeBlanc J.
- BW #1 September 15, 2006 letter Ms. Peggy Beer to Mr. Woolfrey
- " #2 September 2, 2006 copy of e-mail Mr. Woolfrey to Mr. Oates
- " #3 copy of WHSCC/NAPE Collective Agreement, Articles 52 & 53
- DM #1 copy of July 13, 2006 e-mail Mr. Derek Murphy to Mr. Woolfrey
- KM #1 November 1, 2004 letter Ms Mullins to Mr. Oates
- " #2 May 6, 2005 letter Ms. Mullins to Mr. Woolfrey
- " #3 Grievor's November 29, 2002 Performance Development Evaluation
- " #4 Grievor's November 25, 2003 Performance Development Evaluation
- " #5 Grievor's December 9, 2004 Performance Development Evaluation
- " #6 Statement of Grievor's travel June 1, 2002 - Dec 31, 2006

ARTICLE 2
DEFINITIONS

- 2.01 For the purpose of this Agreement ...
(dd) "transfer" means the movement of an employee from one position to another which does not result in promotion or a demotion.

ARTICLE 4
MANAGEMENT RIGHTS

- 4.01 All functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Union as being retained by the Employer.

ARTICLE 8
GRIEVANCE PROCEDURE

- 8.01 Subject to Clauses 8.03 and 8.07, grievances shall be processed in the following manner:

Step 1:

With the exception of dismissal due to unsuitability or incompetence, as assessed by the Employer, of a probationary employee or a part-time or temporary employee with less than six (6) months' service and subject to Clauses 8.03 and 8.07, an employee who alleges that she has a grievance, shall first present the matter to her immediate supervisor through her Shop Steward within five (5) days of the occurrence or discovery of the incident giving rise to the alleged grievance.

In cases where an employee's immediate supervisor is her permanent head, the grievance may be submitted immediately at Step 3.

Step 2:

If the employee fails to receive a satisfactory answer within five (5) days of presenting the matter under Step 1, she may, within five (5) days present a grievance in writing to the second managerial level designated by the permanent head who will give the griever a dated receipt. In instances where there is no second level of management other than the permanent head, the employee may submit her grievance at Step 3 within the prescribed time limits.

Step 3:

If the employee fails to receive a satisfactory answer to her grievance within five (5) days after the filing of the grievance at Step 2, she may, within a further five (5) days submit her grievance in writing to the permanent head who, for the purpose of investigating the grievance, shall form a committee consisting of four (4) persons, comprising an equal number of Employer and Union representatives. One of the Employer's representatives shall chair the meeting(s). The committee shall be entitled to interview such persons as it deems necessary for the investigation of the grievance and shall give its decision in writing to the griever within ten (10) days of receipt of the grievance. The committee's report shall consist of the joint decision of the committee where the committee members agree to a solution. If the matter is not mutually resolved by the committee, then the Employer's representatives will send their position, along with a brief summary of the committee's deliberations, to the griever, with a copy being sent to the Union.

- 8.02 If the grievance is still not satisfactorily settled by the foregoing procedure or if it is of the type referred to in Clause 8.03, either party to this Agreement may submit the grievance to arbitration in accordance with Article 9.
- 8.03 In the case of dismissals and suspensions pending dismissal, the grievance may be submitted in the first instance at Step 3 of Clause 8.01.

- 8.07 Employees shall have the right to grieve against suspensions and alleged unfair treatment on promotion and transfer, and such grievances may be submitted in the first instance at Step 3.
- 8.09 Where the Union has a grievance involving a question of general application or interpretation of the Agreement, or where a group of employees has a grievance, the grievance may in the first instance be submitted at Step 3 of Clause 8.01.
- 8.11 No grievance shall be defeated or denied by any technical objection occasioned by a clerical or typographical error, or by the inadvertent omission of a step in the grievance procedure.

ARTICLE 9
ARBITRATION

- 9.13 An Arbitration Board may not alter, modify or amend any provisions of this Agreement but shall have the power to set aside a decision of the Employer and to modify a disciplinary measure imposed by the Employer.

ARTICLE 32
TRAVEL ON EMPLOYER'S BUSINESS

- *32.03 (a) Employees who are authorized to use their own cars while travelling on business for the Employer shall be reimbursed, as follows:

<u>Effective Date</u>	<u>Rate</u>
2000 04 01	31.5¢/km

(b) All employees when using their vehicles on the Employer's business shall receive a minimum of five dollars (\$5.00) per trip when they are required to proceed on a special trip and when the car is not used on the regular mileage basis. Where the expense exceeds five dollars (\$5.00) then the standard mileage rate in accordance with Clause 32.03(a) shall apply.

- 32.04 An employee is entitled to claim an incidental expense for each night on overnight travel status as follows:

<u>Effective Date</u>	<u>Rate</u>
2000 04 01	\$5.00 per night

ARTICLE 35
DISCIPLINE

- 35.01 Any employee who is suspended or dismissed shall be provided with written notification within five (5) days of any oral notification which shall state the reasons for suspension or dismissal.
- 35.02 All dismissals, suspensions and other disciplinary action shall be subject to formal grievance procedure as outlined in Article 8, if the employee desires.
- 35.03 (a) The parties agree with the principle that employees should be made aware of dissatisfaction concerning their work performance that may affect their standing or advancement with the Employer, and that employees would not be disciplined for anything that they were not informed or made aware of when the dissatisfaction was noted.

(b) Where the Employer notifies an employee in writing of any dissatisfaction concerning her work or otherwise, which may affect the employee's standing with the Employer, such notification shall be given within five (5) days of the event of the complaint. If this procedure is not followed, such expression of dissatisfaction shall not become part of her record for use against her at any time.

35.04 When employees are required to attend a meeting where discipline is to be imposed, such employees are entitled to have, at their request, a representative of the Association in attendance. The Employer shall inform the employee of this right.

35.05 If, upon investigation, the Employer feels that disciplinary action is necessary, such action shall be taken based on the Collective Agreement. In situations where the Employer is unable to investigate the matter to its satisfaction, but feels the employee should be removed from her place of employment, it shall be with pay.

ARTICLE 51

CRIMINAL OR LEGAL LIABILITY

51.01 The Employer shall defend, negotiate or settle civil and/or criminal claims, suits or prosecutions arising out of acts performed by an employee in the course of her duties, provided that the Employer is satisfied that the employee performed duties required by the Employer, and/or the employee acted within the scope of her employment.

ARTICLE 52

NO DISCRIMINATION

52.01 The Employer agrees that there shall be no discrimination with respect to any employee in the matter of hiring, wage rates, training, upgrading, promotion, transfer, layoff, recall, discipline, classification, discharge, assignment of work or otherwise by reason of age, race, religion, religious creed, political opinion, colour or ethnic, national or social origin, gender, sexual orientation, marital status, physical disability, mental disability, nor by reason of her membership or activity in the Union.

ARTICLE 53

*SEXUAL AND PERSONAL HARASSMENT

*53.01 *(a) The Employer and the Union agree to discourage sexual and personal harassment in the workplace. Both parties support the principles espoused in Sections 9,10,13 and 14 of the Newfoundland Human Rights Code and agree to co-operate fully with any investigation held by the Human Rights Commission with regard to a complaint by any employee in this respect.

*(b) For the purpose of this Article, harassment is defined as:
(i) Harassment based on race, religion, religious creed, sex, marital status, physical or mental disability, political opinion, colour, or ethnic, national or social origin, is any behaviour that is directed at, or is offensive to a member, endangers a member's job, or academic standing, undermines performance or threatens the economic livelihood of the member....

(c) Complaints under this Clause will be dealt with by the Employer, the Union and the employees included with all possible confidentiality.

*(d) The employer shall undertake to investigate alleged occurrences with all possible

dispatch. The victim shall be protected from repercussions which may result from her complaint.

- *(e) Subject to Clause 8.01, step 1, employees shall have access to the Grievance and Arbitration Procedures for grievances relating to this Article.

PRELIMINARY PROCEDURAL MATTER

FOR THE EMPLOYER, Mr. Kelly pointed out that it is for the Union to establish a *prima facie* case of discipline in this matter.

FOR THE UNION Mr. Oates responded that the Employer had participated in a committee stage meeting respecting the instant (March 25, 2004) grievance, at which it was agreed to bypass the steps of the procedure and to proceed directly to arbitration. That committee meeting dealt with the discipline and there was no objection from the Employer. Mr. Oates acknowledged being informed the Employer wishes to argue that the matter is non-disciplinary, but it must be asked why the Employer would agree to bypass the steps.

Mr. Oates also pointed to the four conditions set out in Brown & Beatty *Canadian Labour Arbitration*, 3rd Edition at para. 7:2400 that govern whether a matter is disciplinary or not: the Collective Agreement; Employer statements; the facts of the matter including the statement of discipline; or other related facts. In all of these matters, Mr. Oates suggested, the disciplinary character of this matter is clearly established. Nonetheless, the Union is willing to tell its story and let the onus be determined by the Board. Therefore, Mr. Oates proceeded to make his opening statement.

OPENING STATEMENTS

FOR THE UNION, Mr. Oates said that the grievance was filed in response to the Employer's March 24, 2004 action that culminated in a series of violations continuing to this present day. This is a continuing grievance. The matter arose because a client of the Commission charged the Grievor for providing false information and sued the Commission and Mr. Woolfrey. Mr. Woolfrey and the *Commission* were both found guilty of fraudulent misrepresentation. That Decision came down in 2002, and was then appealed. The appeal was heard in March 2004. The *Commission* and Mr. Woolfrey lost that appeal.

At that point the *Commission* decided not to appeal the matter further to the Supreme

Court of Canada. The Union feels that, under Article 51 of the Collective Agreement, the *Commission* should have pursued the matter further. The Employer gave Mr. Woolfrey false hope that they would support him through the matter, but they did not, continue with the appeal through the courts.

Once the 2004 appeal decision was received, the Employer decided to take disciplinary action against Mr. Woolfrey. This is the initial reason for the grievance. At that point the harassment began. The Employer began to threaten, intimidate, and harass the Grievor and disciplined him in a series of continuing disciplinary matters. During the process the Employer met with the Grievor on various occasions and offered none of the Union representation required under Article 35.03 and 35.04. As a result no discipline can stand. All discipline must be treated as null and void.

When he was called to a meeting, the first statement that the Employer made to Mr. Woolfrey was "We're not going to fire you, but..."

The Employer did not get beyond the "but..." since Mr. Woolfrey asked for a witness, or a shop steward, or someone to represent his interests to be present. The Employer did not object, and Mr. Woolfrey went and got someone. It was at that point, with a witness present, that he found out what followed the "but...". The Employer was not going to fire him but they were going to remove him from his case management position and all associated duties.

At a later meeting he was told by management that he would never be considered for advancement with management. That was said without a witness present, and in a threatening and harassing manner, with the Employer knowing that there was a grievance filed. It seemed that the Employer wanted the Grievor to quit his job. As a result of the intimidation and other issues related to the March meeting, the Grievor ended up in a doctor's care directly as a result of what the Employer was doing.

Mr Woolfrey and his family have suffered significantly at the hands of the Employer over an extended period. The initial Court Decision was in 2002. That resulted from a complaint that had been lodged in '97 or '98. In 1997 and 1998 the *Commission* had conducted its own investigation, including interviews with the client and Mr. Woolfrey. The investigation found no fault with Ms. Woolfrey. From that time on Mr. Woolfrey was told that the *Commission* would

support him through the ordeal. But the *Commission* did not do so.

In fact, the *Commission* wrote his doctor while Ms. Woolfrey was on sick leave after the March 2004 meeting, saying that if the doctor did not clarify the medical condition for them there was a possibility that his sick leave payments would be cut off. This was a direct threat to Mr. Woolfrey, constituting further intimidation and harassment.

Mr. Woolfrey returned to work in September, 2004. He was assigned no client-contact work at all, no duties of the Case Manager classification. He reported to his Supervisor as soon as he returned, but no duties of any kind were assigned. He was told that he would be under the direction of Human Resources in St. John's.

After his return to work some private discussions were held with no Union representation, even though the Employer knew there was a grievance and who was representing Mr. Woolfrey. It appears to Mr. Oates that the Employer did not want to deal with the Union.

After his return Mr. Woolfrey was given very little work. A lot of the time he was given none. This was very stressful, demeaning, and mentally debilitating. His whole life seemed to have been taken from him. But he stuck it out, and did not quit. In the Union's view, this has gone on long enough; in fact, far too long. This continuing grievance has got to come to an end. Mr. Oates then cited five headings under which the Union was seeking remedy in this matter.

First, the Union seeks to have Mr. Woolfrey returned to his post as a Case Manager, including assignment of normal Case Manager duties. The Union seeks reinstatement in these duties dating from March/September 2004 to the present.

Second, The Union seeks reinstatement of the Grievor's sick leave entitlement used in the period March - September, 2004.

Third, the Union wants it recognized that there were a number of lost job opportunities. There were opportunities and applications which he made in respect of these jobs which were not considered by the Employer at all.

Fourth, the Union is seeking aggravated, but not punitive, damages based upon the Employer's actions of harassment and discrimination.

Fifth, the Union feels strongly that the Employer failed in the matter of litigation and this must be recognised, perhaps through payment of an appropriate lump sum based upon the

evidence. (There is no jurisprudence on this aspect of the matter, and the Union will base its argument on Article 51.)

In summary the Union seeks the grievance to be upheld in its entirety.

FOR THE EMPLOYER, Mr. Kelly noted that the grievance was filed in response to a decision conveyed in a letter dated March 23, '04. Mr. Kelly asked that the Board pay particular attention to the statement of the grievance which refers specifically to that decision. The Employer is not aware of applicable articles other than the four explicitly mentioned in the grievance, and urged the Board not to allow expansion of the Grievance.

Mr. Kelly referred to the 2002 finding of Judge LeBlanc that the client had been fraudulently misled. He acknowledged the *Commission's* own internal investigation had found that there were was no fault and no fraud, but as a result of the Court's decision Mr. Woolfrey was reassigned duties in 2002 while the appeal was pending. In March 2004 the Appeal upheld the original Decision, at which point the *Commission* decided not to appeal the matter further, and informed the Grievor of their decision not to return him to Case Manager duties. The Employer took this non-disciplinary action in response to a situation which is simply not covered by the Collective Agreement.

In the Employer's submission, there is no doubt that, under the Management rights provisions of the Collective Agreement, management has the right to make the decision it made in light of the Court rulings. The decision was not arbitrary or discriminatory, nor was it made in bad faith. In the Employer's submission the Board must dismiss the entire grievance.

EVIDENCE

THE FIRST UNION WITNESS was Mr. Wade White. Mr. White has been a employee of the *Workplace Health, Safety and Compensation Commission* for approximately eight years, for three of which he has been a Case Manager. His is Shop Steward and Treasurer of the Local. He testified he had been a Shop Steward for about one year at the time of the grievance, and is familiar with the grievance because...

I filed it after speaking with Brian on the date of the grievance. He had got a letter from Human Resources saying that he was not returning to the Case Manager position. I reviewed the Collective Agreement and his information and felt that there was a violation of the Collective Agreement, so I filed it.

Mr. White confirmed he had cited Article 35 "Discipline." He confirmed that he felt it was clearly a disciplinary matter. He identified as WW #1 the letter Mr. Woolfrey had received from Human Resources and which he had passed to Mr. White. Mr. White confirmed he had based his decision to file the grievance citing Article 35 on this letter.

The decision to cite Articles 51, 52 and 53 were also based on this letter. Asked to describe why he had chosen to cite Article 52. "No Discrimination," Mr. White said:

I found that, even though the earlier internal investigation had found that there had been no wrong-doing, now, after the court decision, they were discriminating because of the court decision.

In Mr. White's view the terms "discipline", "classification", and "assignment of work" were the particular parts of Article 52 that implicated this article in Ms. Woolfrey's situation.

Asked to describe why he had chosen to cite Article 53, "... Harassment", Mr. White answered:

I felt this job was being eliminated, and I also had knowledge some days prior because of their attempts to relocate him to St. John's... so we felt that he was being persuaded to make a quick decision. They told Brian that they wanted him to go to St. John's as a Business Analyst, and wanted the decision made quickly. I intervened and e-mailed Glenda Peet saying, 'Let's give this guy some time.' He seemed to be being harassed and pressured and given inadequate time to make decisions.

Asked why he had cited Article 51, "Criminal or Legal Liability", Mr. White said:

Because I understood that the Employer had determined he'd acted appropriately, and then the Employer, therefore, is required to defend him. But there was another appeal, the appeal to the Supreme Court. So I filed the grievance under Article 51 as well.

ON CROSS EXAMINATION Mr. White was asked to clarify how, in his view, the letter from HR (WW#1) violated the articles cited in the Grievance. He answered:

In my opinion it was a stoppage of his rights – his right, particularly, to his classification - and it is punitive. He has no access to professional opportunities, so that's why it violates Article 35.

Asked whether the letter makes any reference to discipline, Mr. White said:

No it does not meet the standard disciplinary letter that I have seen, no.

Asked whether his salary had been affected, Mr. White said: Not his base salary, no.

Asked whether Article 51 makes any reference to the Supreme Court, Mr. White answered:

It is not stated in the article. It says simply, "...shall defend...", and my understanding is that they decided not to go further when they had a chance to go further. He was dropped ... The Employer "shall defend". That is mandatory.

Asked whether the Employer had, in fact, defended Mr. Woolfrey, Mr. White answered:

Partially. It was not the best defence. It was done by a Commission hired lawyer and no one was assigned to him personally. These were my thoughts at the time I filed the grievance. The Employer's action does not fulfill the spirit of Article 51.

Asked which of the grounds prohibited under Article 52 he feels the Employer has violated, Mr. White answered:

When I filed the grievance I looked at the action that had been taken... I looked at the fact of the decision. I did not look at the Employer's reasoning behind it.

Asked about his citing of Article 53.01b(i), which deals with harassment, Mr. White said:

Again I did not identify the specific prohibited grounds as to why they were harassing him.

Mr. White identified WW #2 as the e-mail he had sent Ms. Peet.

I simply understood that they had the court finding and had met with him after. I was not available at the time, and he told me that they wanted him to relocate to St. John's to a Business Analyst position, hence, my intervention on March 23rd.

Mr. White said that the Grievor did not, in fact, transfer to the Business Analyst position. He also confirmed he had not been available for the March 18th meeting and had no direct knowledge of what transpired at that meeting. "No. Brian told me that he felt intimidated..."

ON REDIRECT EXAMINATION Mr. White testified that the bottom of WW #1 indicates that the letter is "copied to the personal file." Asked whether, in his view, that indicated disciplinary intent, Mr. White said:

Yes, this was another reason why I filed the grievance as a disciplinary matter.

Mr. White also confirmed that the e-mail (WW #2) had been sent based on information that he had received not from the letter but as a result of the March 18th meeting.

He also confirmed that immediately after March 23rd, Ms. Woolfrey went on sick leave.

Responding to questions from Mr. Mahoney, for the Board, Mr. White said the statement of grievance links not only to the denial of reassignment, but also to the discussion he had with the Grievor, who understood they were not going further with the case. It does refer to that decision.

THE SECOND UNION WITNESS was Mr. Charlie Young who worked for 28 years with the *Commission*, mostly in Corner Brook but spent 8 years in St. John's. He was Regional Director for Western Newfoundland from 1991 to 1995, and during that time he had responsibility for the Corner Brook office and its 26 staff. Mr. Young confirmed that Mr. Woolfrey reported to him.

Asked to recall meetings with Mr. Woolfrey held in 2002 and in 2004 in relation to the court decisions that occurred in those years, Mr. Young responded:

Yes, the one in 2002 was a conference call. Brian and myself were in Corner Brook and Val Royle, the Executive Director of Corporate Affairs, and Kay Mullins, the Director of Human Resources at the time, and Donna Strong were all in St. John's.

To his knowledge there was no grievance relating to this meeting. The purpose of the meeting was to discuss the court case that the Commission and the Grievor had lost. Asked what had been decided concerning the Grievor Mr. Young said:

That he was not to be a Case Manager in a decision-making capacity. He would not be allowed any decision making regarding an injured worker, but would give direction to other case workers on other issues.

Asked whether this was on a temporary basis, Mr. Young said:

I'm not sure. There was talk of an appeal at that time.

Asked whether Mr. Woolfrey had objected, Mr. Young said, He was not in favour of it.

Mr. Young confirmed that during the period from 2002 to 2004 he continued to be Mr. Woolfrey's supervisor. Yes, I was assigning his work.

Asked whether he, in fact, had work to give him, Mr. Young said:

We tried to keep him busy. He trained some new Case Managers, and he looked at some complex cases and helped with that. Brian could do the duties but not sign off.... Not "piece meal", but he was assigned "as required".

Mr. Young confirmed that he was present at the March 18, 2004 meeting and that he has a good recollection of that meeting. Asked to describe the purpose of the meeting he said:

Prior to calling Brian in I got a call from Val Royle and Glenda Peet. They were going to offer Brian a job in the St. John's office.

Asked whether he knew what the position was, Mr. Young said, Not right at that time, no.

Asked whether this came about as a result of the loss of the court case, Mr. Young said:

My belief and thought is that it was.... Present were Valerie, Glenda Peet (I think

she was Manager of HR), and me. I went and got Brian. There were four in all in the meeting... Yes, I think Val was leading the meeting...

Asked whether he could remember what Ms. Royle had said to open the meeting. Mr. Young said, No I can't, not the opening, but confirmed that he recalled the Grievor had asked for a minute to step out and get help. Asked whether he could recall what had been said to trigger this, and whether Mr. Woolfrey had been threatened, Mr. Young said:

I know what was said in the meeting, but I don't know specifically what was said to trigger it.

Asked whether he or anyone else had informed Mr. Woolfrey that he could have Union representation, Mr. Young said, No, and no one else did. He confirmed that Mr. Woolfrey had requested Union representation, and that no one had objected to.

He came back with Derek Murphy, a senior Case Manager in the bargaining unit.

Mr. Young said he had not considered the meeting to be a disciplinary meeting – "The word discipline did not come up" – even though he was aware the Employer was taking his position. No, the change of Case Manager role had already been decided. Mr. Young was not involved in that decision.

Asked to describe the events in the meeting, Mr. Young said:

Val was spokesperson, and she said to Brian that she wanted him to move to St. John's to work in the St. John's office and also said, 'I needed an answer by Monday or Tuesday of next week.' This was on a Thursday, I think. 'I want you to get back to me by that time.' Brian was upset by this. The way he spoke, and the emotion on his face showed that. He talked about it and said he certainly could not. 'My wife is working in town, and I have one child in school and we've just mortgaged the house.'.... It was not in his best interest to do that. Then Val and Glenda said, 'Well can you think of any other options? You think you can come up with any, and get back to us.' I think that was by next Tuesday. Brian's response was, 'I want to speak to NAPE, and I may want legal advice.'

Mr. Young could not recall what precise post was being referred to in St. John's. Asked whether, in his view, this was being presented as an "option" or a "requirement", and whether Mr. Woolfrey had objected Mr. Young said:

I feel it was a 'You have to go to St. John's'.. Yes, he referred to NAPE and his possible legal advice.

Mr. Young confirmed that the meeting had ended at that point, and added:.

I know Brian went off on sick leave from April until September.

Asked whether he continued to assign duties when Ms. Woolfrey returned in September, and whether Human Resources in St. John's continued to be involved in assigning Mr.

Woolfrey's duties Mr. Young said:

Yes, I was responsible for Brian then, yes... I'd have to check my notes but I think that it was a continuation of the previous matter.... I did contact Val Royle. I'm assuming that he continued to be assigned duties as before. And up until the end of 2004 he continued with the pre-sick leave pattern..

Asked if there was any problem with Brian's record or work as a Case Manager, he said:

No, no. There were no reprimands that I am aware of. I consider him a seasoned Case Manager with a challenging case load in the health care sector, and he had a great rapport with Western Memorial.

Asked whether he had been asked to do anything when he became aware of the complaint from the client, Mr. Young said,

There was a review done; not by me, but by another member of the Commission.

ON CROSS EXAMINATION asked if he knew of other grievances filed, Mr. Young said

Yes I believe there was another grievance filed. Brian is also with the Union, and presented grievances for other employees so I can't be sure.

In Mr. Young's view, discussion about a move to St. John's was in the nature of...

a demand rather than as an option offered to him, but Glenda and Val asked him to propose other options... Initially the decision was 'a must', to me. 'Brian, you are going to have to move to St. John's.' At the later part of the conversation they stuck on... 'Brian, you think of any options you can think of.' ... No, Mr. Woolfrey did not relocate to St. John's.

ON REDIRECT EXAMINATION Mr. Young again confirmed...

As I saw it, the discussion was, 'You are moving.' Then, after that, 'You come up with options.' I firmly believe the initial introduction was to move to St. John's.

THE THIRD UNION WITNESS was Mr. Derek Murphy who has been with the Commission for 16 ½ years in a number of capacities, including Case Manager, Senior Case Manager, and now Regional Director for the West Coast Region where he now works with Ms. Woolfrey. He was present for part of the March 2004 meeting. Asked how he came to be present he said:

On that day I was in the kitchen having a coffee. I didn't know about any meeting. Brian came in and asked me to come into a meeting with him, and I said, Yes. He

told me the basics of the meeting. I didn't know how long it was going on before I went in... I've never been on the Union executive, but I went in as a witness. Charlie Young and Brian and myself were there in Corner Brook, and Val Royle and Glenda Peet were in St. John's. It was a telephone conference.

Asked what Mr. Woolfrey had told him when he asked him to attend, Mr. Murphy said:

He was concerned about what was happening in the meeting. He looked concerned to me. I knew it was with reference to the court case. I can't quote the exact words, but he needed a witness to what he might hear in the meeting.

Asked whether Mr. Woolfrey had indicated any sense of the seriousness of the issue, Mr.

Murphy said:

Yes, I got the understanding that he could not be doing case management and was concerned over what he'd be doing. I could tell by his demeanor that he was concerned and that he needed a witness. The meeting was held until we got there. The sense I got and what I recall, it felt that he would not go back into Client Services: best for him and for everybody. There was a Business Analyst position, and Brian was concerned that that meant head office in St. John's. He was worried for his family. It was suggested he should try and come up with other ideas.

Asked whether, in his view, the Employer was demanding that he go to St. John's, Mr.

Murphy answered:

No, I felt it was an offer, and that as an alternative it was better for his and the Employer's protection not to be in Client Services. There were no other options put by the Employer. That was the only option so far as I can recall... My recollection was that any other options that he could put forward would be considered. The only one that I recall discussed was the Business Analyst. I don't recall any discussion of the Case Manager position... I believe he was concerned about his employment, and that he would not be in case management.

Asked whether, Mr. Woolfrey had objected to going to St. John's, Mr. Murphy answered:

I think he was interested in staying in the Corner Brook office, and stated that in the meeting.

Asked whether he recalls there being any particular time frame specified during which a decision should be made, Mr. Murphy said: I think it was a possible option on both sides.

Asked whether he heard any mention of firing, Mr. Murphy said

It was not mentioned in the meeting while I was there.

Asked whether he interpreted the tone of the meeting as disciplinary, Mr. Murphy said:

No, I don't know if someone asked Val if she had a problem with me as a witness. The part of the meeting I was in was a discussion about his vulnerability to other clients. So it was, 'Where do we go from here?' It was not about firing or discipline like that.

Asked whether he had not considered Ms. Royle's removal of Mr. Woolfrey from Case Management as discipline, Mr. Murphy said:

I knew it was upsetting for Brian, and that he was not interested in St. John's.

Asked whether he considered it to have been a serious meeting, Mr. Murphy answered:

When Brian came to get me in the kitchen I knew he was concerned. But I did not hear any of the Managers say it was disciplinary. It was 'Where can you fit?'

Asked whether the tone was friendly tone, he answered:

No, I'm not saying that. I could tell that he was concerned but when I was there Brian was passionate about his wanting to stay in Corner Brook. There was no tone of punitive. I was there as a Union friend and there were three management staff there.

Asked whether he had any conversation with Brian after the meeting, Mr. Murphy said: Brian had said to me shortly after that there was a mention of firing. There was consideration of it; but there was nothing of that in the meeting while I was there.

Asked whether he had been concerned for Brian, Mr. Murphy said:

Yes, I feel that I was empathetic to Brian's situation.

THE FOURTH UNION WITNESS was Mr. Eric Bartlett who had been

Executive Director of the Commission's Compensation Services between 1995 and 2001, and since 2001 has been Director for Corporate Governance and Planning with the Commission reporting to the CEO, and overseeing the Benefits and Rehabilitation programs for workers, including Health Care Services and other areas for both Grand Falls and Corner Brook regions.

Mr. Bartlett described having been asked to do an investigation ...

Yes, it is not a normal part of my job, if it's a staff complaint. But if we get complaints through the Minister's office or through an MHA, then that's where I am sometimes asked... It was a complaint by a client from the West Coast against Mr. Woolfrey. I think, if I recall, that the complaint arose through a letter looking for clarification of a financial matter. There were two or three letters involved. It was complicated, so we thought that we should look at it at my level. It had been looked at at other levels. At least three or four letters had been written at the political level.

Asked whether it was unusual to have political involvement, Mr. Bartlett answered:

Lots happen. It is not uncommon, but an accusation like this... The complaint was persistent, so it was decided that I should do a review. I report to the CEO, who told me to do this. I went to Corner Brook. It involved the Public Service Pension Plan, and offsets under that plan. The client had been told something she felt that she had been ill advised to her detriment.

Asked to describe the process he had used, Mr. Bartlett said:

It was pretty informal. I went to Corner Brook office, called the client, and asked for her to speak with me. We like to get control of it... She said, Yes she would meet with me without prejudice, and I met with her at her home (minutes EB #1) ... I also did a review of the file thoroughly, including the case work sheets, to be sure I'd considered everything. Everything was in place. There were no missing documents... In reviewing it, I found some issues regarding the administration of the file, but could find no evidence of what she was alleging... and I could find nothing to support or refute what she'd said. Case Managers put notes of what they say in the files. We stress the importance of documenting the file.

Mr. Bartlett said he had not dealt directly with Mr. Woolfrey before, and had never been in a direct reporting relationship with him. Mr. Bartlett sent the report of his investigation EB #2 ... to the client and to her file. I don't know if we closed the loop in the mix to finance. I think we addressed that through the process. It was also sent to my boss, Barbara Stark, not to the Minister.

Asked whether any action was taken against Mr. Woolfrey at the time, Mr. Bartlett said:

No we did not initiate that. I had some administrative things, management issues, but they were addressed through the normal.... I could not reach any conclusion that he had lied to her as she indicated.

ON CROSS EXAMINATION Mr. Bartlett testified he had no direct involvement in the 2004 decision concerning Ms. Woolfrey's case management duties.

No. I was then in a different role, and had no direct involvement.

THE FIFTH UNION WITNESS was Ms. Glenda Peet, currently Manager of Human Resources and temporarily Acting Director of Human Resources with the Commission. Ms. Peet described her involvement with the instant matter:

I was replacing Kay Mullins who was off on sick leave in March of 2004 at the time this grievance was filed, so I was responsible for planning, directing and coordinating all aspects of the Human Resources portfolio and responded to the CEO for administration at the management level on Human Resources matters. I was also responsible for directing policy and handling the grievance procedure... I reviewed the grievance, received it on behalf of the Commission, and attended the committee meeting in respect of this grievance.

She identified as GP #1 the Union's April 1, 2004 letter conveying the instant Grievance in which "Article 8, Clause 8.01, Step 3" is noted, and confirmed that the committee had met at Step 3. Her response to the grievance was that there was no violation.

Asked whether the processing a grievance at Step 3 means that it is a disciplinary matter, Ms. Peet said

It is not necessarily the case... There has never been a complaint about missing steps. I went directly to step 3.

Mr. Oates pointed out that GP#1 references Article 35, headed "**DISCIPLINE**", and actually cites "discipline" in the subject line at the top. He also pointed out that no stages in the grievance process were waived in this matter.

Asked whether she had accepted this letter, Ms. Peet answered, Yes.

Asked whether the Union and Employer had therefore gone to Step 3 on "discipline", Ms. Peet answered, Yes.

Asked whether it would be possible to get to Step 3 otherwise, Ms. Peet said:

Yes, depending if the Regional Manager is involved.

Asked whether the matter did, in fact, involve Mr. Charlie Young, Ms. Peet answered:

I don't know... Based on this letter we went straight to a grievance committee meeting.

Ms. Peet also confirmed she attended a meeting with Mr. Woolfrey in March 2004.

It was a teleconference call... I was there. Valerie Royle was there. She was the Executive Director of Workers Services at the time. Brian and Charlie Young were in the Regional office, and Derek came in later... It was at the very beginning of the meeting. We were talking about the Court of Appeal Decision. Brian knew the Court Decision. I made the comment, 'We aren't going to go to the Supreme Court,' and that would be 'on your time and cost.' That was when Val said that we were not disciplining... There was no Union representative provided 'but if you want one...!' It was then Brian asked for Derek as a witness. He was available.

Asked whether she and Ms. Royle had any discussion about the Court Decision prior to teleconference meeting, and whether there had been any decision about discipline, Ms. Peet said:

Yes, that morning... There was a preliminary discussion concerning discipline, and the status of the case management position in general, but it quickly moved from the disciplinary focus... Neither Ms. Mullins nor Mr. Young were involved in that conversation, not that I recall... I had been told concerning the decision, and I'd certainly have got direction concerning contacting Treasury Board, but I don't recall any discussion concerning discipline with Kay.

Asked whether the decision to remove Mr. Woolfrey from his Case Management position was temporary or permanent finalized decision, Ms. Peet answered:

He had been removed back in 2002 temporarily, and we decided to maintain the *status quo*... It was at that point in time what we felt had to be done, not that it was a permanent decision. This was going to be a longer term decision.

Asked whether Ms. Wolfrey had stopped the meeting to get help, Ms. Peet answered, "He requested it."

Mr. Oates asked whether she could recall Val Royle making a comment at the beginning of the meeting concerning "firing", Ms. Peet said:

Yes. Actually at the point of whether he needed a Union Rep, Val realized and said, 'Don't worry there is no discipline, and you aren't going to be fired... Yes you can get someone, or we will get somebody'... We were trying to reassure him.

Asked whether the word "fired" was used at some point, Ms. Peet said, Yes.

Ms. Peet was asked whether they had informed Mr. Woolfrey as required under Article 35.04 "When employees are required to attend a meeting where discipline is to be imposed...", Ms. Peet answered, No. Asked whether removing him from his duties as Case Manager is not, in her view, an act of discipline, Ms. Peet answered:

That decision had been made at an earlier time. We were maintaining the *status quo*, more long term.

Asked what she recalls of the meeting, Ms. Peet said:

The discussion was Where are we going to go? There were few if any options in Corner Brook because of the client contact. We had the Business Analyst position as an option. Brian, obviously, was not wanting to move his family to St. John's. This was a huge issue for him. We said any other options would be considered. Time was a factor, and we wanted resolution. so Brian was asked to let us know as soon as possible: early next week. Brian did indicate that the meeting was not as he had expected. He had experienced more support from the local office but felt he was not getting support from head office.

Asked whether she had said that he could appeal the 2004 Court Decision to the Supreme Court, Ms. Peet said: I said we would not be absorbing the cost.

Asked what Brian had been told at that meeting about his duties and case load, she said:

Brian had been removed temporarily. We said we'd be maintaining the *status quo*, and we would have to look at longer term options based on the Court of Appeal Decision, and the decision to remove him would be maintained for the present: that he could not be put back at this point in time... He was told that there was a position in St. John's as a Business Analyst. It was a new appointment, and it was an option that we could look at.

Asked whether they were telling him that he had to go to St. John's, Ms. Peet said:

Yes. There was no option in Corner Brook. There were others in St. John's.

Asked whether Mr. Woolfrey had objected, Ms. Peet nodded her head and said, "He made it clear."

Asked what options he did have, Ms. Peet answered:

That position was an option. We were trying to resolve the matter and go forward without putting him back into client contact. The options were in St. John's, yes. One of the St. John's options was the Business Analyst position... He did not have to go to the Business Analyst job. We were open to hearing other options. We were trying to work to find an option... We did not feel there was any option for him in Corner Brook. We did not have that 'What if he does not move to St. John's?' discussion prior to the meeting.

Ms. Peet confirmed she had not been involved in the 2002 meeting or decision about his assignment of duties. Asked whether, in her view, he had been given time to find a solution to his problem, Ms. Peet said:

He said that he did have to speak to the Union or to a lawyer. Val said that she did not want to be left hanging. I recall him saying, 'I've been hanging too, for two years.'

Ms. Peet confirmed that Mr. Woolfrey then went off on sick leave the next day, and that she had called him during sick leave at his home just to "to say How are you?" She did not recall asking him about his decision concerning the move to St. John's. Asked whether such calls are normal procedure, Ms. Peet again answered:

I knew it was a stressful event for him and his family. I knew he'd gone off on health issues. He had told us he was diabetic, and indicated that it was due to sugar levels... There were lengthy calls throughout his seven month sick leave on

various issues. Yes, I have made calls to those off on extended illness.

Ms. Peet said she received a message from the Local after the meeting of the 18th.

Yes I got an e-mail from Wade White. I remember getting it and wondering who I should deal with on this. I believe I consulted you (Mr. Oates).

Asked whether she had responded to Mr. White's e-mail, Ms. Peet said:

If I did it was just to ask who do I deal with: You as shop steward or Fred as ERO?

Ms. Peet was directed to WW #1 where, in the first paragraph, there is reference to recent telephone conversations. She was asked whether this meant that during the period between March 18th and 23rd she had been in conversation with Mr. Woolfrey, Ms. Peet answered:

Yes, there could have been. And during the conversation with Val and Charlie he did ask to return to his original position but we had agreed....

Asked if Mr. Woolfrey had not objected to the decision he not have client contact, she answered:

Not that I am aware. He was out of the position, and there were no objections. There was no grievance filed. We were opening up discussion on other options.

Ms. Peet confirmed that the letter (WW#1) was directed to the Grievor's personal file as well, but repeated that in her view the matter was not disciplinary. Asked whether WW#1 would likely affect his employment opportunities, Ms. Peet said:

The letter would not be used in competition. We don't look through the personal file in a competition. In a competition they would not go back to the personal file. But the decision from the court would be used. Client contact would need to be considered. That would be a factor in that competition.

Asked if it could be used against him at any time, and have to be considered when evaluating him, Ms. Peet answered, "Yes." Asked whether there is indication in his file that this letter is not a disciplinary matter, Ms. Peet answered: No... but other managers would know.

Asked whether Mr. Woolfrey would be eligible for consideration for client contact jobs, Ms. Peet answered, Right now he would not be, based on the court case and the appeal.

Asked whether there was anything in the court decisions to direct the Employer to take any action against Mr. Woolfrey, Ms. Peet answered, No. She also confirmed that she had read the initial Decision and the Appeal Ruling, and said that

Everyone there knows that he is removed from client contact and is not to be considered for positions with client contact... No, the Court Decision is not on the

Grievor's file... but the letter is.

Ms. Peet was asked whether other benefits were also made unavailable to the Grievor as a result of WW#1 , including overtime, travel and the like. She answered:

He is, and has been, eligible for overtime but not in relation to Case Manager position... There was a car allowance allowed for Case Managers and he did get that, yes. But he has not been eligible for overtime in Case Management.

Ms. Peet acknowledged that no one else has had the same treatment, and confirmed that the Commission has been sued by clients, even during the last two to three years. She is unaware of any worker who has been disciplined in relation to a court case since 2002.

Asked why WW#1 had been sent so soon after the 18th, Ms. Peet answered:

Brian was to get back to us the following week, and then we appear to have had a call in which Brian said that he did not want the Business Analyst position... We agreed that I'd be the contact for the Commission and Fred would be the contact for Brian as a result of his request to go back to case management. We wrote this letter so he could get on with what he needed to do.

Asked whether there is not a five day time limit in respect of discipline in the Agreement, and whether the letter's dating had anything to do with that time limit, Ms. Peet answered:

No, no such connection. We became aware of things on the 17th, so it was outside the five days. Mr. Woolfrey said that it was important. I think it was important for him, getting it into his hands... I did not write this inside or outside time limits since I was not thinking discipline.

Asked whether she is aware of the five day discipline rule, Ms. Peet said, Oh, yes.

Ms. Peet also confirmed that she had written a letter (GP #2) to Mr. Woolfrey's doctor. [The Employer objected to the introduction of this evidence.] Ms. Peet testified she can not recall whether she had spoken with Mr. Woolfrey about this issue and the letter in her telephone conversations with him. Ms. Peet testified she did not know how he felt about this letter. Asked whether this might not put pressure on Mr. Woolfrey, Ms. Peet answered:

I don't know. I don't think so. When clarification is required we may have to use the other kinds of leverage.

She acknowledged that the doctor had not provided the information requested.

No we typically do not. We often have eligibility issues and still do not get responses... There may have been further sick notes.

Ms. Peet confirmed that the Employer had continued him on sick leave until he returned that fall.

She was not involved at all in assigning him duties after his return.

I returned to Manager of HR in May or June of 2004. There were no specific assignments. I was in conversation with Charlie Young, and since then there have been other projects. I was not the decision maker.

Asked to describe special projects and whether those assigned are given a choice, Ms. Peet said:

There could be new initiatives, and people are assigned because of their knowledge; for example, in the business area.... Sometimes they are selected or assigned based on availability but usually there are discussions. Depending upon their expertise they may not be given a choice.

Ms. Peet testified that she would have had a copy of the Appeal Decision "by the 18th", but had not given the Grievor a copy at that time. There was no reason she had not done so....

No. He'd heard it from the lawyer, Mr. Glen Roebottom, who had represented the Commission. There was no request for a copy.... The Commission had the lawyer represent both the Commission and Mr. Woolfrey.

Asked who normally would have provided Ms. Woolfrey a copy, Ms. Peet said:

I don't know whether it would be the Legal Department or HR. We had not had it before... It was in our grievance committee meeting when I learned that he did not have a copy. I saw to it that he got one.

She identified GP #3 as her letter dated May 28, 2004 attached to a copy of the Decision of the Court of Appeal, and confirmed that this was supplied as a result of the May 21, 2004 grievance committee meeting.

Ms. Peet said she is aware that the courts have time limits and that the time limit to make an appeal to the Supreme Court is two months, I believe. Asked whether she was aware when she provided the copy of the decision on May 28th that the time limits had already elapsed, she said:

I would assume so, yes. I do recall, at some point, that Brian was going to talk to the NAPE lawyer. Brian had identified that he'd had some conversation, but I don't know the dates... The first I was aware was at the grievance meeting.

She also confirmed that there were no reprimands on the Grievor's file and that he is a good employee. Ms. Peet confirmed that if he applied for any type of position with client contact, he would be automatically excluded because of the Court Decision, and further that he had actually been screened out of competitions in which he had applied because of the client contact.

ON CROSS EXAMINATION Ms. Peet described the mandate of the Commission and confirmed that she had written WW #1 as a result of the Court of Appeal decision in which the

original Court decision had been upheld ...

So we were back to the 2002 decision. So that decision re client contact was maintained. The *status quo* was renewed.

Ms. Peet identified GP #4 as the initial 2002 Decision, and confirmed that Decision, particularly paragraph 55 formed, in part, the basis of the Employer's decision to remove the Grievor from all client contact.

The potential for vulnerability is key to his work. It makes it clear that the Employer's decision was the correct one, particularly in light of the liability concerns... If Brian returned to case management then there is liability for further suits. We could be facing costs if we ignored the Court's decision.

Ms. Peet said WW #1 was never designed to be disciplinary or punitive in effect, nor had it been intended as the basis for future discipline or to correct unwanted behaviour. The Grievor had not lost salary as result of WW#1.

Ms. Peet testified that the Grievor had been aware of the Court of Appeal decision before the March 18 meeting, and had not requested a copy of the Court of Appeal decision prior to the grievance meeting. There had been no deliberate attempt to keep the decision from him:

No, absolutely not. I had assumed he'd got it from his solicitor or one of the Legal Department. I assumed that he'd had it. It is a public document.

Asked whether she considers the Grievance's reference to Article 51 to encompass the Employer's decision not to take the matter to the Supreme Court, Ms. Peet answered:

No. I assumed it related to legal representation up to the appeal. It was at the grievance meeting I learned the Grievance was to encompass the Supreme Court issue. Fred said he would file a grievance on that, and he filed that later.

Asked whether the letter to Mr. Woolfrey's doctor (GP#2) was different in any way from the way other employees are treated in similar circumstances, Ms. Peet said:

No, it is in accord with the Agreement, Article 8.03. He wasn't treated any different from others on sick leave.

ON REDIRECT EXAMINATION Ms. Peet confirmed that the judge had based the 2002 decision on credibility.

Ms. Peet confirmed that there was concern for liability, and that the Commission had been aware, prior to the Appeal, of changes to the legislation.

Yes. There were two problems with Section 14 of the *Act* concerning liability, and

they had been modified that year. But I am not sure if it was prior to the 2002 case. This was a public finding and there could be vulnerability to Brian and to the organization if he were returned to his case management position.

Ms Peet confirmed that the Section 14 problem was rectified in 2006. It was changed to broaden the scope of its limitations and gave employees the same protection as the CEO and the Board on the basis of good faith. The effect is that all employees have the same protection with, therefore, reduced liability. Ms. Peet went on to explain that this was the first finding of bad faith so everyone had concerns about this. All were asking, How can I can protect myself?

Asked how she could conclude that the Grievor had suffered no loss of salary, Ms. Peet said, He stayed on at the same salary. She acknowledged, however, that he has not worked overtime as Case Managers have.

He was on special assignment, and did work overtime; but not in the case management position.

Asked how she knew that Mr. Woolfrey was aware of the Appeal Decision prior to the meeting on the 18th and whether he had asked for a copy of the decision on the 18th, she said:

Not to my knowledge... I don't know how Val Royle knew he had been speaking to the lawyer on the night before... If I'd been asked it would have been provided, but, as an organization, we did not provide it for him until the grievance meeting.

Asked whether on March 18th Brian was told that he would be going to St. John's as a Business Analyst on a transfer, Ms. Peet answered:

There was no option in Corner Brook because of the client contact. There were more opportunities in St. John's, including the Business Analyst position. It was not a matter of the Business Analyst position, or else. Brian was concerned about the family and the home, but we did say St. John's.

Asked whether that was not a forced transfer under the Collective Agreement, Ms. Peet answered, He was changing office. She agreed that this "office" was in another city.

Ms. Peet also denied that the position change cannot be seen as a suspension under Article 8.03 and defined a suspension as:

Removal from a work site, either with or without reason. There is no interest in doing any discipline to Brian. This was a matter of finding a solution. I never ever viewed it as disciplinary.

With respect to Article 51, Ms. Peet confirmed that on March 25th she had the impression

that the matter that the Grievance was complaining of was the representation Mr. Woolfrey had been offered and used during the trial and during the appeal.

That was my misunderstanding. I thought it related to representation during the hearing.

In response to questions concerning her letter to Mr. Woolfrey's doctor (WW#2) Ms. Peet said that it is standard practice, currently in effect, to write such letters.

For example, I sent two letters to sick leave recipients last week. If clarification is needed we do it. The longer a patient is off, the harder it is to return. We have changed our practice. Notes are required in access of two weeks. That was changed late in 2004.... The practice was as normal before 2004. We had always done this.

Responding to questions from Mr. Mahoney for the Board, Ms. Peet said that WW #1 does not instruct Mr. Woolfrey that he has to go to St. John's, but it suggests the current special project assignment in Corner Brook had a life span.

Responding to questions about Step 3 initiation under Articles 8.03 and 8.07, Ms. Peet testified that the first reply is in her own writing, and that the April 1st letter (GP#1) came later.

Responding to questions from Mr. Diamond for the Board, Ms. Peet confirmed that she was aware of no performance issues relating to the Grievor, and acknowledged that he has been damaged as a result of the court case.

As an organization it was necessary to respond to the facts. The organization could not ignore the Court finding.

THE SIXTH UNION WITNESS was Ms. Kay Mullins who was on sick leave in March 2004 from her position as Director of Human Resources. As Director, Ms. Mullins is responsible for all programs including training, labour relations, health and safety and human relations programs as the Commission's senior position on the management committee.

Ms. Mullins was on sick leave from October 21, 2003 until June 1, 2004 and had dealt with Mr. Woolfrey' case in 2002.

My involvement started after the receipt of the 2002 Court Decision. I attended the meeting with Mr. Woolfrey in 2002. I can't recall who was at that meeting. It was a conference call between me and Val and Brian and I don't remember who else... we talked about his duties and how he could continue to function. My position and the Commission's was that he'd be better off removed from case work.

Asked whether Mr. Woolfrey had objected to that decision, Ms. Mullins said:

I don't remember, but the point of the decision would have been for the good of the Commission and of Brian. I don't remember it primarily for the Commission. We were concerned about the impact on both... No, there was no consideration that it was a disciplinary matter in any way. The option of possible dismissal was an earlier matter, not then... If the question of discipline arose I'd have said it was outside time limits so discipline could not be considered. The issue was reassignment to whatever work was available that did not involve client contact... Yes, at the 2002 meeting the issue of promotion and overtime was raised as an issue. As far as promotion was concerned, he would be eligible except for client contact positions; but overtime as a Case Manager was not to be available.

Ms. Mullins said she did not feel that in removing him from Case Manager duties was a threat to his livelihood. After return from sick leave, Ms. Mullins was updated on Mr. Woolfrey's files.

Yes. I had been in contact with Glenda Peet but not a lot. I had seen her perhaps once or twice a month. It was a practice that if she needed me she would call me.

Ms. Mullins was not involved in the 2004 decision not take the matter to a Supreme Court of Canada appeal.

That was legal counsel. Donna Strong was the primary decision maker based on the grounds to go forward. Donna advised the Commission on this... I returned to work in June 2004, and in September 2004 Brian returned to work. Then he and I had interaction in September 2004 concerning his duties in the Corner Brook office and the grievance there. There was a decision to delay the grievance for a while.

Asked whether she had told Mr. Woolfrey there was no opportunity for promotion in the organization because of the court decision, Ms. Mullins said:

Yes. I said that it would impede his forward motion in client contact jobs. I thought that he would not get Mr. Young's job when he leaves... It was not intended to intimidate or threaten him... I was aware of a grievance.

Asked whether there was a Union representative present during this conversation, Ms. Mullins said:

It was not about a grievance. It was to discuss Brian's future opportunities and how to deal with issues we were all faced with.

Asked whether she was aware of other grievances ongoing at the time including one involving overtime issues, Ms. Mullins identified as KM #1 a letter concerning time limits for proceeding to arbitration ...

that arose in the course of a meeting between Brian and myself during which we discussed a lot of implications including his possible win at arbitration. It was my feeling that if he were returned to case management it would not be a good thing. That was my position. The Commission had no alternative. We were restricted in terms of job transfers. We assigned him to projects and so on.

Asked whether Mr. Woolfrey had ever refused any projects, Ms. Mullins answered:

Not that I am aware of. I think that the letter was in the hope that time would cure things and that opportunities might emerge.

Ms. Mullins confirmed that it has now been four years without any change in Brian's situation.

Asked who was assigning Mr. Woolfrey his duties after October 2004, Ms. Mullins said:

I can't recall. I had some involvement, some dealings. He was in the HR division for some work at the time. Janet Butler was doing a new claims management model. At various periods of time Mr. Woolfrey reported to various people, including Charlie Young... I was aware of the 'core competencies' project in 2004, but do not know what was implemented out of that... I don't remember the details. There have been changes, but I don't know if any of it incorporated his recommendations or not. I don't know.

Asked if she was aware of Mr. Woolfrey's involvement with Occupational Health and Safety activities, Ms. Mullins said:

I think that was Glenda... but I had conversations with Mr. Woolfrey by phone after October 2004 relating to the issue of promotion. I had a number of conversations while I was there. I don't recall all of them... He was complaining about his work assignments, yes.

Asked whether she recalls Mr. Woolfrey had said that he had found her remarks about Mr. Young's job and the lack of promotion opportunities intimidating, Ms. Mullins answered:

Yes he did. I attempted to mitigate this, but no resolution had been found to his situation... I also sought other departmental support. I was aware of Brian's record with the Commission. There were no problems with it... He's a good employee... Yes, I knew about Mr. Bartlett's report, and that there had been no findings of fault against Mr. Woolfrey in it that warranted discipline... The initial reassignment of duties had been revised on March 23rd to show that he had been removed from duties... It was removal on a non-disciplinary basis.

Ms. Mullins was not part of the decision not to go forward to the Supreme Court. After her own return to work she had a meeting with Ms. Donna Strong. Asked whether she had asked Ms. Strong why Mr. Woolfrey had not been given a copy of the Court of Appeal decision, and whether she knows of any reason he had not been given a copy since the Commission had

represented him, Ms. Mullins answered:

No, I did not ask her that... I don't think we had the experience. I don't know where the responsibility lay. I don't know how it happened.

To the best of Ms. Mullins' knowledge, the Commission had never considered giving Mr. Woolfrey his own lawyer and does not recall Mr. Woolfrey requesting that. She confirmed that it is normal practice for the Commission's lawyer to represent both the Commission and an employee.

I'm sure that there are those who said it would be better to have one each. There was a liability committee looking at the liability issues, but I don't know if it's in policy.

Ms. Mullins acknowledged that is aware of "a change in substance but not the detail" of Section 14 of the *Act* subsequent to Mr. Woolfrey's case.

It closed what was seen as a potential loophole.

Ms. Mullins said that she was not aware of any pre-trial argument concerning that loophole before going to court.

Ms. Mullins's attention was drawn to Article 51, and particularly the options there set out "to defend, negotiate or settle civil and/or criminal claims, suits or prosecutions". Asked whether there was some reason the Commission had decided to appeal rather than settle with the complainant, she said:

The (2002) Court decision was a major shock to all of us. The wording and the extent to which the (judge) went was farther than anyone had anticipated: that the staff member could be found liable for fraud and bad faith. A lot of the staff were concerned. So we did the pros and cons and weighed the benefits to Brian and the Commission. But the interest was to appeal it.

Ms. Mullins confirmed that the Commission gets sued and agreed that there have been cases against the Commission since 2001 in which the Commission has been found guilty. Asked whether she is aware of any action taken against an employee, Ms. Dale Kavanagh, as a result of a 2003 case from Central Newfoundland, *Mandavia v. Central West Health Care Institutions Board et al.*, Ms. Mullins said that, despite the fact that no action was taken against Ms. Kavanagh, the Case Manager involved in that case, there was no discrimination to be inferred in Mr. Woolfrey's situation. In her view, their situations were different.

She identified as KM #2, a 2004 letter Mr. Woolfrey denying promotion, and confirming

that had been screened out of the competition because of client contact. She also confirmed that there was a 'team lead' position from which he had been screened out, both of which would have been potential promotions with higher pay. Comparing these actions with the *Mandavia* situation, Ms. Mullins said:

I knew Dale Kavanagh had been involved only through the administration. I was never privy to the details. I was told at the time that there was no finding in Dale's case of bad faith and deliberate harm to the client.

Asked whether she would agree that Mr. Woolfrey has been affected by this matter, and has lost job opportunities, Ms. Mullins answered, Absolutely. Yes. She confirmed that Mr. Woolfrey is listed as a Commission employee:

Certainly up until the time I left the Commission in the Spring he was on the employee list and is eligible for all the pay and benefits on the seniority list and any other list so far as pertaining to staff to the best of my knowledge.

ON CROSS EXAMINATION Ms. Mullins said that there had been no grievance filed when the Grievor was removed from client contact in 2002.

Asked whether the Commission had sought legal advice concerning the reference to the Supreme Court, Ms. Mullins said:

The Commission did seek legal advice, and we did get Ms. Strong's advice. After I went back to the Commission after sick leave, I had a discussion about why the Supreme Court decision was made, and she told me.

Ms Mullins said that there was no guarantee that Mr. Woolfrey would have been successful in the (KM #2) job application or any other competition,

She also confirmed that there had been no finding of bad faith in the case in which Dale Kavanagh had been involved.

ON REDIRECT EXAMINATION Ms. Mullins was asked whether Mr. Woolfrey's removal from client contact in 2002 had been on a temporary basis. She said:

I can't comment on that. We all thought that we would win on appeal. I can't recall if we said it or not. But now in 2004 the court case was in and it was confirmed. The confirmation of the 2002 case, I can't speak to that.... in terms of the job competition there simply was no opportunity for him to compete since he had been screened out. I was not going to go through the charade. There was no chance. None.

THE SEVENTH UNION WITNESS was the Grievor, Mr. Brian Woolfrey who has worked with the Commission's office in Corner Brook for fifteen years, starting as a Rehabilitation Counsellor and then as a Case Manager until 2002.

In April 2002, I was removed from the Case Manager duties. I have had no real job title since that time, in particular, since the appeal of the 2002 court case was finished in March 2004.

Mr. Woolfrey confirmed that he had a meeting with the Employer in 2004 about the Court of Appeal decision and as a follow up to the meeting that had occurred in March 2002.

Those involved in the 2002 meeting were:

Myself, Charlie Young, Kay Mullins, Val Royle; with Ms. Mullins and Ms. Royle on teleconference. Ms. Royle was the Executive Director of Workers Services at the time.... It was after the court decision and the Commission had it. I was aware of the finding at that time. Charlie Young came and got me in the back room. There was a meeting on the phone. 'Kay and Val wanted to talk' to me; 'nothing serious.'

Mr. Young had not advised him he needed a Shop Steward.

I went back to his office at the other end of the building. Val and Kay took over at that stage. They told me that they had got the Court Decision and, as a result, they were going to remove me from the job as Case Manager. I objected to that, and they indicated they had had a meeting, and the decision was to take me out. I saw no reason. I had been the leading Case Manager all through up to that point. Kay said, 'The point is it is not a choice. You're coming out of it.' I was concerned. She said, 'We are doing this to protect you. It's only a short time.' ... We talked about an appeal.... We were talking about appeal and I made it clear I wanted to appeal... They wanted me out (of the Case Manager position), so I would not be a sitting duck.

Mr. Woolfrey said there was no definition of what his job duties would be at that point, Just that they would assign work that would come up.

Asked whether he had requested a lawyer for himself, Mr. Woolfrey said:

I requested a lawyer of my own a long time ago, and this time I had concern over what was happening going forward. And they said I could have a lawyer to review the Court Decision, but not to conduct the appeal... I was to stay with the Commission's lawyer. Yes, Glen Roebottom.

Asked to describe the background events, Mr. Woolfrey said:

In 1997 or 1998 an overpayment of a client's claim in respect of an extended earnings loss was discovered by someone else. Another officer had picked up an

over-payment that had not been recovered. These reviews were backed up and the client was sure that the matter was not correct. The Commission's officer was in contact with the client... There were ongoing contacts between the Commission and the client concerning recovery of the overpayment... The client filed a complaint to management, and there was an investigation approved by Charlie Young, the Manager, and Mr. Eric Bartlett did an investigation... I was cleared of the complaint, and there was no issue of what I had done. Business was as normal. Between 1998 and 2002 there was no problem. I continued as Case Manager until after the court case had occurred. After the court case the client took action against the Commission and myself... In March 2004 ... The appeal decision was a long time coming down, and it resulted in me being assigned piece meal work: a number of different projects and then assisting new staff who were basically replacing me.

There was not much work assigned to him during the subsequent year, and he had been assigned no client-related case load at all:

That was personally extremely trying for me. I'd gone from a full case load every day into a demoralized state. There was simply no purpose. I was backed into the corner waiting for the Employer to find work for me to do. It was stressful to go to work. The work site was a bit of a no man's land. I am the senior Case Manager there....

Asked whether there was anything for him to do Mr. Woolfrey said

I was on the complex claims committee dealing with difficult claims. I'd review them and give the Case Managers direction which they followed.

Asked whether he was respected by the case workers and the Employer in the work site, Mr. Woolfrey answered: I think so. Very much so. Yes.

Asked to describe what had happened once the Court of Appeal Decision came down in March 2004, and what had happened during the March 18th meeting, Mr. Woolfrey said:

Again, I was in the lunch room, and Charlie came and got me. The decision of the Court of Appeal had come down. I knew that. Glen Roebottom had called me from the court house... Glenda Peet and Val Royle were on the phone. Glenda Peet was Acting Human Resources Director at the time. I went back to the office with Charlie. Glenda and Val were on the phone and me and Charlie.

He had not been asked to bring a Shop Steward, and none had been offered.

I sat down, and she said: 'We've got the decision from the Court of Appeal, and' ... As a result I was going to be removed. I was told I was going to a Business Analyst position in St. John's. Val said, 'We're not going to appeal. We've spent enough money, and we are not going any further.' I said, I expected them to; and

they said if I wanted to appeal I had to do it on my own. 'The good news,' Val said, 'is, we're not going to fire you.' Now at that stage... At that point I stopped the meeting ... About the Business Analyst position I said: "Stop. I need someone with me. This started out as a talk, and now it's your 'not going to fire' me." I stopped the meeting and said I wanted someone with me. I went and tried to find someone with the Union or the executive. There was no Shop Steward, no one from the executive. I went and Derek Murphy was in the kitchen. I said, 'This is very serious. I think that my job is in jeopardy. Would you come in with me?' He said, 'No problem,' and he got some paper and pen and went to the meeting with me... While Glenda was talking this Business Analyst position in St. John's I said, 'You know I am only just moved to Corner Brook.' I made it quite clear I expected to go back into case management. I made that quite clear. I objected vehemently to sending me to St. John's to a Business Analyst for which I had no training. I am a Rehabilitation Social Worker, trained and experienced..

Asked how he felt about the way the meeting was going, Mr. Woolfrey said:

From the perspective of "the good news" I felt threatened by it. They were coming after me now. You can imagine how stressful it had been. Originally they wanted a decision made at the meeting. Then it got to be 24 hours. Derek was there... So many things you could not say... to do. They were saying 'Go, or else come up with an option.' I could not think of an option. The job classification was in Corner Brook. I asked for the time, and they said, 'OK, over the next few days.'

Asked whether this is what he had expected from the meeting, Mr. Woolfrey said:

I expected just to talk about the court case... Then I was given a few more days and, as you can imagine, I was pretty upset... All you're trained for, a lot to take in. I had to talk to the Union. I did not know my rights... I went home and talked it over and got no sleep for 24 hours. Then I went off on sick leave. I had to see the doctor. I am diabetic. Stressful, my sugars went through the roof because I wasn't eating. The doctor said to take some time and he gave me some time off..

Asked whether he had any contact with the Commission from that point on while he was on sick leave, Mr. Woolfrey said:

The thing was I had to have an answer by Monday, and so I was looking for the Union person to talk to. Glenda called for my decision or an answer at my home. I told her on Tuesday AM: 'Look I am in no position to make this decision. I'm stressed out.' She said they needed the decision. She was talking about five days, and needed to get the decision out. I asked her to wait and said I was not going to make the decision about the Business Analyst position in St. John's, and I didn't have any option at that stage.

Asked what he thought about of the call from Glenda Peet at his home, he said:

I felt threatened about the job. She is calling my home about needing to have an

answer and only putting more pressure on. I did not need that deadline.

Asked what the next contact with the Commission was after that call from Glenda Peet, Mr. Woolfrey answered:

The next was registered mail, a letter from Glenda concerning my case management position. I had tried to stop that letter (WW #1 dated March 23rd). I called Wade, the Shop Steward, and told him they wanted me to make a decision and they're sending me out the letter, and can you do something to help me. Wade sent the e-mail (WW #2) right away and asked, What's the rush here? I needed time ... to get her to put the brakes on; but she sent the letter anyway... I never received the letter until a couple of days later, and then I contacted the Shop Steward and filed the grievance...

The next contact with the Commission was the letter Glenda sent to my doctor (GP #2, dated April 29, 2004). When I read the letter I felt very threatened. ... It only created more stress. I was not doing the best anyway, and now there was more stress than before. I felt that I had no security any more. It was disappearing before my eyes... I had a wife and two children, and they don't know from one moment to the next what's happening at home. I can only apologize to them.

I was off until September 2004, and I returned then. I was off from March 'til September, when I reported to Charlie in the office...

Asked what Mr. Young had told him at that point, and what his work pattern was, Mr.

Woolfrey answered:

That Kay Mullins would be in touch, and that HR would give me assignments from St. John's... It was very insecure. In going back. I'm feeling better. But it's still demoralizing... There was a call to go to St. John's to talk about finance. I am President of the Local and Shop Steward, and she said to come in in early October to talk about all the grievances and HR assignments.

I met with Kay up in her office. We discussed a couple of grievances with no solution, and then Kay started to address my grievance... No, there was not (a Shop Steward present). She said, 'It's time to let it go.' I said, 'I'm not letting it go. I am more determined. I'm not willing to let the arbitration go at all.' I indicated that I felt threatened by what had occurred. I felt that I would win the arbitration and went into some detail about what I felt personally.

Asked what Ms. Mullins had said to his concerns over his career and related issues Mr.

Woolfrey said:

Kay's response was that my career 'had gone as far as it was to go. If Charlie's job opens up tomorrow you are not going to get a look at it.'

Asked whether work assignments had been discussed, Mr. Woolfrey said:

We concentrated more on the arbitration, but later I did talk with Glenda Peet.

She wanted me to hold the arbitration. We did talk about some HR projects involving job evaluation. She asked me about holding the arbitration and she'd give me some good projects. The offer sounded good in that I would discuss it with you (Mr. Oates) in anticipation that it would occur... She said, if I'm 'good over the next couple of years' I might find the employer services operation... I did not think I was bad.

Asked for his view of these comments, Mr. Woolfrey said:

If she says your career is over... I'd come for a career in the organization. I'd expect it to go up. I felt very threatened and demoralized.

Asked what work assignments had developed after these meetings, Mr. Woolfrey said:

In mid to late summer I started on a HR project and completed that in December, and submitted my report early in January. After December 2004 there was no work assignment.. After I had submitted that report, I'm doing piece meal work. That's one thing. But I have been doing it since 2002. It's depressing. I felt depressed and demoralized. I'm a Senior Case Manager with a wealth of experience on all aspects of the Worker's Compensation, and I'm sitting in a corner of no use to anyone. There is no resolution or solution. It is frustrating to deal with the Employer. There is no end to it, and since I was out in Corner Brook I believe it was 'Out of sight; out of mind.'

In April 2005 Janet Butler was tasked with a project. Kay Mullins called me in concerning some minutes of a meeting for me to do. I never got to it. The work never materialized. Janet Butler gave me a little bit here and there. There was an April conversation with Kay... Yes, I'd expected more. I reflected on our October meeting and the undertakings made concerning projects.

Asked whether there was any discussion about his leaving the organization, he answered:

I said to Kay concerning the October meeting: 'Here is your HR Director saying that you are finished in the organization!' She said that she did not realize I'd been threatened by it that way. Yes, there were good aspects to the conversation; but they did not develop. There were black days, and it could not continue like this. She was somewhat consoling, asking if there is any way out, even out of the organization. She said there were no 'packages', and that they were limited by Treasury Board. I said, 'Put something in front of me, and I'll consider it.' That was in April/May of 2005.

The Shop Steward and I met with her concerning some ongoing grievances and also my grievance. Wade was with me this time. Wade said there had to be some sort of solution. There was an Occupation Health and Safety Advisor job in the office. It was just... That job did not materialize.

Asked whether, up until May 2005, he had any conversation with Joe O'Neill, then the new Chief Executive Officer of the Commission, he said:

I talked to Kay when the new CEO was in place, Joe O'Neill. Kay said she would make it happen. I met with him in August, and he said he'd have it worked out by Labour Day 2005.

During the period from 2002 to 2005 Mr. Woolfrey had applied for various posts within the organization.

Yes, I expressed interest in internal review of overtime and also in a team lead post, and the Regional Director's position when Charlie Young left. KM #2 effectively screened me out of all such considerations because there was no good to even look at positions that had any client contact involvement... The whole Corporate Services side was client related. I gave up. Peggy Baird said, You're screened out. I started to look at the Occupation Health and Safety Advisor job, but I was not qualified, and I was screened out of that as well by the Court of Appeal decision. That cuts me off internally. I requested the letter (BW #1) to confirm the fact. It's dated September 15th but it was for a much earlier time. She had no problem confirming it... I felt my career is over at that point. I am fully qualified and I am going nowhere. I apply for jobs to make more money, to better myself and my family, and I am rejected everywhere I turn.

Asked whether, in his view, this is a form of discipline, Mr. Woolfrey answered:

Without a doubt. From day one I considered this a discipline.

Mr. Woolfrey said that he got overtime from 2004 onward ...

Only for a much earlier time. All other Case Managers get overtime if they want it... Yes it is (a loss) every time, every year. I was sitting there, eligible, and I applied for the team lead and for the Regional Director jobs, but was screened out. I basically gave up applying.

Mr. Woolfrey confirmed that the decision from the 2002 case had been sent to him but that he had not received a copy of the March 2004 Court of Appeal decision until May.

That court decision? No. Glen Roebottom called me from the Court House steps. I requested my own lawyer from day one, but never had one.

Asked whether there was any talk of further appeal when the lawyer called, Mr. Woolfrey said:

No. He just called with the news.... They said they were not going to appeal the decision. The impact was devastating. They said if I wanted to appeal I could do it on my own... I got (a copy of the appeal award) in May or June. It was after a committee meeting with you (Mr. Oates) and me, and we told them that they never sent out. Glenda Peet sent it out... in June it was too late. My rights were gone. I only had sixty days to appeal. There was a time limit. It was passed by the time we had the committee meeting. The opportunity to clear my name was gone.

Mr. Woolfrey felt that the Commission should have taken the matter to further appeal.

Asked whether he felt that the Commission had defended him throughout this matter, he said:

No. They had the opportunity to defend me. They knew the law, and they knew by April that Section 14 (BW #2) protection was not taken into account by the judge. The Commission knew pre-trial that we were in trouble with the immunity argument for the Employer. The legislation was in place, but it did not apply to employees; only to the directors. So once they knew that, they knew the immunity was not protecting us. There was a Collective Agreement obligation to protect me. You put someone in court, and I got a finding that is shocking by the gravity of the finding, but they never moved a finger to settle with the client... The new Collective Agreement is affected by my case... I think very much influenced by it.

Mr. Woolfrey said that, in his view, the Employer has done no assessment of the harassments he has faced as required under Article 53. There has been no investigation by the Employer of this matter, to Mr. Woolfrey's knowledge. Nor, to his knowledge has the Employer made any effort to settle with the client. Mr. Woolfrey knows of no way WW #1 can be removed from his file.

ON CROSS EXAMINATION was asked to explain how the Employer's decision not to assign him to case duties violates Article 51, and whether, in his view, Article 51 requires the Employer to exhaust all avenues. He responded:

As a result of the court case their failure to defend me or to settle with the client. has left me undefended. The Employer did not defend me. It does not limit the range of defence. That is my reading.

Asked how the Employer's decision violates Article 52 prohibiting discrimination, and which of the grounds prohibited by that article apply to him, Mr. Woolfrey said:

I do not know anyone who has been treated as I have been treated in being removed from my duties and in being removed from my job. In any of my history I don't know of any example... All these articles in the grievance are pertinent to my being disciplined. I don't know why I have been singled out for discrimination ... The only suggestion I can give is that no one is treated this way. Is it because I am President of the Union? I want to know why this has occurred.

Asked how the Harassment provision (Article 53) has been violated, on the grounds prohibited, by the decision not to assign him case work, Mr. Woolfrey answered:

It's clear to me as I read that article that all of the Employer's acts constitute a danger to my job and to my economic livelihood. I've made it clear who threatened me and all of their daily harassment of me... I am the "or" (in clause 53.01(b)(I)). Many of the things in article relate to them not defending it.

Mr. Woolfrey confirmed that GP #3 and GP#4 were the records of the court proceedings and that Mr. Roebottom represented both himself and the Commission. Asked how it can be said, therefore, that the Employer had failed to defend him, Mr. Woolfrey answered:

I had an investigation done by the Employer. Nothing was changed in the court evidence. Everyone was shocked. All were shocked. When the Commission did not settle with the client prior to the hearing, they set out at court to defend me. I had asked for a lawyer to be assigned to me. This defence stopped at the Court of Appeal in Newfoundland.

Mr. Woolfrey acknowledged he had not filed a grievance in 2002 when he learned he was being removed from Case Manager duties.

No, I objected to what was happening, but the Employer said that it was a temporary solution and I had no representative with me. They said they were reassigning me for a temporary basis and I assumed that it would be temporary.

Mr. Woolfrey also acknowledged that the Employer had not told him he would return to case management duties regardless of the outcome of the Court of Appeal decision. Asked whether he had requested his own lawyer, Mr. Woolfrey said:

I told Charlie I had to get my own lawyer. I said, 'Charlie, I've got a Collective Agreement.' He went away and said that he had spoken to the Director and now they were going to get me to share the one representing the Commission.

Mr. Woolfrey acknowledged that the specific language of the Collective Agreement does not require the Commission give him a lawyer,.

Mr. Woolfrey also acknowledged he had not requested that Mr. Roebottom supply him a copy of the Court of Appeal Decision.

I don't know if he had a copy at that stage... I would just expect that it would come as it did in the first time. I was on sick leave. I am being put out of a job. I am assuming they will send it, but the only thing now is "Woolfrey, you are on your own." I am wondering if I am going to have a job tomorrow.

Asked whether he had not been offered a Shop Steward at the March 18th 2004 meeting , Mr. Woolfrey said:

Yes... one in St. John's: not one from Local 1810 ... not my Shop Steward. How do I know who is coming? They never said, 'Brian you're going to need a Shop Steward in here.'

Mr. Woolfrey acknowledged that, with reference to GP #2, the Employer has an obligation to accommodate expenses for medical reasons. Now they have. Yes.

Mr. Woolfrey testified that he had never been offered the Occupation Health and Safety Advisor position. Asked whether he is sure about that Mr. Woolfrey answered:

Positive. I am not qualified for the Occupation Health and Safety position. The matter came up as an option and Kay said that she would consider it but nothing ever materialized from it, not outside the context of any settlement.

[Mr. Oates intervened to note that there are privileged matters not before the Board on this.]

Asked how Section 14 of the *Act* as it currently reads might have changes his situation, Mr. Woolfrey answered:

I would have had the protection before I got to court. I was found by the Commission to have acted in good faith. There was no evidence at the trial that changed their view of my work. If there was, they would have fired me. That protection was not there. It was not protecting me.

Mr. Woolfrey's attention was directed to Court's finding on the issue of bad faith. He responded that, in his view, the matter would not have got to court under the changed *Act*.

Mr. Woolfrey confirmed his salary has not been reduced. Asked if he had ever been told that this was a matter of discipline, Mr. Woolfrey said: All I have is their actions.

ON REDIRECT EXAMINATION Mr. Woolfrey confirmed he had expected the Employer to continue defending him under Article 51.

Mr. Woolfrey's attention was directed to the Trial Judge's reference to the fact that he is "satisfied on the balance of probability", and his acknowledgement that the matter came down to a contest of credibility between himself and the client. Ms. Woolfrey confirmed that he had not received any benefit from this decision of the court.

Asked whether he felt that there was a conflict being defended by Mr. Roebathan, he answered:

I asked for my own lawyer from the beginning to protect my interests, but it did not happen.

Asked whether he had refused any work assigned, Mr. Woolfrey said:

I always did everything they asked. I thought that if I ever did anything I was going to be out the door.

Asked why he had not, himself, requested a copy of the appeal decision, Mr. Woolfrey said:

I anticipated it was coming. It came before and I just expected it would be sent to me.

Asked whether he had applied for the Occupational Health and Safety Advisor position, he said:

Yes. But I was screened out. Asked whether there were client services involved, Mr. Woolfrey answered, no.

Asked whether he feels that he has been disciplined, Mr. Woolfrey answered:

I am one hundred percent positive what happened is discipline.

Responding to questions from Mr. Mahoney for the Board, Mr. Woolfrey confirmed that he had become President of the Local Union: Five years ago, in 2001.

He also confirmed when he had applied for the position of Occupational Health and Safety advisor, "I was not qualified."

Responding to questions from Mr. Oates, for the Union, arising from Mr. Mahoney's question, Mr. Woolfrey said that his recollection of the March 18th meeting was that he had stopped the meeting, and then they offered him a Shop Steward, and at which point he insisted on finding someone of his own choice.

THE FIRST EMPLOYER WITNESS was Ms. Val Royle currently President and Chief Executive Officer of the Yukon Worker Compensation Health and Safety Board. Ms. Royle described her career from 1993 to 2005 with the Newfoundland Workers Compensation Board where, from 2001 to 2005, she was Executive Director of Workers Services Compensation and Health Care.

Ms. Royle explained the role and the services provided and also described the role of Case Managers who are assigned a case when a worker who has lost time from work and wages needs assistance under the rules of the Workplace Health, Safety and Compensation Commission.

The Case Manager is the key contact for workers in the system, providing the worker information and helping in the return to work process, and deciding on entitlements.

Ms. Royle described the relationship of trust between Case Manager and injured worker as ...

huge... The legislation says, and our procedures and forms all make it clear. A lot of the work is done in helping the worker through the system. There is a huge responsibility shouldered by the Case Manager. Case Managers are also dealing with workers at vulnerable times in their lives, when they are off work and their return to work is uncertain. Unless the Commission provides accurate information and the worker relies on the Case Manager to get the information, certainly the

worker is in a vulnerable position.

Ms. Royle confirmed she is familiar with Mr. Woolfrey's situation in respect of the court decision and related circumstances. She recalls a meeting with Mr. Woolfrey immediately after the first court decision.

That was the 2002 meeting. We had got the decision and we were all very surprised. I had met with Kay Mullins, Derek Bartlett, and Donna Strong to discuss the outcome of the case. We'd asked Mr. Bartlett – this was a private meeting of managers – as he had investigated the matter internally and he said there was nothing that was not known already. There was nothing new or surprising ... except the judge's ruling. Our legal advice was to appeal. Everybody was surprised at how far the judge's decision and finding went. So we knew we were going to appeal right away because both the Commission and Brian were named. So we knew right away... We tried to see what to do and called a teleconference with Charlie and Wade and Brian. Charlie said nothing... We have the decision. What do we do? All agreed that Brian could not do case management until the appeal was finalized. Other case work he could do; and the concern was that if a case came up with an injured worker during appeal it could hurt the appeal process. If another worker raised an appeal it could hurt directly both the Commission and Brian.

Asked whether Brian had protested this decision, Ms. Royle said:

Not at the time. The way it was, we were all in St. John's so I can't say. But Brian was assigned to help with another Case Manager who was struggling, and a committee of complex claims where claims were stalled with the Regional Director to advise on complex cases to move them along.

Ms. Royle said Charlie Young, the Regional Director, was assigning Mr. Woolfrey his duties in 2002. Mr. Woolfrey had never been told he would return to case management duties regardless of the Court of Appeal decision. Asked why, from the Commission's prospective, Mr. Woolfrey had not been returned to case management duties, Ms. Royle said:

Well, there were other things that transpired between the original Court ruling and the Court of Appeal that affected our decision after the Court of Appeal came down. Brian continued to be assigned to indirect case management duties, but three months into the process the plaintive in the case wrote to the Commission and asked what Brian was doing day-to-day. She went the political route and was vehement that he was not to have anything to do with injured workers at all. In her view, the court finding being under appeal was not an issue for her. We were concerned about the whole appeal process and what could happen prior to the appeal being heard. So Brian was assigned work in medical aid redesign project.

There is a tremendous threat where outside injured workers are concerned.

So in the eyes of those outside people who only knew the media ... from their view, Brian and the Commission had deliberately tried to disadvantage the injured worker. So we knew that it would be an issue for anyone who was his assignee.

And secondly we knew that the plaintive was extremely active and vigilant; and for the Corner Brook area we knew any injured worker who was assigned, she would contact them and inform them of the court ruling. It would create an impossible situation.

Asked whether she recalls the meeting in March 2004 which involved herself and Ms. Glenda Peet in a teleconference with Brian and Derek Murphy, Ms. Royle said:

I can't recall why, but Wade was not there. We'd offered a representative from St. John's, but he did not want anyone from St. John's. So we started the teleconference by reassuring Brian that his job was safe. He wasn't going to be fired or anything like that. And Brian became very upset as to why I would say that. That we couldn't fire him. Yes, very upset. But he just heard of the outcome the day before, and it's not surprising. I responded – because I felt upset too – that we could fire him, but we weren't going to. But that for reasons, primarily because he was in a position of trust and for the credibility of the organization that he could not do case management work.

At that point we offered him the position of Business Analyst. With his skills and ability Brian would be qualified and able to do that. However, our thinking on it was that it would be in St. John's. Brian became very upset again, and said he wanted to go back to case management. It was his career and what he loved to do. He did not want to move to St. John's. His family was established in Corner Brook. We ended that by saying what other posts he would propose. Case management, or anything that involved injured workers or decision making, was not an option. That's when that call ended. He did not want the Business Analyst job. I felt, and still do, that he has all the skills to do it; but he did not get into it, he was so upset. Case management was his chosen career and what he wanted.

Asked whether she had informed Mr. Woolfrey that he had to go to the Business Analyst position, Ms. Royle answered, No.

Asked whether the decision not to return Mr. Woolfrey to the case management position was disciplinary in nature, Ms. Royle answered, No.

Asked whether the decision was intended to be punitive, Ms. Royle answered:

No. We were trying to accommodate the position that the Commission and Brian found ourselves in. On the one hand we had a court decision, upheld at appeal, saying that Brian had fraudulently misrepresented, and that was on the public record. On the other hand, a good employee. We had already done an investigation after the complaint, and we were trying to find a way to keep him whole in the face of these findings in the courts.

Asked what the implications were for Mr. Woolfrey if he were to be returned to case management, Ms. Royle answered:

Credibility with injured workers would be tremendously damaged, and the effect on the credibility of other Case Managers. Whether you agree with it or not, the court finding was that Brian and the Commission were found guilty of fraudulent misrepresentation to the injured worker. The nature of that advice goes to the very core of the case management job which is to provide information to workers.

After the Court of Appeal decision Brian was working on claims management, and he got some work from HR.

Asked whether she was aware of opportunities that he was denied, Ms. Royle said:

Yes, we were all trying to find an accommodation. Kay and I had talked about an Occupational Health and Safety Advisor position. I was not involved in the decision with Brian on that. I was consulted to see if that would be a good position. Kay asked me if it might be a good fit, and I thought it could be. Other Case Managers had transitioned to that job...

From my personal prospective I think we tried to accommodate as much as we could. Personally, when we got the first court decision, Brian was so upset and he had called my office. I was not in and my secretary called and said that Brian was asking for me. So I called him back from the Director's office. He was reading the transcript. So we spent time with him on what he'd read, and the more upset and upsetting it was.

Then on June 2, 2002, there was an Evening Telegram piece – an article, first page – about the court decision. And it was detailed with quotes from the decision. I was having a dinner party, and I got the paper, and I could not believe it. So I called Charlie at home, and called Brian at home to let him know about the article before it hit the papers in Corner Brook. Because up until then it was quiet. So I spent an hour and a half with him on the phone, and left my guests to themselves, and read the entire article to him. We talked about it, so he wasn't blind sided. These are just examples of... attempts to empathise with his position.

The court decision was totally unexpected and we tried to make sure, during the appeal, that nothing would add to the situation. It was unique. I'd never dealt with something like this before. The Commission provided legal counsel, and meaningful work within his skills and ability, so we had a lot of scope and we expected to win the appeal.

So we were not thinking of a position. We gave Brian time at training sessions in November 2002. He had a chance to talk with other Case Managers on the importance of documentation, and Brian let us use his example with other staff to try and prevent this happening to other people.

Asked whether Brian was discriminated against or harassed in any way, she answered,

No.

Asked whether she had ever told him that his job was in danger, Ms. Royle said: No. In fact, the exact opposite.

Ms. Royle confirmed that:

The Telegram piece was the big media article. There were others. The reporter had the court decision and was really painting a dark picture.

Asked what impact this had on the Commission, Ms. Royle said:

In this province, the Commission is a favourite target for the media. Credibility is key. A Case Manager position is particularly key in dealing with an injured worker. The media did no favours in how they presented that. It was a favourite topic with the injured workers association... even though I would never discuss it with them. But it came up at every meeting... The injured workers association is a group of fourteen vocal registered members. We have tried to work with them, not always successfully. The plaintive was a member. She referred to herself as 'Head of the organization in Corner Brook', although I never saw that as a constitutional position.

Asked what the implications might be for an injured worker who found him or herself working with a Case Manager found guilty, Ms. Royle answered:

If I were an injured worker I would not want that person as my worker. They have to trust. With that finding hanging out there, it is untenable. They would ask for a substitute. I do not know what we would say to an injured worker if that were the reason given. I think any decision a case worker made would be challenged, and each decision would be appealed.

Asked whether the Commission had been prepared to support Brian in an alternate career path, Ms. Royle said:

Yes. We were willing to work out other options. Brian has tremendous skills, and at that time the organization was growing and changing so there were opportunities.

Asked whether there were opportunities not involving direct client contact, Ms. Royle said:

Yes. The Business Analyst position. And we discussed the Health and Safety Advisor. If you look around, there were other positions in assessment, in dealing with employers, lots of opportunities... Based on my own discussion from the day after the decision in 2004, Brian felt wronged by the court and by the employer, and wanted to be a Case Manager, and wanted to be in the original position. That was his focus in that meeting.

ON CROSS EXAMINATION Ms. Royle testified that her first two positions were bargaining unit positions and she had risen through the ranks with the Commission in Newfoundland. She had not been involved in all decisions relating to Mr. Woolfrey . She was not involved, but had been informed of the decision not to appeal the matter further to the Supreme Court. She had not been involved with the grievance or with any discussions involved after that.

I was Director of HR until 2001; so I was not Director of HR when these decisions came down... I was not involved in HR, but I was his supervisor and was posted on all the information. I attended the meetings as Executive Director of Worker Services. Yes, that was my job to do that.

She confirmed that the CEO had been aware of what she was doing. Ms. Ann Marie Hann was CEO in both 2002 and 2004. She was advised of the 2002 meeting, but was not involved.

We were confident of the appeal. In 2004 it was also my responsibility and she left it to me. The management team, as a group, did discuss both 2002 and 2004 decisions. As a group it was decided... I got their opinion and we looked at all the issues.

Asked whether termination had been discussed, Ms. Royle said: In 2004 yes, in 2002 no.

Asked about the private meeting she had with Ms. Mullins, Mr. Bartlett, and Ms. Strong as legal counsel, when Mr. Bartlett had said the Court had revealed no new evidence, she said:

Yes, Mr. Bartlett told us that. He had done the investigation and there was nothing wrong in his opinion.

Asked whether, in her view, the 2002 meeting had been disciplinary, especially in view of the fact that Mr. Wade White was present, Ms. Royle answered

To my recollection it was not disciplinary. It was a teleconference so I can't say that I saw him there... We knew that Brian and Charlie were there. It was not a big meeting and it was not disciplinary.

Asked whether she recalls the meeting being suspended since Mr. White was not there, Ms. Royle considered for a moment and then said: No. It is still my recollection.

Ms Royle was asked whether her recollection is that all had agreed there would be no client contact, or whether she would be surprised to hear Mr. Woolfrey had testified that he had objected to that decision. Ms. Royle said:

At the end I recall that we all agreed. I remember commenting to Kay Mullins the decision by Brian is there. Yes, we all agreed.

Ms. Royle confirmed that the decision to remove him from case management was a

temporary decision until the appeal was over. Asked who had made the assignments of work to Mr. Woolfrey from that point forward, Ms. Royle answered:

Charlie Young. I was consulted, and I knew that there were case management duties assigned.

Asked whether Brian was upset during that meeting, Ms. Royle answered:

Yes, he sounded upset... I did not say that Brian did not object to his removal from case management duties. What I said was that at the end of the meeting we agreed. He was upset: completely surprised by the decision. We did not remove him from all his case management duties. He was used on indirect case management duties.

Asked whether the Commission was concerned about Brian, himself, Ms. Royle answered, Yes.

Asked whether the Commission offered him support, EAP, counselling, she answered:

I don't remember in that meeting. No we didn't. At the end of the meeting we were all in agreement. [Mr. Oates asked that the record note this point remains in dispute.] He was told that this was temporary, yes. We thought that we would win the appeal. After the case in 2002 the client was on the political route.

Asked whether it is normal for the Commission to remove a worker in such circumstances, Ms. Royle answered that This was the first time in my experience. She confirmed, however, that the Commission gets complaints. Asked whether she had made Brian aware of this client's complaints, Ms. Royle answered:

That was after that meeting. The removal was based solely on the court decision. Subsequent to that we had complaints, and we removed him from helping with other case management duties, after the complaints. There were a lot of cases. The medical aid design project... I made that decision to assign and take him out of it in late 2003. That project was winding down. Then we had the claims management system. We budgeted him full time and assigned him to that until the appeal is heard". The Commission had a number of options. We could settle or we could go to court.

Asked why the Commission had not settled, Ms. Royle answered:

I was not involved at the time, and after the decision we were confident of our appeal.

Asked whether she had been advised that there was no immunity under the *Act*, Ms. Royle answered, no.

Asked whether she is familiar with the Collective Agreement, Ms. Royle said, I was.

Asked what her interpretation is of the reference to defend or settle in Article 51, and whether

she could have decided to settle after the Court's decision in 2002, Ms. Royle answered:

I don't know. At the time I left the new CEO was doing it with legal counsel and to the client.

Asked whether she believes the Commission defended Mr. Woolfrey by not settling, Ms. Royle answered, Yes. Reminded of her testimony on direct examination that the client was vigilant in her contact with other injured workers and this was one of the reasons for removing him from case management duties, Ms. Royle responded:

Yes. But that was a couple of months after the 2002 meeting... Brian and I had a discussion and ... felt that she would sit outside the door of the building and ask ...

Asked whether Brian had been offered a Shop Steward at the 2002 meeting, Ms. Royle answered: I don't know. I'd say No, not disciplinary, but I think Wade White was there.

Asked why she continues to regard the 2002 meeting as having not been disciplinary even though the Grievor had been removed from his duties, Ms. Royle answered: Because we all agreed...to my knowledge.

Asked who was present at the start of the teleconference meeting with Brian in 2004, Ms. Royle answered:

Myself and Glenda Peet in the office here and Brian, I think Derek Murphy. I don't remember if Charlie was there or not. That's my recollection.

Asked whether she had offered a Shop Steward, Ms. Royle said

Glenda Peet was told to offer a Shop Steward, so I assume she did it.

When it was pointed out that two others had testified that no Shop Steward was offered, she said:

The first thing we wanted to do was reassure him that he was not to be fired, so we felt that it was important to have a Shop Steward there because the words were going to be used. I directed the Acting Director to offer a shop steward. I don't know if she did when she called to set it up.

Ms. Royle was reminded that she said, in her direct testimony, that she had offered a Shop Steward from St. John's. Ms. Royle said:

I didn't. If she offered a Shop Steward at the time she set it up... I directed it to be done before the meeting, yes. I did say that we offered a Shop Steward from St. John's at the meeting.

Asked why she would offer a Steward from St. John's when Corner Brook is the Local, Ms. Royle said there were none available in Corner Brook. Asked how she knew this, she said:

I'm not sure if it was at the beginning of the meeting and Brian...

Asked whether the meeting was stopped at any time and whether when she had said that he was "not going to be fired, but.." the meeting was stopped, and whether she could recall how Mr. Derek Murphy got to the meeting, Ms. Royle said:

I could not swear...No I can't. I thought he was there from the beginning. Glenda could be better informed. She kept notes. I was chairing the meeting, and Glenda was taking notes.

Asked what she meant by saying, that he was "not going to be fired, but", and what she intended to follow the "but", Ms. Royle answered:

He needed to assigned outside injured worker duties. That was the point at which the Business Analyst position had been offered to him, in St. John's.

Asked how she proposed to do that without a posting and without Union involvement, she said:

We were trying to find an accommodation.... If Brian were interested we would have pursued the matter... I remember talking about the Business Analyst position. I don't remember talking about other positions. I think he was very surprised by the turn of events in the meeting. We invited him to think of other options. He was upset and focussed on his case management duties.

Asked how long he was given to make his decision, and when she had received it, she said:

I can't tell you. I don't remember... It would have gone to Glenda. After that meeting it moved to grievance. At the meeting it was crystal clear that he did not want to move. He had a family... all good reasons. St. John's was the first opening that we talked about, the Business Analyst.

Asked whether they had offered any other options at that time, Ms. Royle said:

Me personally, no. I was asked about the HS advisor. We felt that it was a fit.

Asked whether this was at the same time as the Commission was making approximately seventy posts redundant, Ms. Royle answered:

Yes we were. We were changing how we were doing business. Some areas were expanding. HS were never reduced.... Given his skills and ability and security there were lots of opportunities.

Mr. Woolfrey had never given his decision concerning the Business Analyst position to Ms. Royle personally. Asked whether there had been any behind-the-scenes management position on what might happen if Brian did not move to St. John's, Ms. Royle answered:

We did not have any big meeting. Glenda Peet and I spoke. The Business Analyst was a good option, but not a good one for Brian in St. John's. There was

no backroom management discussion concerning what Brian should do if he didn't move to St. John's.

Asked whether she was aware that Mr. Woolfrey had applied for the HS Advisor position and was screened out, Ms. Royle answered:

Yes I was aware. We'd have to go and give him training, but HR was dealing with this by this time. I was consulted but the grievance was up and running by then.

Asked whether she did not consider the removal of his case management duties and being screened out of other positions as penalizing him, Ms. Royle answered:

No I didn't believe he could do the job... I did know (he was and being screened out), yes... The Employer had a court decision, and had to work with that fact.

Asked whether she was aware of WW #1 and whether Mr. Woolfrey might view that letter as a penalty, Ms. Royle said: I believe it's an accommodation of the situation. Asked whether she would agree that Mr. Woolfrey is restricted as a result of WW #1, she said:

Yes. Approximately 50% of the other 320 employees of the Commission have client contact of whom 42 are Case Managers. But it's not a discipline or a penalty. It's an accommodation.

Asked whether there had been any problems with Mr. Woolfrey and whether Mr. Woolfrey is a good employee, Ms. Royle said:

No problems. There were some issues with previous project assessments, but that was not clearly set out to him.... Yes, he knows his stuff.

Asked whether the Commission is penalizing him for one incident, Ms. Royle answered:

It's a court decision, not an 'incident'. Everyone was shocked by the Appeal Decision. I don't know how much work he has actually done since the 2004 decision. Janet Butler, Charlie Young, and Glenda or Kay for HR, did the assignments of Mr. Woolfrey's work after 2004.

Asked whose responsibility it was to give him a copy of the Appeal Decision, and whether she was aware that he had not got a copy, Ms. Royle said:

Our legal department took care of that. I'm not aware, no. I met with him on the 18th. I would have expected him to have had a copy. I expected that he would have as soon as the Commission had it.

Asked whether she had considered the implications for harassment and discrimination in her comment at the opening of the 2004 meeting that the Commission was "not going to fire" him she said:

I decided that. I decided that, if I were in his shoes, I'd want reassurance on that. We'd made a conscious decision to say that, to be up front.

Asked whether she was aware that, after the 2004 meeting the Commission had called Mr. Woolfrey at home, and whether it is normal to call people at home, Ms. Royle said:

I would not be surprised. He was off on sick leave.... It would depend on the circumstances.

Asked if calling someone on sick leave at home does not constitute harassment, she said, No.

Asked whether she is aware that there was a policy change in this respect in 2005, she said:

I wasn't there. I wasn't aware. Policy or no policy, yes I would call when I was there if I was concerned or needed to. I was Director of HR. Glenda was Manager; but then she was Acting Director while Kay was (off on sick leave).

Referred to the letter to Mr. Woolfrey's doctor (GP #2), she was asked whether the phrasing does not suggest intimidation or harassment in the threat of withdrawal of benefits. She said:

I knew she was sending it, yes; .. because the Collective Agreement needs something from the doctor.

When it was pointed out that the doctor's note had already been submitted, Ms. Royle said: But obviously she is not accepting it.

Ms. Royle said she did not regard this as "strong arm", and acknowledged she is aware of the *Mandavia* case (KM #3). Asked if any penalty was suffered by Ms. Kavanagh, she said:

I know the outcome. I was not involved in it... By the time of the meeting in 2004, I was aware that Ms. Kavanagh was named, but not found guilty. ..To my knowledge, no. The two cases and outcomes are different. In Brian's case Brian was found guilty.

Ms. Royle confirmed that, up to the time she left the Commission, no offer of settlement had been made to the client so far as she knows.

Ms. Royle could not recall discussing the decision of the Commission not to appeal to the Supreme Court in the March 18th meeting. Asked how Brian found out about the Commission's decision on this matter, Ms. Royle said:

I don't know. I knew that we were not going to the Supreme Court. That decision was made by the CEO, Ms. Hann. Who told Brian Woolfrey, I don't know. What do Glenda's notes say? I'd be lying if I said I did remember.

Asked whether a comment had been made to the effect that the Commission was "not spending any more money" on this case, Ms. Royle said:

I don't remember. That was two years ago. I did not take notes.

Asked whether Brian had asked for his own legal counsel, Ms. Royle said:

He did. He did. I talked to him about that between the 2002 and 2004 decisions ... Or was it after 2004? I know we changed our decision. He felt better with a separate Corner Brook lawyer. I can't say who. I can't be sure who. It was after one or both of the decisions, and we did change policy after that. I can't recall who it was... after one or both. We did talk about that, yes. The policy was changed after Brian, and now an employee would get their own lawyer.

Asked whether that change came about after Mr. Woolfrey's case, Ms. Royle said:

Yes. In the case (involving Dale Kavanagh), Case Managers were concerned that they were not protected. In Brian's case it emerged... It was clear that the protection was not there. Section 14 was changed after I left... if it is changed.

Asked how she could now say that Mr. Woolfrey was not discriminated against if she felt she had to say that his job was not in danger, Ms. Royle answered:

No, the exact opposite. In that meeting that was the first thing I clarified with him.

Ms. Royle agreed that all case management duties that involved client-contact had been removed, and that he was not eligible for overtime in any client-contact context.

He would have a job with the Commission but his job with the Commission ... That's true... what you're saying, yes.

Asked if the Commission had responded to the Telegram article, Ms. Royle said, No.

Ms. Royle confirmed the Commission held a meeting with employees on the situation.

At the end Brian talked to the Case Managers... we gave Brian an opportunity. People wanted to hear and Brian to tell. So Kay arranged sessions with Paula Schumpf and Shelia Greene, and they came in and talked on September 14th about good faith and bad faith and what help he would get from the Commission. Brian was very discouraged with the Court and felt, as I did, that it went very far. What the judge said could happen to anyone if it could happen to Brian.

Asked whether a settlement with the client after the first court decision, might have settled the whole matter, she said: Anything is possible. Hindsight is wonderful. We thought we'd win the appeal.

ON REDIRECT EXAMINATION, asked whether the Commission had considered termination in 2002 and had decided not to do so, Ms. Royle said:

It was considered in 2004 and was decided as indicated to Brian in conversation.

The Commission did not go down that road, no.

Ms. Royle confirmed that no shop steward had been present at the 2002 meeting and there was no grievance as a result of that meeting.

Asked whether the Commission had been willing to do what was necessary in order to help Brian accommodate to a new position, Ms. Royle answered, Yes.

Asked whether there had been any finding of bad faith in respect of Dale Kavanagh in the other case, she answered, No.

Responding to questions from Mr. Mahoney for the Board, Ms. Royle said that she was not aware whether the 2004 decision had been a verbal or written decision and is not aware at what point it became available in writing.

THE SECOND EMPLOYER WITNESS was Ms. Jennifer Parsons, Coordinator of Corporate Planning and currently Manager of Project Planning for the Claims Management Project. She has been involved with that project since 2004 on a half time basis, and since October 2005 on a full time basis. She was on maternity leave from June 2004 until October 2005. She said that the Commission is currently in the process of exploring all phases of the claims process in the hope of making it more effective. Asked whether Mr. Woolfrey was involved she answered:

Yes. He started in April or May 2004. In 2004 he was helping set up definitions, basically a glossary of terms, and similar documentation work for us. Then after June 2004 I was off work, but when I returned in 2005 I was chairing the analysis group. Brian was in one of the groups, claims distribution, and he was working on it when I got back; particularly the regional boundaries definition. I divided that group up into three subgroups, and Brian worked on that up until the end of 2006, analysing what the requests were and how to distribute claims among the managers. They produced a report on that in the first week of December.

Asked whether Brian is still involved in that work, Ms. Parsons answered:

Yes, but he may not be assigned any particular work. We're trying to get going on implementation, so we're in planning and design. The intent is that he will continue in that support group. We're planning to ask Brian to attend to unfinished work in the first quarter of 2007.

Asked the extent to which Brian has contributed, Ms. Parsons said:

Yes, he definitely has. One of the reasons I assigned him was the work he has done prior to my work. I got feed back. He'd helped to get the group through the problems. It was the most complex area, and he helped through the various phases I had at the time. He did a good job, and brought back exactly what we

asked him for, including the recommendations... Yes, he completed all the work. All we asked him completed. There were no problems. When there was any problems with deadlines along the way he let us know and there were very few. There were no problems.

ON CROSS EXAMINATION Ms. Parsons clarified the duration of the period involved in her administration of the project as being between 16 and 17 months, but that she only actually had direct administration of the project for three months in 2004 during which time Mr. Woolfrey was preparing the glossary of terms. Ms. Parsons confirmed that she had assigned that work but cannot recall how long it took to complete.

Asked whether Brian was on sick leave from April to June 2004, Ms. Parsons answered: No, not to my knowledge. He worked on through. I'm going on memory. I could be slightly off on the dates... It must have been January and March that he did that work.

Asked whether work on these projects were full time positions, Ms. Parsons answered:

No, with the exception of Brian. But he'd be more involved by the fact that others could not give there full time to it.

Ms. Parsons agreed it would be normal to expect each of the others to commit perhaps two hours every two weeks to this sort of work based on their availability.

She also confirmed that the subgroups were, in fact, committees.

We would send out messages asking for input and for interest, and they would self- declare to me. Then we'd go back to those who said that they would be interested. Yes, this work was volunteer with the exception of the team lead, starting in '06. None of the working groups were full time.

Ms. Parsons confirmed she had very little contact directly with Mr. Woolfrey before June. Between January and June of 2006 she had no contact except, perhaps, for one or two meetings.

I have no way of knowing how many hours he logged on the project from September 2006 until December.

ON REDIRECT EXAMINATION Ms. Parsons confirmed that

The data and documentation work assigned in early 2004 definitely came from me. Val Royle, to my knowledge, may have passed on the work to him... The meetings could have involved two hours meeting every two weeks.. and then there would be work to be done arising out of these meetings and in preparation for them in the interim. It was more than just the minimal meeting hours involved.

Responding to questions from Mr. Mahoney for the Board, Ms. Parsons confirmed that the

project is a very large one involving all processes throughout the corporation, and is not yet finished.

Responding to a question arising from Mr. Oates for the Union concerning why a full time hire had not been assigned to the task, Ms. Parsons said:

We do have a dedicated team working on it. The team this year will have six members.

THE THIRD EMPLOYER WITNESS was Ms. Nadine Devereaux, Team Lead in Compensation Services since January 2006. In that capacity, she is familiar with the Claims Management Project:

Yes, it was developed as a result of inefficiencies in Case Management... to be more effective in their job. All of that is being reviewed by a panel or working groups drawn from throughout the organisation.

I was asked to lead the Claims Distribution Group to look at how a claim goes through the Commission. I reported to Jennifer Parsons and to the team leader, Janet Butler. Brian was a member of the group, and was already in the group when I became team lead. I think that group had started in May of 2005. When I came on board we set it up for a meeting once a month, on a Monday for a working day. I'd then take the work away, and do the research; and if I needed something specific from Brian I'd note it.

Some of the regional boundaries in the Corner Brook area we'd been exploring... Brian was able to review all of the communities... in the Corner Brook area... There is a problem with claims complexity, so we did 50 claim audits to see if there were indices of complexity. So he took those 50 and reviewed them at the second week and the eighth week to see what indications he could identify; and he acted with Case Managers and got them to identify the levels of complexity. We determined that the beginning information had no index of what the claim complexity would be, so that changed our direction.

In September of '06 I went to team lead and did not have time to work on the project quite as much, so Brian took on the claims complexity and took his work on audits one step further to devise data points.

Asked whether Brian had been a valuable member of the group, the witness answered:

Oh absolutely, very articulate and an analytic way of thinking; and he kept us out of the rat holes and moved us in better directions. Yes, he completed all the work that was assigned.

ON CROSS EXAMINATION Ms. Devereaux confirmed she had been 11 years with the Commission and had worked for a time as a Case Manager, then moved on to work as a Labour Market Planner. In 2004 she was Labour Market Re-entry Coordinator. Asked what level of

direct contact she had with Mr. Woolfrey from January 2004 until July 2005, Ms. Devereaux answered:

No involvement that I can recall with Brian Woolfrey. In March 2005 I was the Labour Market Coordinator.

Ms. Devereaux confirmed that, in her experience, the groups are volunteer committees which are formed on the basis of "expressions of interest" in response to a project communication that goes out each month. She said that she had asked Mr. Woolfrey to do the review of the regional boundaries in December 2005 and the report probably took "a couple of weeks". She confirmed, again, that between July and September of 2005 she had not personally assessed his work. Asked how long he had taken to assess the 50 claims, she said:

That started in December of '05. There was a delay in the assembly so it not start really until 2006. I would say, eight weeks maybe.

Asked whether she had assessed his work after February, Ms. Devereaux said:

No not after that, no. After that, their focus was on claims registration. They said to put on hold the complexity analysis, so it was put on hold until September. And in September Jennifer and I said that we would move on it. So we assigned Brian to it... From February or March until September there was no assessment of his work... No, that's right.

There was no redirect examination.

THE FOURTH EMPLOYER WITNESS was Mr. Derek Murphy, Regional Director for the Corner Brook office since July 2, 2005.

Mr. Murphy testified that Brian began reporting to him early in July 2005 and has reported to him since that time. Asked what he had assigned Mr. Woolfrey in that time, he said:

Well Brian has essentially handled my Employer Health and Safety Program in Corner Brook, coordinating the program, including work plan implementation, hazard assessment, emergency preparedness, fire evacuation, and employee safety meetings with clients. There are various aspects of the Occupational Health and Safety program in place, including safety protection for meetings with clients, fire drills and exercises, consultations with the landlord (because we are a tenant there), and coordinating planning with head office in St. John's who are trying to regularize for all of the Commission's properties. He was involved in all of these measures from August 2005. There were peaks of involvement in there. The new PRIME program was introduced and all employers in the province, including the Commission, were required to have it up and running. I relied on Brian as much as possible in this, and I had him involved in special projects with head office and

working group initiatives out of head office.

Mr. Murphy also described training programs in which Mr. Woolfrey had been involved.

There was a three day Occupational, Health and Safety training session and a one day session on various health and safety related issues, emergency preparedness, etc. He was also involved in Human Resources training, particularly in conflict resolution.

Asked whether, in his experience, the Commission has ever harassed or disciplined Mr.

Woolfrey, Mr. Murphy answered:

I'm not aware of any situation when the Employer has harassed or disciplined Brian; not, at least, in any of my previous roles in the organization.

Asked whether he had done all he could in assigning work to Mr. Woolfrey, he answered:

Yes. I did all I could as Regional Director. It was challenging. The Regional Director does not have any authority over special projects. That requires collaboration with head office. We only have Worker Services and Employer Services. Worker Services deals with injured workers and healthcare providers, and he was not involved with that. Employer Services is a small department, and does not directly respond to me. The key categories are collections and auditing, and he's not trained. The other area is the Health and Safety Advisor.

Mr. Murphy identified as DM #1, an e-mail he had sent in July 2006.

Mr. Woolfrey had been involved with the committee and with Nadine's group and was also doing Occupation Health and Safety work for Glenda Peet for the St. John's office. I said that it was 'fine to be involved in both pieces of work. Please notify me.'

Mr. Woolfrey had ever told him that he was not being utilized; nor, as Regional Director, had he had ever been told that Mr. Woolfrey was not fully utilized.

ON CROSS EXAMINATION Ms. Murphy was asked how his last answer on direct examination squares with the fact that the e-mail (DM#1) responds to a question about Mr.

Woolfrey's utilization, Mr. Murphy said:

I don't recall an e-mail to that affect. The content of the email was about the committee work, the Health and Safety project. We were indicating that he already had work with Glenda Peet, and asked if he could continue work with Nadine. It was not a statement that he was not being utilized.

Asked what work Mr. Woolfrey was assigned in July 2006, Mr. Murphy said:

As I said, he was involved in pieces of work for Corner Brook, Occupational Health and Safety, and Nadine Devereaux; and there was a new piece of work for

Glenda Peet. These were three pieces of work at that time.

When it was pointed out that Ms. Devereaux had testified she had no work for him from February to September 2006, Mr. Murphy responded that the DM#1

... e-mail was in response to a question from Brian about Nadine's work. As Regional Director I don't have control over assigning project work out of St. John's. There is no reporting mechanism to the Regional Director. I do not have an update on that portion of the working groups work. As Regional Director I took pains to assign Brian meaningful work he was interested in. He did not have that under the previous Regional Director. He was blocked in both departments in Corner Brook. The one that was best for him was the Occupational Health and Safety. I did attempt to liaise in assigning work, but I was not in control of assigning all the work. I did make the decision in DM #1, yes. I had a prior contact with the project managers in trying to get him work in that area. I did what I could to assure him work in areas I controlled, as well as in obtaining work from other offices.

Brian wanted to remain in Corner Brook. It was a small office with only client services. It's very limited. But I think I did assign work when I thought that there was a solution and where he was interested and where he excelled.

Asked whether he has any expertise in certain areas, Mr. Murphy said:

No formal education, but I have congratulated him in meetings in my office concerning the jobs he did. Brian is very good at accessing information. He performs great work in Health and Safety. He thrives in it. I was doing all I could do. In '05 and '06 the Commission was driven by PRIME and the *Act* so it had to have regional input to fit our circumstances. Glenda Peet arranged him work on that. He looked at the holes and went through our safety precautions in '05 and identified ways to improve our already good score in the next audit... Yes the work was sporadic, with peaks and valleys, quite a bit in some of it, less in others. I was trying to give him what I could because he was very good at it.

Asked whether he was trying to add in work to fill up to what Brian had, Mr. Murphy said:

I did not think that I was adding. Brian did not report to the previous director. I thought that I was being somewhat innovative. I'm limited.

Asked whether other employees had commented to him about Brian's level of work, he said:

I don't recall any very specific comments to me, but I did understand at some point that Brian was not as busy at his work as I thought he was because of the flow of work from St. John's. But I do not recall anyone informing me. Certainly, as a Case Manager, I know that he wasn't busy, and he was not responding to.... I do know that he did not appear busy, so I tried to give him meaningful tasks as I could. Some of his work flows are from St. John's, and I don't necessarily know always what they are and... assignments were not day-to-day. There were periods

when he was more involved then at other times.

Asked whether the local office did get involved in PRIME, Mr. Murphy said:

Yes, I was involved in a piece of it that required management, and there was some liaison between the Occupational, Health and Safety committee. Brian coordinated some of that with me, but that work was not done by the Occupational, Health and Safety committee. But that is not to say that he was occupied full time day-to-day. That was the only aspect of the office that I can give meaningful work.

Mr. Murphy was asked what insight he could offer into the Union's complaints of harassment and discrimination. He said:

Since I took on my role as Regional Director I have tried to stay out of what I'm not involved in.. other than the meeting I sat in on for Brian. On that day I did not view it as punitive. I think that it was the Employer trying to do as best it could trying to deal with a very difficult situation. I did not hear about the termination of employment part of the meeting... I am not aware of discrimination or harassment that might have occurred.

Asked if he does not see this assignment pattern as harassment or discrimination, he said:

I certainly would say that this is not an ideal situation for Brian, the Commission or myself... I call it "challenging."

Asked whether Brian had brought up any frustrations during his performance evaluation, Mr. Murphy said:

Yes we met briefly, and we had maybe fifteen minutes. I went through some of my perceptions, and he did express dissatisfaction with his role in the organization. So I gave him the form and told him he could provide feedback and that was provided to our office yesterday.

ON REDIRECT EXAMINATION Mr. Murphy was asked what he meant by a solution in this matter. Mr. Murphy answered:

I was trying to say that I was restricted in what I could provide to Brian. Occupational Health and Safety was obvious. I selected it because it was meaningful and he did a good job with it based on my understanding through a couple of emails. There was a potential job as Health and Safety Advisor.

I became aware that he was looking for training in Health and Safety and there were a couple of issues under my management and whether he could do the course and study during business hours. Brian had discussed that as a possible solution. Then I became involved in training approval: whether a person was allowed to study during the work day. I sought clarification with Kay Mullins. I was not aware of any decision from Kay or Joe... I was aware of a problem

because there was no special agreement. If there was a special agreement in place... But otherwise I had to treat him as all other bargaining unit members. He could not study during business hours. I was aware of that all through conversation with Brian...

There were difficulties in getting the PRIME initiative up and running... I involved Brian to help me manage the audit and to get the final audit that gets us up for award, not a penalty. At the introduction of the project we had to be on top of this. That is where Brian was a natural fit, and he did a good job with it.

Asked whether this was valuable and meaningful to the Commission, Mr. Murphy said:

Yes, and I congratulated him on his work.

IN SUPPLEMENTARY CROSS EXAMINATION on the issue of training, Mr. Oates asked whether Brian had done the Occupational Health and Safety training at all. Mr. Murphy answered:

I am not familiar with the past discussion. He told me there was some agreement. I understood from Brian that he may have started the training. Brian said that he thought he could study day-by-day.

Asked how much of the program Brian had studied, Mr. Murphy said I don't know.

I was not privy to that. Brian brought that to my attention. I wanted to know the reasons as I have other employees. I wanted to know what there was. Brian must have emailed HR. He is referenced in a \$6,000 outlay and then I got asked to see if there was a special grant. After my e-mail saying No I did not want other employees treated differently, HR told me that there was no special grant. It was an e-mail from Kay as far as I know. But I don't know if he did any training under a previous Director.

THE FIFTH EMPLOYER WITNESS was Ms. Kay Mullins, former Director of Human Resources and Financial Services. Ms. Mullins described the effect of the 2002 Court Decision as having been ...

absolute consternation. Not so much at the loss – you win some and loose some – but at how far the Trial Judge had gone in his ruling. The Commission hadn't dealt with any similar case. It was outside Government's experience. It was a case of trying to figure out What do we do? We have a long term employee. We have our legal department. We have Eric Bartlett and Val Royle. I can't recall who the CEO was at the time.

Very quickly we decided to appeal. Everybody decided that the Judge had overstepped in his ruling. The second was What to do with Brian? We talked about leaving him in his post, but it was not a real alternative. We talked about assigning alternate duties. It was clear that it was not going to be leaving him in the Case Manager job. We concerned for the reaction of the injured workers, but it

was broader: the whole impact on the Commission, and also the impact on Brian. There were any number of things that could go wrong if the injured worker would come forward. What if they were to say, What is he doing? We would have the same story all over again as with the complainant in this case.

A meeting was arranged. I can't recall exactly who was there: Charlie Young, Brian, myself, and maybe Val and someone else. We had a discussion over what was going to transpire. I led the discussion with Brian on either removing himself or being moved for a period of the appeal. I felt it was 9 months to a year for the appeal. During that time Brian would be reassigned alternate work.

Asked whether Brian had ever been told that he would go back to case management, Ms.

Mullins answered: No, he was not told that.

Ms. Mullins, herself,

.... went off on sick leave on June 1, 2004. I knew what the decision of the Court of Appeal was. I'd got a call at home. I could not attend the meeting because of the cancer. When I went back to work, Glenda briefed me and we discussed the decision and Brian's grievance. There was a grievance committee meeting and it was going to arbitration.

Asked whether she had assigned Brian any work, Ms. Mullins said:

Yes, when Brian returned that fall. I'd been involved prior to that as well. When the decision was initially made to remove him from his post he was going for training. He was to be a resource for a number of things that Charlie wanted done. That went on into the spring of 2003. In that spring we'd been lobbied under the freedom of information for information about Brian's duties, and when it came out that he was involved in complex claims the Injured Workers Association felt that he was still able to do harm. So they managed to get him removed from that work.

At the point when he was no longer able to do any claims work. I was trying to find him safe work in the medical area redesign project... When I came back it came out there was difficulty in his getting work. Then there was the Core Competencies project. There had been major work on competencies, and they were taking it to evaluation. So I assigned further work up to Brian on that, and I think Glenda Peet was assigning work as well, perhaps at another time.

We'd had a discussion when I returned in June of '04. It was a changed organization. We had been moving to PRIME prior to that, but by the time I got back PRIME had expanded into a huge all encompassing thing. It was recognized as having a major impact on claims. And there was a new web strategy.... And there was a major initiative concerning a data warehouse for the Commission. There were all kinds of projects, and I was comfortable that the work would provide ample room for Brian. I had been tasked with an HR plan and all these projects, and over the summer I'd put the plan together. So I knew when I met

with Brian about all the major projects. And, while there were redundancies coming, they were all at the clerical levels. There were significant new duties in Easy Safe Return to Work and Quality Assurance.

In September and October of 2004 I met with Brian. I was convinced that there were ample job opportunities on project work for eons to keep any number of people busy, but I did assign him to Core Competencies after that.

Asked if she had assigned him any other work, Ms. Mullins said:

No, not directly. I had a hand in coordinating various meetings concerning what sort of work he had been assigned.

Asked whether he had completed the work assigned, Ms. Mullins said, Oh yes.

Asked whether that work had been valuable, Ms. Mullins said:

Oh yes. It had been taken up by Shelly Lamb. Yes, it was valuable and it was used. The program was good and the Health and Safety Advisor position was discussed. My memory of it starts with Peggy Bear coming into my office in Special Appeal Projects in 2005 to say that we'd been given funding for a Health and Safety Advisor in the Corner Brook office and that Brian had applied and Was he screened out? She'd put him in because of seniority. I picked up the phone and called Brian. I don't recall the specifics of the call, but it would have been something like, 'Is this of interest? Would you be ready to be retrained? If so, I'd do what I can to make it happen.' My memory is that Brian said that he'd be interested if it was something that he could do.

I went instantly to Marie Hann, the CEO. She said, 'Do it. Make it happen if you can.' The next step was Val Royle. Brian was in her area, and I had to get her sanction. During that conversation Val said, 'Make it happen, even if it is a transfer of a Case Manager into an Advisor capacity'... We agreed that he would be a second Health and Safety Advisor on the West Coast. We had one, but they felt it would take time to get the training. They felt it would need that time, so make him a second.

So I now have a go ahead from all parties to make it happen. So I tried to see how to make it happen. One thing that I had not expected was opposition from the Union. It then turned into a settlement type of story.

Asked why Mr. Woolfrey did not get the Health and Safety Advisor position, she said:

I could not get the consent of the bargaining unit to waive the posting or to declare one redundancy. I had to follow the contract, and they would not waive the contract requirements. They said that there was more than Brian Woolfrey involved. They had a whole bargaining unit and there were potential conflicts.

Asked whether the Commission had been prepared to give Mr. Woolfrey the training, Ms. Mullins answered, Yes.

Asked whether the Commission had been prepared to help him in any way they could into

the position, Ms. Mullins said, Yes.

Ms. Mullins was reminded that Mr. Woolfrey had testified she had told him his career was over. Ms. Mullins responded:

That was when I told him about the four major projects and the job opportunities that would be available to him. I don't recall all of the meeting. He asked career questions, and I did tell him that his career would be narrowed to exclude client contact.

Asked if she had said that his career was over, Ms. Mullins said:

Absolutely not. We could not go to Team Lead or Director. I went so far as to talk to Brian about what could be done or would be done concerning introducing a complete career change into the provincial government. And so, if he were not interested in what I was suggesting, the option was to wait before going to arbitration and we would look at the opportunities opening up in the organization.

I think that there were lots of opportunities. The four year strategic plan was set to roll out at the end of that September. We were within a week. And it did not get rolled out until March of 2005. And after that roll out we ran into a problem with the Union and a request to all the bargaining unit members not to participate in the working groups. The Union made that request from Leo Puddister three weeks after the March 5th roll out.

Ms. Mullins identified as KM #3, KM#4, and KM #5 performance evaluations completed by the Grievor in 2002, 2003, and 2004. She confirmed that in none of these evaluations does the Grievor complain of being underutilised. She also identified as KM #6 ...

a document I had prepared this week to set out the travel made available to Mr. Woolfrey in the 3 ½ years. It included a total of nineteen trips over the period from 2002 to 2006.

Asked whether there is anything in these documents that suggest either discrimination or harassment, Ms. Mullins answered, No.

Asked whether she views WW#1 is disciplinary in nature, Ms. Mullins said:

I do not. It is not disciplinary. It was not intended to be such. If it had been disciplinary it would clearly say so. There would be reference to EAP, and a reference of it being put on the file. There would be a signature portion for the employee to have noted and that he had understood the letter.

Asked if Mr. Woolfrey has been compensated for less overtime than others, Ms. Mullins said:

As Director of HR I do know the figures. I can claim and can say, he is equal to many at the Corner Brook office... The Commission has done all that could be done. Assignment of work was problematic. It would have been easier to handle

if he had been in St. John's. He wanted, and had every right to want, to be accommodated in Corner Brook. We tried extensively to accommodate him. In my role as Director of Human Resources I can't tell you how many efforts we made not to harass or hound him. We weren't successful because the democracy of the Union turned unreasonable... not to get into the settlement issue.

ON CROSS EXAMINATION Ms. Mullins testified she was aware of direct impact on the Commission and on Brian in the form of letters that had been received and press coverage. She confirmed that the 2002 decision had been made to remove him from case management for the duration of the period required for the appeal.

What I testified was that I was sure that he'd go back; but we all felt that we would win the appeal and at the end of that Brian would be able to go back.

Ms. Mullins confirmed that she was also aware of Mr. Bartlett's assessment of the situation. Asked whether the decision was based on the court case and not on Mr. Bartlett's, Ms. Mullins said:

Yes. We could not ignore the Court Decision. Whatever we felt, we had to live with the Court Decision: that he was guilty of fraudulent misrepresentation. That defines the fact... In September of 2004 that confidence had evaporated because the decision of the Appeal Court had gone against the Commission and against Brian. Ms. Mullins was asked, in that situation, whether she was permanently involved in assigning him work. Ms. Mullins said, I think I assigned him the core competencies but I'm not sure when it would have been.

Asked what he had done between October 2004 and March 2005, Ms. Mullins said:

The only project I directly assigned was the Core Competency... I can't tell you how long it took to do the Core Competency and submit the report... I think Glenda was already involved in assigning; and there were other assignments by a multitude of people at the Commission.

Asked whether it was in fact the case however, that no one knew Who was assigning what? Ms. Mullins said:

No. All were fully aware that there was a problem.

Reminded that Mr. Murphy had testified he was out of the loop, Ms. Mullins said, But he took over in July, 2005.

Asked whether Charlie Young had assigned nothing, Ms. Mullins said:

I tried to get involved when I got back to work in September '04. I said I'd get the assignment projects, but that slowed down until March. And then the Union blocked participation in the committees.

When it was pointed out that these assignments were all of a volunteer nature, Ms. Mullins answered: Yes, but we had to have those volunteers.

It was pointed out to Ms. Mullins that the biggest holdup was from September to March and Ms. Mullins acknowledged: Yes. And that had nothing to do with the Union.

Ms. Mullins also testified that:

The report that Brian did he submitted in January 2005. It was all handed to Kelly Lamb, and that has since been rolled out. I think she came with us mid-2005. I would certainly have told Kelly Lamb she could have contact with Brian. She did take it over and finalize it.

Asked whether she had any other direct involvement in assignments after that report was submitted, Ms. Mullins answered:

Not directly, but we continued to try to see what was available. I think that he went back to Janet Butler's direction. She was the Project Manager.

Asked whether she felt during her conversations with Brian that he was in fear for his job, Ms. Mullins answered:

I don't think that I felt that he was in fear for his job. I do know he was worried about full time, lack of permanent, positive work and he felt the need.

Ms. Mullins was asked whether, in her view, the Union blocked the job posting for the Health and Safety Advisor position in view of the facts that Mr. Woolfrey was not qualified for the position and that when Mr. Oates himself got involved he had already been screened out, Ms. Mullins answered:

Peggy Bear said that he had, or was, to be screened out. He could not get through the competition, and we could not get him into it. There was no redundancy and there was no reclassification available... I was told, by Sean Power, that the Union would not agree.

When I got involved I was not thinking about a grievance; I was looking for a solution to a problem. My discussions were with Brian. He was President of the Local in Corner Brook and Sean was President of the Local in St. John's.

Asked whether there were other applications in that competition and whether anyone was qualified, Ms. Mullins answered:

I do not know. But we could not relax the conditions, because we would have to relax them for all who had grade 12, or off the street.

Asked whether there are opportunities under the Collective Agreement for retraining, Ms.

Mullins answered, Yes, I'm sure there are.

Asked whether she was aware the matter had got straightened out with the Union, Ms.

Mullins answered:

It got settled as a formal grievance settlement. His post in Corner Brook was newly created, a number 2 for Brian. It was not the one that was posted. We could not get him into the one that was posted for precedent reasons. Val said to take the money from the redundant Case Manager position.... And then it went all in another direction.

Asked whether she would agree that we could just not get a settlement, Ms. Mullins responded: A settlement did not happen.

Ms. Mullins was reminded that she had spoken earlier of Mr. Woolfrey developing new skills, and she responded:

Yes, because significant new opportunities were opening up at the Commission now, and he agreed and the Union agreed.

Asked whether any of those opportunities had actually materialised, Ms. Mullins said:

No. From September 2004 to March 2005 the job opportunities, to be frank, did not roll out. The Early and Safe Return to Work did not open up. Salaries were frozen, and then there were a lot of problems with a kaleidoscope of problems.

The Union got pissed off with the Commission so when the Occupation Health and Safety Advisor position came available I jumped on that. Brian and you (Mr. Oates) knew we could not get rid of this. No way. What we did shows that Glenda and I were not harassing him... He would not leave Corner Brook. We tried. We were faced with a court decision that we could not get out of.

Ms. Mullins confirmed that she arranged a meeting between Mr. Woolfrey and Ms. O'Neill, the new CEO.

She also testified that, in her view, March 23, 2004 letter (WW#1) is not punitive despite the fact it is on Mr. Woolfrey's file and Ms. Mullins does not know if he can have it removed:

Other than by arbitration, I don't know if you can. The Commission is not prepared to have him in client contact. We felt that it was within management rights to do so. The facts are on the file.

Asked whether the letter is to be used against Brian Woolfrey with respect to promotions to other jobs and other duties, Ms. Mullins answered, Absolutely. Asked again whether she insists this is not a disciplinary matter, Ms. Mullins answered:

That's right. It has to do with reassignment of duties and responsibilities. That is

ours to do in the workplace. It is neither arbitrary nor disciplinary.

Asked whether she had heard Ms. Royle testify that she had instructed Ms. Peet to offer Mr. Woolfrey a Shop Steward prior to the 2004 meeting, Ms. Mullins answered:

I don't know why she didn't... What's more to the point is that she *did not do so*. She knew it was *not* disciplinary (Witness' emphasis) ... Brian wants this situation fixed, like someone who has lost a leg. What Brian wants is for this not to have happened: for the Court not to have made the decision that it made.

Ms. Mullins confirmed, however, that the Commission had decided not to appeal the matter to the Supreme Court of Canada, and that Mr. Woolfrey had lost the opportunity to do so himself.

Ms. Mullins added:

I gave him the first decision. I can only assume that Glenda or Donna would have assumed that he had one. I was not there in 2004.

ON REDIRECT EXAMINATION Ms. Mullins confirmed that the Union and the Employer had been unable to reach an arrangement by way of settlement.

Asked whether it is fair to say that employees have a right to make comments without fear of retributions on evaluations, Ms. Mullins said:

Absolutely. The evaluations had nothing to do with what was going on. He had no need to fear.

Responding to questions concerning the extent of the Employer's responsibility to provide a copy of the 2004 Appeal Decision, Ms. Mullins said:

Certainly I know that if he had asked, he would have gotten one.

ARGUMENT

FOR THE UNION Mr. Oates commented that this is, obviously, a unique case. The oddity, in the Union's view, is the way in which the Employer has handled the entire matter. It has to end somewhere. Ms. Mullins commented, at the end of her testimony, that the letter will never come off Mr. Woolfrey's file. It is there in perpetuity to be used against him for ever and a day. That simply cannot be the situation. It has to end somewhere. That is one of the things the Union seeks among the adjustments requested.

Onus: The Employer has shifted the onus to the Union to prove *prima facie* that this matter is disciplinary. Each and every one of the witnesses called, all of them from Management, have clearly shown that the matter is disciplinary as discipline is dealt with in Brown & Beatty

Canadian Labour Arbitration, 4th Edition at 7:2400, which sets out the conditions to be met.

Specifically, if the employer insists, (the union) will be required to prove the existence of the collective agreement, the status of employment, the fact of (discipline) and perhaps certain other facts relating to the grievance...

All of these conditions have been met as set out in the grievance form.

The Collective Agreement is in evidence as Consent #1.

The Union's letter to Ms. Peet (GP#1) clearly references the matter as "discipline" and, with no objection from the Employer, moves the matter to step 3 under Article 8.

The letter of March 23rd to Mr. Woolfrey (WW#1) making his changed employment status permanent, clearly establishes a disciplinary act including the fact that this is attached to his personal file. Ms. Mullins made that clear as she confirmed that the letter itself would never be removed from his file.

It is also unambiguous that the opportunities for any type of advancement with the Employer ended after March 2004. KM #2 shows clearly that he is never to be considered for a position with client contact or with client services. This violates the Collective Agreement's job posting provisions. Mr. Woolfrey's opportunities are blocked.

As verified in the evidence, Mr. Woolfrey has suffered loss of overtime and of similar benefits since March 2004. BW #1 makes clear that the issue of overtime is also a serious problem. There may appear to be some conflict in the evidence in that Ms. Mullins says that all overtime was paid between 2002 and 2004 to Mr. Woolfrey, whereas the letter itself says that it is not. That issue is not settled.

Based on Browne & Beatty 7:2400 the onus has been discharged. This is a disciplinary matter. The Union has met its onus. It is now for the Employer to show just cause for its action. *The facts:* The facts are not in dispute. No one had any problem with Mr. Woolfrey's work, his work ethic or his decision-making at all. Not one person has had a bad word to say about Brian Woolfrey. But he has been put out to pasture. His duties and work assignments are gone. The narrative is straight forward.

In 1997 there was a complaint which was investigated by the Employer in 1998 (EB#1 and EB#2) and Mr. Woolfrey was cleared of any fault. But in 2002 the Commission and Mr. Woolfrey were found guilty in court. No one is challenging that fact.

Also in 2002 there was a meeting between Mr. Woolfrey and the Employer. The evidence is that the Employer themselves did not know what to do despite their very ample resources. The meeting was held to discuss what they referred to as "options" and What to do with Brian Woolfrey? He was not offered Union representation. He was there by himself with a group of Managers. No grievance was filed at that time. That is a fact. He was told that he was out of client contact until the appeal was completed. This was clearly temporary.

Nonetheless, Mr. Woolfrey did object in that meeting to being kept out of client contact and having his duties reduced. All confirmed that Brian did make this objection. In Mr. Woolfrey's mind he was convinced that he would be returning to his case management duties.

In the Union's view he was misled by the Employer in this regards and, as a result, he decided not to take any action. He thought that the matter was temporary. The Commission said they would support him and appealed the decision. Mr. Woolfrey depended on the Commission based on what they said, and what the lawyer did, through the "he said, she said" court process.

In 2004 the appeal was lost again, as Ms. Mullins testified, to everyone's consternation and amazement.

It is clear that it is Commission's reputation that is driving their decisions. What about Mr. Woolfrey's reputation? It isn't all about the Commission. It is also about Mr. Woolfrey and the employees of the Commission. The question has to be answered. Why did they not proceed to the Supreme Court of Canada? The Employer had that opportunity. Mr. Woolfrey lost his opportunity by virtue, at least in part, of the fact the Employer did not provide him a copy of the Appeal Court decision.

The Employer also had the opportunity and the responsibility, explicit on the Collective Agreement, to settle the issue with the client. That is all she wanted. There is no evidence that it has ever been settled to this day, almost five years afterwards. Someone dropped the ball and left Mr. Woolfrey hanging in the wind ... and he is still hanging to this very day.

Ms. Val Royle simply shut the door. We are not going any further. You can go on on your own time if you wish. The Commission, including Ms. Mullins, attempted to put the onus on Brian. He could have got a copy of the decision. But Mr. Woolfrey never had his own lawyer responsible for protecting his interests. That was the Commission's decision. In 2002 Kay

Mullins, herself, gave the decision to Brian Woolfrey. Then Ms. Mullins got sick. In 2004, after the Court of Appeal decision, no one takes responsibility at all to pass it to Mr. Woolfrey, the person most directly concerned. All distance themselves from that fact, but it remains a fact. Mr. Woolfrey is not a lawyer who would be alert to the Supreme Court's rules.

The Employer is also responsible for the assignment of Mr. Woolfrey's work and has spent a lot of time in its evidence dealing with its attempts to assign him meaningful work. But based on the Employer's own evidence provided by Nadine Devereaux and Ms. Mullins it was all piece meal, committee, volunteer work. What Derek Murphy testified about preparing for PRIME and checking fire evacuation plans shows just how deeming this work was for a professional person like the Grievor.

Mr. Woolfrey suffered through the entire period since 2002, has completed all tasks assigned to a very high standard. In all the evidence it is clear that he has played the role of a model employee from 2002 straight through. Then the March 23rd letter arrives and Mr. Woolfrey is assigned the same backroom duties, helping with case management files, helping train new Case Managers. Derek Murphy said that he found it "challenging" to find work for Mr. Woolfrey given the restricted range of services in the Corner Brook office, and noted that Mr. Young had done no assignment of duties. Ms. Mullins testified much to the same effect.

There is some confusion concerning the precise details of what happened in the 2004 meeting when Ms. Royle's testimony is compared with both Glenda Peet's and Brian Woolfrey's. But there is strong evidence to show that Mr. Woolfrey was never offered the Shop Steward; and therefore every action the Employer has taken is *void ab initio*. Mr. Woolfrey had a right to representation. That was Ms. Royle's evidence, and she was the Employer's witness. This was the meeting in which the comment was made by Ms. Royle about not firing him. At that point Mr. Woolfrey stopped the meeting because he realized the dangers he faced.

The Grievor was directed to go into the Business Analyst position in St. John's. He objected. He was going to be forced to move. Mr. Woolfrey's evidence on this was confirmed by Mr. Young's and Ms. Peet's evidence. The Employer referred to "options" but none were identified. In the end, they asked the employee to suggest a job he could do, as if he had authority to appoint himself to a job.

Ms. Royle testified she recalls that once the meeting was under way she offered a Shop Steward from the St. John's office; but Mr. Woolfrey decided to look for his own Shop Steward from his own Local in Corner Brook. There was No Shop Steward available, and he found Mr. Murphy, another Union member, in the coffee room and asked him to assist. The Employer is the only one who knows what the meeting is about. The employee does not know, so the onus is on the Employer to say, You should bring a Shop Steward with you.

The only reason offered for this failure to offer a Shop Steward is that the managers had decided not to discipline Mr. Woolfrey. But Ms. Royle's testimony on this is confused and confusing because she testified that she had instructed Ms. Peet to arrange for a Shop Steward to be present. This was not done, though the reason that it was not done has not been made clear. Ms. Royle's testimony is clear, however, and confirmed by Ms. Mullins', that there were discussions in 2004 about whether or not Mr. Woolfrey should be fired. If those discussions were ongoing behind the scenes, it demonstrates the thinking of the Employer at the time. Nonetheless, the Employer decided not to advise Mr. Woolfrey about his right to have a Shop Steward despite their awareness that discussions had been held concerning his possible firing.

During that meeting he was "offered" the position of Business Analyst, but there is no evidence provided by anyone that the Employer could make such an offer without a job posting. There is no evidence here before the Board as to any other alternatives.

The March 23rd letter (WW #1), which actually sparked the instant grievance is dated interestingly. On that same date the Shop Steward, Mr. Wade White, contacted Glenda Peet to try and slow the process down so that calmer heads might prevail before too much damage was done. Under the Collective Agreement the Employer has exactly 5 days to act on discipline, once the employee is informed verbally. This is the time frame within which the letter of March 23rd is sent by registered mail. The Union assumes that the reason is because the Employer knows the matter is disciplinary. The letter confirmed the Employer's decision to remove Mr. Woolfrey permanently from all client services and client contact and his duties as Case Manager. March 23rd was when the Shop Steward saw the letter and that is when the grievance was filed upon Mr. Woolfrey's behalf. The statement of the grievance was well thought out by Mr. White. He testified as to the reasons why he filed the matter under discipline. The five day time limit

stipulated under Article 35.01 provides the appropriate context.

Both Ms. Peet and Mr. Woolfrey testified that Ms. Peet had a number of conversations with him between the 18th and 23rd while he was on sick leave; but Ms. Peet could not remember what was discussed. Mr. Woolfrey, himself, cleared that up in his testimony. He went on sick leave under the care of Dr. Jerome Davis. Ms. Peet said she was calling to see how he was, and did so in keeping with the Commission's normal policy. There is some contradiction here, and the Board should perhaps pay attention to this as it goes to the credibility of the witnesses. Ms. Peet testified that the policy came into effect in November or December of 2004. But this was then March of 2004 that she was calling Mr. Woolfrey. This is Ms. Peet's own evidence so that her behaviour was not, according to her own testimony, normal Commission policy in March 2004. The policy came into affect a lot latter according to her own testimony, and she was then HR manager.

This does constitute clear evidence of harassment and intimidation as does GP #2, Ms. Peet's letter to Dr. Davis. There is a clear sanction implicit in this letter, the sanction that his sick leave benefits may not be paid. Again, this is evidence of intimidation and harassment by the Commission. GP #2 is dated April 29, 2004. Ms. Peet testified that there was no response from Dr. Davis to that letter and acknowledged that the sick leave benefits continued, in any case. The Union does not understand why Mr. Woolfrey was not informed if they were going to continue paying his sick leave benefits. So they left him hanging.

The next contact was in May 2004 through the grievance committee. Up to that point Mr. Woolfrey still did not have a copy of the March Court of Appeal decision, GP #3. It was during the committee meeting that it became clear that the Employer had not supplied it, and by that time it was outside the time limits for an appeal. Nobody takes responsibility for this.

And the Union is not blaming anyone specifically. That is not the intent. But someone should have provided a copy to the person most directly affected by the documment. It should be borne in mind that Mr. Woolfrey was told on March 18th that they would not be going forward with the appeal, and that he could go forward on his own if he wished. They left him hanging. That is one more piece of defence that Mr. Woolfrey was not given.

[Mr. Mahoney, for the Board, asked Mr. Oates to clarify this line of his argument. He

asked whether Ms. Oates feels that the defence called for in the Collective Agreement is to be continuous. Mr. Oates responded that as the term "defend" is used in the Agreement, there is nothing to indicate otherwise. In Mr. Oates' view, under the Collective Agreement the Employer has the obligation first, to "defend" the employee, or alternatively to "negotiate or settle". The Employer simply stopped defending, but did not "negotiate or settle". If there were no grounds to appeal I would agree that there is no way to go forward. But no one has ever told the Union or Mr. Woolfrey that there were no grounds. So the Union's understanding is that the Employer must simply continue the defence].

The Employer provided the one lawyer to represent its own and Mr. Woolfrey's interests. Mr. Woolfrey asked for a lawyer for himself. Ms. Royle testified that as a result of this case the employees now have a right to their own lawyers in these circumstances. The Commission recognized that a mistake had been made. That is her testimony. The Commission has been in charge of this whole case.

Brian Woolfrey is a good employee of the Commission, and the Commission has to be held accountable. He was not equipped with the resources or knowledge the Commission has available to it. The Commission has legal staff, and retained a private firm to represent them in this matter. Mr. Woolfrey was totally dependant on the Commission for support and guidance on these issues. There was no explanation given as to why the Commission was not going forward. Someone should also have explained why the decision not to go forward to the Supreme Court was taken. No meeting was held to explain the matter. There was no contact of any kind with their lawyer or with the law firm. He was simply left sitting with the decision of the Court of Appeal. It is not hard to imagine how Mr. Woolfrey must have felt. His sick leave in March of 2004 and his return in September 2004 then followed.

He returns in September 2004 and reports to Mr. Young, the then Regional Manager, who has to be very creative to find any type of work for Mr. Woolfrey, as Mr. Murphy himself said. There was no work assigned by Mr. Young and Mr. Murphy testified that he tried to supply that work assignment.

Once Mr. Woolfrey returned to work he had to go to St. John's to meet with Kay Mullins, the then Director of Human Resources, in relation to some grievances – not his own specifically

– out of the Corner Brook office and to discuss some possible projects. During the meeting, while there was no Shop Steward, the issue of Mr. Woolfrey's own problems was brought up. During this discussion Ms. Mullins told him that his opportunities in the Commission were pretty well non-existent. She said, "narrowed", during her testimony. Client contact and client service opportunities were non-existent. Mr. Woolfrey testified that he found Ms. Mullins' comments intimidating and harassing. He told her so as Ms. Mullins, herself, confirmed in her testimony. Mr. Murphy, in his testimony, said that he simply did not know what was going on as far as assignments were concerned.

At the time of his meeting with Ms. Mullins, Mr. Woolfrey was assigned some work for the period from 2004 to 2005. But it did not seem to him that it was substantial or considered as important. Ms. Mullins, in her own testimony, said that she did not know what happened to the report after it was submitted to her in January 2005. Ms. Mullins said that she had got directly involved in assigning work only for a time. There was very little work and it was piece meal. There was no meaningful work for Mr. Woolfrey, and he complained about the fact to her as she confirmed in her testimony.

Mr. Oates called the Board's attention the May 6, 2005, letter (KM #2), which confirms that he is not to be considered for the position of Regional Manager or Team Lead, promotions in the Corner Brook office. In the Union's view this confirms that these actions are disciplinary, since they remove a right under the Collective Agreement.

The March 23rd WW#1 letter is being used by the Commission against Mr. Woolfrey to penalize him within the Commission. Sanctions are levied against him based on that letter. A number of private meetings have been held between Brian and the Employer about his situation without representation to the Union, when management should have been attempting to solve the matter with the Union, not with Mr. Woolfrey himself and alone.

Mr. Oates then sketched, in summary, the Collective Agreement articles referenced in the grievance, and the reasons for those references. He pointed out that the grievance was filed the moment the confirmation of the permanent change of the Grievor's status was received. That confirmation (WW#1) was issued and received within the five day period required for discipline, between the 18th and the 23rd of March.

Mr. Woolfrey wanted his duties and his Case Manager position back and he wanted the Commission to further appeal the Court of Appeal decision. He was clear on that.

The reason for citing the discipline Article 35 is clear as has been repeatedly pointed out both in testimony and in argument.

Clause 51 has to do with criminal legal liability. It is clear that Mr. Bartlett's investigation of the matter cleared Ms. Woolfrey of fault and that Mr. Bartlett confirmed that the trial had added nothing to the facts of his investigation. Ms. Bartlett is a senior manager with the Commission. He testified that he did a complete and total investigation of Brian Woolfrey and the client's complaint and found nothing wrong. Therefore, once the charge was laid, the Employer is obligated under the Collective Agreement to defend the worker or to settle with the client. Under Article 51 the Employer was satisfied that the duties were performed. So once Mr. Bartlett had done his investigation and found no fault the Employer had two options, defend or settle. They decided to defend, and therefore should have continued to defend. In all the evidence there is nothing to show an attempt to settle.

The Commission does not have the option of going halfway. The Employer clearly decided to violate the requirements of the Collective Agreement by not appealing the matter to the Supreme Court. Their failure to do so within the sixty day time limit also eliminated the Grievor's right to appeal. Someone in the legal department of the Commission or in the private firm had to know, and failed to provide Mr. Woolfrey the basis upon which to act. This obligation and the Employer's failure in its regard must be addressed by the Board

Clause 52 prohibits discrimination. Clearly the Employer has discriminated in respect of promotion, overtime and assignment of duties. The case involving Dale Kavanagh is evidence of a similar situation in which the Employer has chosen not to penalize another employee in ways that Mr. Woolfrey, himself, has been penalized. Mr. Woolfrey's case was used as a supporting document in the conduct of the *Mandavia* case. Based on the fact that no action was taken against Ms. Kavanagh, Mr. Woolfrey himself should have been treated in the same way.

Mr. Woolfrey has also been discriminated against in respect of his seniority. In fact, he has been stripped of his seniority. Effectively, he has no way up in the Commission. He can apply as much as he likes. His seniority is no longer relevant as a consideration. We're screening

you out... The job is going to someone else. This clearly also another form of discrimination.

Mr. Oates pointed out that Article 53 prohibits personal harassment. Again there is clear evidence on a number of fronts that Mr. Woolfrey has been harassed. The meetings reported in testimony, including several private conversations, have harassing elements. The Employer's action in treating the matter as non-disciplinary is, in fact, another evidence of their harassment of him. Mr. Woolfrey has been submitted to demeaning and harassing behaviour throughout the entire process. The March 18 meeting is one clear evidence; the calls to his home while he was on sick leave and the letter to his doctor while he is on sick leave are others. The October 2004 meeting with Ms. Mullins in which he is effectively told that his opportunities within the Commission are now "narrowed" and her comments to the effect that he is not going anywhere in this organization, are all clear instances of harassment. So too, of course, is the continuing failure to provide him meaningful work assignments. All of this is a threat to Mr. Woolfrey's livelihood.

Mr. Oates pointed out that the Employer had attempted to piece together some evidence to persuade the Board that the work completed by Mr. Woolfrey had been meaningful work. But the fact remains Ms. Parsons had supervision of Mr. Woolfrey for only a month and similarly the brief actual contacts between Mr. Woolfrey and Ms. Devereaux prove very little if anything. Derek Murphy tried very hard to meet the challenges of making assignments, but found that very restrictive given the available work in Corner Brook. All it really amounted to was committee work and volunteer work.

Mr. Oates provided the Board with the following jurisprudence in support of the Union's argument and in respect of the redress sought: *re Campbellford Memorial Hospital and Canadian Union of Public Employees*, Local 2247 14 L.A.C. (4th) 129 Ontario R.D. Joyce, 1990; *Chinook Health Region and C.U.P.E.*, Loc. 408 (Smith) (Re) 131 L.A.C. (4th) 63, D.J.D. Leighton, 2004; *Re Solicitor General Canada – Correctional Service and Chenier* 119 L.A.C. (4th) 110, J.W. Potter, 2003; *Re Bear Creek Lodge and Hospital Employees Union* 106 L.A.C. (4th) 254 British Columbia J.I. McEwen, 2002; *Re Canadian Union of Public Employees and Office and Professional Employees' International Union*, Local 491 133 L.A.C. (4th) 123 Ontario, F.D. Briggs, 2004; *re Keyano College and Keyano College Faculty Association* 34 L.A.C. (4th) 182 Alberta A.V.M. Beattie, Q.C., T. Drouin, D.J. McNab, 1993; *Supreme Court of*

Newfoundland and Labrador Trial Division Mandavia v. Central West Health Care Institutions Board et al., Justice Seamus B. O'Regan, 2003.

In respect of the redress sought by the Union in this matter, Mr. Oates said that, in the Union's view, damages are in order. The Employer's treatment of Mr. Woolfrey has taken its toll on him and there are damages owing. Mr. Murphy, Mr. Young and Ms. Peet all confirmed that they were concerned for Mr. Woolfrey's well being. They had reason to be based on the decision and the appeal and the Employers subsequent acts. They felt that he was under severe stress.

The Union is therefore requesting aggravated damages, based on the extent of the hardship experienced both before, during and after the grievance. If the grievance is upheld, the quantum should be left to the Employer and the Union to work out, as agreed at the opening of the hearing,.

The damages should also include consideration of lost opportunities.

The Employer has also inflicted mental suffering on Mr. Woolfrey as a result of which he went on sick leave.

And as a result of their continuing action he has not been assigned proper work during the ensuing period despite the fact that they insist that he is a valued employee.

Mr. Woolfrey has always been in fear of being fired as a result of the Employer's actions.

In addition to the aggravated damages noted above, damages should therefore also be awarded that recognise lost opportunity costs in respect of overtime and promotion opportunities from which he was excluded by the Employer's decision. The Employer screened him out of opportunities and this constitutes significant loss. We will never know if he would have secured the jobs for which he applied because of the Employer's actions in this matter. But that does not affect the fact that the Employer did not give him the opportunity.

This is a continuing grievance, ongoing to this very day. The award should therefore take effect as of the date on which the award comes down. Mr. Woolfrey must be allowed to live and work again.

Ms. Mullins's testimony made it clear that the Commission felt it was put under extreme pressure by the lobbyists and felt that they had to do something. There is no doubt that that is the case. But if the Commission is to bow down to every lobbyist then the employees in this

Commission are in real trouble.

The Union requests that the grievance be upheld on all points. The Union is requesting that the Board decide for the Union on all points. The Parties have agreed to determine the quantum but the heads of damages are for the Board to determine.

Mr. Woolfrey should be placed back in his position as Case Manager with full duties, responsibilities and benefits as required under the Collective Agreement. His sick leave rights should be reinstated as of March 2004. In particular it is important to return the period that he was off duty from March until September 2004 to his bank since that period of time was directly due to the Employer's own action.

Damages for lost opportunities and overtime, as set out in Peggy Bear's letter, should be addressed. Aggravated damages for mental and personal suffering should also be considered and damages as a result of his lost opportunity to proceed to litigation since the Employer did not provide him with adequate representation in respect of that matter. Mr. Woolfrey clearly is responsible to mitigate damages and a number of cases set out by the Union deal with this issue.

Not least, the letter should be removed from his personal file.

In summary, Mr. Oates urged the Board to uphold the grievance on all points.

FOR THE EMPLOYER Mr. Kelly opened the Employer's argument by speaking first to a number of issues raised in the Union's argument and the jurisprudence on which the Union relies.

He noted the Union's position on GP #1, and pointed out that the grievance was filed at Step 1 so the probative value of GP #1 is moot at best. Further; the reference to Step 3 in GP #1 is not limited to specifically disciplinary matters. The provision for a five day time limit under Article 35.01 relates to suspension or dismissal. Mr. Woolfrey was neither suspended nor dismissed. The matter simply has no application, therefore.

Mr. Kelly also addressed the Union's claim that Ms. Mullins' comment concerning Mr. Woolfrey's "narrowed" career opportunities was a violation of the seniority provisions of the Collective Agreement. It should be borne in mind that this related only to matters following from the Court of Appeal decision. In the Employer's view the Board must not consider this complaint as it would expand the scope of the grievance quite significantly to do so.

On the issue of overtime it should be noted that Ms. Mullins has confirmed that overtime

has been paid based on comparison with others in the Corner Brook office. That is her testimony and it is uncontradicted.

The fact that the Union was not represented in certain meetings with the Grievor is, itself, not relevant to the matter before this Board since none of these events were grieved.

Mr. Oates also argued that Mr. Woolfrey was led to believe that his withdrawal from case management duties was temporary. The evidence, however, consistently has been that he was never told he would be returning to the Case Manager position.

On the issue of allegedly lost opportunity to appeal to the Supreme Court of Canada due to the fact that he was not given a copy of the 2004 decision, it should be noted that the Employer does not exercise the sole responsibility in this respect. Mr. Woolfrey was speaking to Mr. Roebathan who called him from the court house. Clearly Mr. Woolfrey knew of the decision. All he had to do was ask for the copy of the decision. Therefore the Employer is not totally responsible for that matter. While it is true that Mr. Woolfrey did not have his own lawyer, the fact remains is that he did have Mr. Roebathan, and the Collective Agreement did not require that Mr. Woolfrey get his own personal lawyer.

The Union has complained about what it describes as the "piece meal" nature of the work assigned to Mr. Woolfrey. But the Employer's testimony on this matter is clear and candid. It is the Employer's right to organize the workforce. That is the for Employer, and not for anyone else, to determine. It is also clear that Mr. Woolfrey was not told that he was required to move to St. John's. That is not what the managers said, and the fact remains that he did stay in Corner Brook which lends credibility to the Employer's position on this matter.

In addition to the Business Analyst position there was also the Health and Safety Advisor position. That matter was pursued, but we were unable to come to a reasonable solution, in the Employer's view.

The Union urges that damages should be paid for lost opportunities. But damages cannot be speculative. To assume that Mr. Woolfrey would have received the position of Team Lead or Regional Director is speculative, in the Employer's submission.

On the issue of mental suffering, not one shred of evidence has been entered concerning the medical aspects of this matter. The notion that Mr. Woolfrey is due damages because he is a

valued employee and has been submitted to great stress does not address the fact that this Board cannot deny that there was a fraudulent misrepresentation charge sustained against the Grievor. The Board must not lose sight of the fact that the charge of intent to injure a client while acting as a Case Manager represents a significant problem for the safety of clients.

The Union's submission that the sick leave for the period of March to September 2004 should be restored to Mr. Woolfrey's bank is, in the Employer's submission, not possible because this sick leave was already paid. It was used.

Turning to the Employer's own argument in the matter Mr. Kelly suggested that the initial issue for the Board to determine is What defines the scope of the grievance stated in Consent #2? It is from this definition of the grievance that the Board derives its jurisdiction. The statement of grievance here is very specific. It alleges violation of Articles 35, 51, 52 and 53. There is no evidence to suggest any basis for dealing with any other articles. The Board is not a court and, despite the Union's attempt to expand the matter, it cannot treat the grievance as open ended.

The Union's insistence that this matter was disciplinary defies the evidence, which shows that it was not disciplinary. It cannot be transformed into a disciplinary matter simply because the Grievor feels that it is. The onus is on the Union to show it is disciplinary: an onus which the Union has not met. The Employer's purpose was not to discipline. This is made clear by Ms. Peet, Ms. Royle, and Ms. Mullins. The Employer's purpose was to preserve the credibility of the Commission, to protect the credibility of the Case Managers, and to protect the injured workers of the province.

Browne & Beatty's definition of discipline includes, first and foremost, the intention to correct bad behaviour. It is clearly not what is at issue in this matter. There is nothing upon which a claim to discipline can be built. There is no verbal or any other reference to discipline in WW #1. Every Employer representative has given assurances that this matter is not disciplinary. Mr. Woolfrey's salary has been maintained. He has been compensated for overtime comparably with other employees in the region. There is no violation of Article 35.

The Union's concern that there was no Shop Steward present during certain meetings is not justified because there was no discipline involved in those meetings. The Union did not grieve or object at the time, and it cannot be permitted to do so at this point.

In respect of Article 51 it is clear that the Employer did defend the Grievor at two levels of court. The Union claims the Employer was required to take the matter to the Supreme Court, but nothing in the Collective Agreement sustains the Union's position in this matter. To rule with the Union on this matter is to read something into the Collective Agreement that is not there. The Collective Agreement's language does not allow such an interpretation, in the Employer's submission, and the Board has no authority to add to or to change or to exceed its jurisdiction in any other way. It should also be noted that the jurisprudence shows that the Union, insofar as it bears the onus in this matter, has the onus of showing that its interpretation of a Collective Agreement must be superior to the Employer's. There is no violation of Article 51.

In respect of Article 52 the Employer notes there has been a lot of evidence submitted by the Union to support the view that there has been some discrimination. However Article 52 has a specific set of restricted areas to which the prohibition against discrimination is limited. The key phrase to bear in mind is "...by reason of...". The Board cannot ignore the canons of construction. All words must have a meaning and clearly the words in Article 52 must be given full weight and meaning. Neither Mr. White nor Mr. Woolfrey could make a link to any prohibited areas. What prompted the Employer's action was a court decision. That is not a prohibited ground. The Employer submits that there is no violation with respect to Article 52.

In respect of Article 53 Mr. Kelly urged the Board to look carefully of the definition at 51:01(b). There is a hurdle to be got over as there is in Article 52. There is a set of prohibited grounds, none of which apply in the instant matter to Mr. Woolfrey. The fact remains that there has been no harassment. Mr. Woolfrey was told he was not going to lose his job. He was not being forced to go to St. John's. The letter to Mr. Woolfrey's doctor applies to all staff. This is proper sick leave management. The Employer must live up to its legal obligations. There was no harassment here.

On the issue of sick leave it should be noted that there is no shred of medical information before us, and therefore nothing upon which the Board can draw a finding about medical grounds for the Grievor's absence from work.

There is also no evidence that Mr. Woolfrey was hidden out of the way in Corner Brook. He was travelling back and forth to St. John's, and was assigned work from St. John's. The

situation clearly was not perfect, but he was not completely ignored either. The Employer did what it could in light of a very difficult decision by the courts. The actions and decisions of the Employer were not arbitrary. Options were explored. Mr. Woolfrey said No to the Business Analyst position. The Employer did not say No to the HS Advisor position. It was just not resolved.

Mr. Woolfrey was provided reasonable work on projects worth millions of dollars to the Employer, and there is no doubt that he did all that he could in the assigned work. In July 2006 Mr. Murphy e-mailed the Grievor asking him to report if he was being under utilized and there was no response. The Grievor did not approach Mr. Murphy to complain he was under utilised.

There was no harassment and no discrimination. Mr. Kelly urged the Board to step back from the issue, and consider the situation in its real context. The root lies in the Court decision. Yes, the Commission was named; but Mr. Woolfrey's act resulted in the Court decision.

KM #s 3, 4 and 5 show that nothing the Commission has been doing was harassment or discriminated against Mr. Woolfrey, and his own comments bear this out. Mr. Woolfrey's own evidence calls in question the credibility of the Grievor's perspective on the matter.

[Mr. Oates objected to any allegation that Mr. Woolfrey's testimony is not credible.]

The Employer takes the view that if there is no specific limitation the Employer has the right, under Article 4.01, to do what its management's rights permit. Since there is no specific abridgement in this Collective Agreement concerning how the Employer has to respond to a Case Manager who has been found to have fraudulently misrepresented something to a client, a very specific action, the Employer can not now be found to have dealt improperly with an employee whom the Court has found guilty of a serious tort. The trial Judge was very clear in his finding of fraudulent misrepresentation and bad faith.

In the case involving Dale Kavanagh there was no finding of bad faith. The Commission has a responsibility to provide a service to its clients. Case Managers are a key point of contact with the Commission. The clients must be able to put their trust in the Case Managers. Ms. Val Royle made this very clear. It was for these reasons that Mr. Woolfrey was removed from client contact. It cannot be said that the Commission acted in bad faith in making that decision.

Mr. Kelly then introduced the following jurisprudence which, in the Employer's view,

supports its position in its management of Mr. Woolfrey: *Newfoundland and Labrador Association of Public and Private Employees* and *Western Health Care Corporation*, Grievor: Margaret James C. Oakley, D. Curtis, R. Kearley, *Fish, Food and Allied Workers (Canadian Auto Workers)* v. *Fishery Products International Limited*, Grievor, James Dalton, Arbitrator James C. Oakley; re *Ontario Hydro and Power Workers' Union Canadian Union of Public Employees*, Local 1000, 53 L.A.C. (4th) 163 Ontario K.M. Burkett, B. Stephens, B. Cruickshanks. January 9, 1996; *Charles S. Curtis Memorial Hospital and Newfoundland Association of Public Employees*, David Alcock, 2004; *Re Pacific Press (a Division of Southam Inc.) and Communications, Energy and Paperworkers Union*, Local 2000, 90 L.A.C. (4th) 218 British Columbia, June 21, 2000; *Department of Social Services and Newfoundland Association of Public Employees*, Grievor Mrs Eileen McCann, John Scott, C. Horlick, T. Hanlon 1987; *Government of Newfoundland & Labrador v The Royal Newfoundland Constabulary Association (Policy Grievance)* John Scott, Arbitrator, July 2005; *Newfoundland & Labrador Department of Works Services and Transportation and Newfoundland & Labrador Association of Public & Private Employees*, Grievor Allister Whalen, David Alcock, 2005. Mr. Kelly also submitted the following jurisprudence in respect of the Union's argument on damages: *Toronto (City) v. Canadian Union of Public Employees*, Local 79 (Burnett Grievance) Ontario, L.M. Davie (Arbitrator) October 25, 2005; *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local Lodge 4513 v. Georgia- Pacific Canada Inc.* (Edmonton) (Diberadino Grievance), Alberta, P.A. Smith 2006; *Village of Harrison Hot Springs v. Canadian Union of Public Employees*, Local 458 (deBrouwer Grievance) British Columbia, R.S. Keras 2006.

IN REBUTTAL ARGUMENT FOR THE UNION Mr. Oates argued that the Board is bound to interpret the Collective Agreement. It is clear from WW#1 and Ms. Peet's testimony that the letter (WW #1) was, itself, a Step 3 act confirming the disciplinary nature of this action. From this evidence alone it is clearly disciplinary.

On the overtime issue there is no evidence to support Ms. Mullins' testimony that the overtime issue from 2002 to 2006 has been settled. There has been no overtime according to the Peggy Bear letter. There is an outstanding grievance on this matter. If there is credibility at issue

then it should be borne in mind that Ms. Mullins' testimony is contradictory on this matter.

The Employer wants the Board to draw an adverse inference from the fact that there was no grievance entered about the lack of a Shop Steward at the 2002 meeting. There was no permanent decision made at that meeting, and Mr. Woolfrey decided to await the outcome of the court case. He assumed that it was a temporary matter.

The Union never claimed that the Employer ever said that Mr. Woolfrey was returning to the Case Manager work. The Union does say is that the Employer has, all along, described the 2002 decision as a temporary one, because they did not know what the final decision was to be. So Mr. Woolfrey was led to believe that the matter was temporary. Based on the evidence, that is justifiable.

On the issue of damages in respect of lost job opportunities the Union is not claiming that Mr. Woolfrey would have got the jobs for which he applied. The fact of the matter is he was not considered. That failure to consider is what was lost.

On the issue of carrying the matter through to the Supreme Court the Employer seems to justify its action by pointing to the fact that Mr. Woolfrey was informed of the outcome of the appeal by the lawyer. The lawyer called Mr. Woolfrey from the steps of the court house on March 17th. There was, at that point, no written decision. The lawyer was then let go from the Commission. There was no lawyer to get it for him at that point. The Employer is the only one left. The Employer failed to do that. Someone failed to do it. It did not happen.

The wording of Article 51 must be noted. This article uses the verb "shall". Thus the Employer is obligated to defend or settle. There is no "may". It is "shall". The fact that all were amazed at the outcome of the appeal decision as well as the initial loss of the case does not justify the Commissions's decision not to go forward. The Employer still did not settle with the client, which was its other option. And clearly did not appeal to the higher court. Thus the Grievor was left without recourse. The Collective Agreement speaks to this. The verb is "shall".

And in the meantime the employee is left without meaningful work. No one has shown any options to stay in Corner Brook. The fact remains he did not move; but to this day no one has shown how the Employer arranged for him to stay. The only offer in 2004 is that of Business Analyst in St. John's. The Health and Safety Advisor position was not put on the table in March

2004. That was a lot later. The Employer says it was not able to resolve the advisor position. It was not acceptable to the Union. We walked from the table on that issue.

Article 35.01 does specify five days. It applies to all the subclauses, including 35.03(b) which refers to any dissatisfaction or otherwise as being subject to the five day rule.

In 2004 and 2005 Mr. Murphy was trying to find Mr. Woolfrey work; but it is clear that what Mr. Woolfrey was seeking was that Mr. Murphy provide some direction as His Regional Director. That's what Mr. Woolfrey was seeking as is made clear in his 2006 e-mail. This Employer has instituted a series of actions against Mr. Woolfrey based on conditions that it had to face. But this employee was investigated and found to have done nothing wrong.

On the issue of the alleged speculative nature of the damages sought, Mr. Oates pointed out that there is nothing speculative about the overtime loss, as raised by Ms. Mullins contested evidence. There is nothing speculative in the fact that Mr. Woolfrey was automatically screened out of job competitions.

The Employer has said that there is no medical evidence of mental suffering. Yet there is clear evidence from the Employer's own staff who were called to give testimony that they recognized he was upset. In fact, according to Ms. Peet, it was this that prompted her to make a number of calls to his home. She said that she was worried about his stress levels. Ms. Peet, herself, provides the proof of the mental suffering to which Mr. Woolfrey was exposed.

Clearly, Mr. Woolfrey did use the sick leave; but only because the Employer forced him into it. His medical problems were exacerbated, as the evidence has made clear, by the Employer's decision to act as it has.

The Employer insisted that Ms. Royle was attempting to be reassuring in her comment "the good news is we are not going to fire you." The evidence is clear that this was taken to be a real threat, especially when coupled with the single offer of a move to St. John's. These issues are all deeply stressful to the Grievor, including Ms. Mullins's statements.

It has to be asked why Mr. Woolfrey must carry the brunt of the impact of the Court's decision. The only answer is that the Commission has been acting arbitrarily. The Employer's attempt to impugn Mr. Woolfrey's credibility simply flies in the face of the evidence before this Board. Not one single manager who went on the stand raised any questions as to his credibility

or his work ethic in anyway. This is an exemplary employee whose credibility is not subject to question in this matter. The evidence is that all were in disbelief of the outcome of the initial and of the appeal process in the courts.

The Union has brought a grievance based on the grounds noted, and is looking for damages in respect of these grounds. The Board should take careful note of the jurisprudence submitted in support of its position, and in particular *Brown & Beatty Canadian Labour Arbitration*, 4th Edition at Article 7:4210.

In summary, the Union asks the Board to uphold the grievance on all points.

CONSIDERATIONS

At issue between the parties is a grievance complaining that the Employer's action "... violates the Collective Agreement in general & more specifically violates Articles 35, 51, 52, 53 and all other applicable articles. No authoritative basis for displacement." The Union argued under each of the Articles specified and under "other applicable articles" of the "Agreement in general."

The Board must make its findings on the balance of probabilities.

The Union argued, in the first instance, that the March 23, 2004 decision was, in fact, an act of discipline that has continued in effect from that date forward. The Employer argues that its action was an exercise of its Management rights under Article 4.01, and that the decision not to return the Grievor to the case manager position was taken for sound business reasons. The Employer denies its actions were disciplinary, and put the Union to its onus to demonstrate, *prima facie*, that discipline has occurred. The Board must therefore determine whether the Union has established a *prima facie* case of discipline. *Brown & Beatty* offers the following:

7:2400 Order of Proceeding

The requirement that in disciplinary matters the employer has the burden of proving its case necessarily affects the order in which the evidence of the parties will be presented. Because the employer is required to prove it had just cause for invoking the sanction imposed, the usual procedure is to allow it to adduce its evidence first and, after the union's case has been presented, to call rebuttal evidence. However, in order for an arbitrator to be properly seized of the grievance, should the employer put the union to the strict proof of its case, the union will be required to meet an initial onus of establishing a *prima facie* case of discipline. That is, the union must meet an initial onus to establish the essential ingredients of its complaint. Specifically, if the employer insists, it will be required to prove the existence of the collective agreement, the status of employment, the fact of discharge and perhaps certain other facts relating to the grievance. So, for

example, if an employer claims that, rather than being discharged, an employee has resigned, the union may be required to proceed first. Indeed, although there is some division of opinion on this matter, it has been held that an employee may be obliged to establish a *prima facie* case even if the employer did not raise, or even conceded, those basic ingredients during the grievance procedure.

The Union offers support for its claim that the matter was disciplinary in the evidence that: a) the fact that the Employer accepted Grievance documents (GP #1) presented explicitly as "disciplinary" and processed the matter according to the disciplinary procedures (at Step #3) set out in the Agreement; and b) the Grievor lost his position as Case Manager and overtime remuneration that might have been associated with that position, together with access to a number of promotion opportunities; and c) has been continuously denied meaningful regular work assignment appropriate to his training, education, skill and attainment; and d) that the letter conveying the March 23, 2004 decision (WW #1) has been placed on the Grievor's file to be used against him for as long as he remains and that, according to Employer testimony of Ms. Mullins, it will not be removed from the file except by an Arbitration Board.

The Employer denies the March 23, 2004 decision and related actions were disciplinary. The Employer argues that the decision and related actions were in accord with its Management Rights and taken for sound business reasons. The Employer's conduct was the unavoidable administrative result of the combined circumstances of the 2004 Court decision which found the Grievor liable jointly with the Commission (GP #4 at para. 56) and the Grievor's legitimate resistance to moving to St. John's, where, in the Employer's view, the Grievor could have been more effectively deployed.

In support of its position, the Employer points: a) to the fact that nothing can be inferred from the GP #1 reference to "Step 3" since the Collective Agreement allows Step #3 initiation in various circumstances including those under Article 8.07; b) to the fact that it had decided not to discipline; c) to the absence of any formal marks of discipline either in the letter conveying the March 23, 2004 decision or in any of its derived related actions; and d) to the lack of a corrective element in its intent and to its continued treatment of the Grievor as a valued employee whose work, before and since March 23, 2004, has been of high quality, and who has been efficient and effective in discharging meaningful and responsible assignments he has been given since then.

The Communications Context:

There is evidence of a communication gap between the Parties as to what precisely was happening. Was it explicit or implicit discipline? Was it something else? The extent of the communication gap becomes clear when viewed in the context of some of the facts in evidence.

The testimony of various management witnesses revealed an understandable frustration with the peculiarly complex, unprecedented situation in which the Employer and Mr. Woolfrey found themselves as a result of the 2002 and 2004 Court Decisions. The Board notes Ms. Royle's response at the end of direct examination by Mr. Kelly when asked whether there were opportunities not involving direct client contact.

If you look around, there were other positions in assessment, in dealing with employers, lots of opportunities... Based on my own discussion from the day after the decision in 2004, Brian felt wronged by the court and by the employer, and wanted to be a Case Manager, and wanted to be in the original position.

In his unchallenged testimony, the Grievor described a similar view expressed by Ms. Mullins during a meeting in October 2004 after Mr. Woolfrey's return from sick leave.

I met with Kay up in her office. We discussed a couple of grievances with no solution, and then Kay started to address my grievance... She said, 'It's time to let it go.' I said, 'I'm not letting it go. I am more determined. I'm not willing to let the arbitration go at all.' ...

The Board also notes Ms. Mullins' testimony, when asked by Mr. Oates whether she had heard Ms. Royle testify that she had instructed Ms. Peet to offer Mr. Woolfrey a Shop Steward prior to the 2004 meeting:

I don't know why she didn't... What's more to the point is that she *did not do so*. She knew it was *not* disciplinary (witness' emphases) ... Brian wants this situation fixed, like someone who has lost a leg. What Brian wants is for this not to have happened: for the Court not to have made the decision that it made.

In his summary argument for the Employer, Mr. Kelly struck a related theme:

The Employer can not now be found to have dealt improperly with an employee whom the Court has found guilty of a serious *torte*. The trial Judge was very clear in his finding of fraudulent misrepresentation and bad faith.

From the Grievor's perspective, it feels like he has suffered discipline, or something like it, in a number of ways. He continues to have WW #1 on his file where it has impeded his advancement in some ways at least. The Employer chose to communicate its decision about the

Supreme Court of Canada appeal option without extending the Grievor, an obviously and vitally interested party, the courtesy of discussing it with him. Then the Grievor found he had not received a copy of the 2004 Decision in a timely manner that might have let him appeal to the Supreme Court of Canada privately. In addition, a senior Commission manager, Mr. Eric Bartlett, had conducted the Commission's own investigation, and cleared the Grievor of wrong doing. (Mr. Bartlett also confirmed that nothing new was revealed by the 2002 Court case to change his finding.) The Commission not only found the Grievor's acts free of wrong doing, but acted on the basis of that finding in responding (EB #2) to the complainant, who subsequently sued the Commission and the Grievor. The Commission itself was, in fact, found jointly liable with the Grievor in the 2002 Decision upheld in 2004.

From the Grievor's and the Union's perspective, therefore, it oversimplifies the complex situation for the Employer to regard, and act toward, the Grievor simply as an employee "whom the Court has found guilty of a serious *torte*" when the Employer had found nothing wrong with his action and was itself found jointly liable with the Grievor.

The Board notes Ms. Mullins' analogy, in which she compares the Grievor to someone who wants "this situation fixed, like someone who has lost a leg." It is in some ways a very apt analogy. The Courts' rulings were a fact of life, something they all, somehow, had to deal with.

But the analogy may also oversimplify the facts of this complex situation. The fact is not simply that Mr. Woolfrey had "lost a leg", and should accept the fact that he could no longer do what those with two legs can do, and "let it go." Another analogy might be that Mr. Woolfrey and his bigger contractual partner had jointly "lost" a vital shared organ through the Courts' decisions. Consequently, the bigger contractual partner chose to respond to the shared loss by isolating the smaller partner so as to limit the vulnerabilities all faced. Like all analogies, of course, neither this, nor Ms. Mullins', completely captures the situation the Parties actually faced.

And the communication difficulties were made even more complex by the provisions of the Agreement itself, in particular Article 51. (Contractual issues arising in Article 51 will be considered more directly below, but the Article also figures in the communications context.) On the evidence, the Employer saw its decision as made for sound business reasons arising out of the Decisions of the Courts. The evidence shows, and the Employer argued, that it felt that it was operating within its strongly, broadly worded, Management Rights as set out in Article 4.01:

All functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Union as being retained by the Employer.

But Article 51 clearly directs the Employer how it must act in a situation where there are...

criminal claims, suits or prosecutions arising out of acts performed by an employee in the course of her duties, provided that the Employer is satisfied that the employee performed duties required by the Employer, and/or the employee acted within the scope of her employment.

In such circumstances, the Employer is required to ("shall") "...defend, negotiate or settle..."

Thus when, as in the circumstances set out in the evidence, a contest emerges between an employee who has "performed duties required by the Employer, and/or the employee acted within the scope of her employment" (as confirmed by Mr. Bartlett's finding, on which the Employer acted) and some party bringing a criminal claims, suit or prosecution, Article 51 expresses a limitation on the Management Rights set out in Article 4.01.

In the Union's view, however, the Employer did not actually fulfil its obligation under any of the "defend, negotiate or settle" options offered by Article 51. It started "to defend", but failed to carry through by not appealing to the Supreme Court of Canada, and there is no evidence that it ever undertook to "negotiate or settle." As reviewed further below, the contractual issues raised in Article 51 are not simple, and require review and determination by this Board.

It is in this context of confused and confusing communications problems that the Board must determine the specific questions before it.

Violation of Article 35.01 DISCIPLINE?

The Union pointed to the fact that its April 1, 2004 letter (GP#1) submitting the March 25 Grievance (Consent #2) references the matter as "discipline", and that the grievance proceeded at Article 8, Clause 8.01 Step 3 without objection from the Employer. Article 8.03 reads:

In the case of dismissals and suspensions pending dismissal, the grievance may be submitted in the first instance at Step 3 of Clause 8.01.

The Union also pointed out that WW #1 was sent, in its view, within the five day window stipulated under 35.01, and invited the Board to draw an inference from that fact.

The Board notes that all Management witnesses who testified on the point denied the Employer's action was, or was intended to be, disciplinary. The Employer argued that since the grievance was filed at Step 1, and the reference to Step 3 in GP #1 is not limited to specifically

disciplinary issues, GP #1 is moot at best. Further, since the five day time limit under Article 35.01 relates to suspension or dismissal, and the Grievor was neither suspended nor dismissed, GP #1 is not probative. The Employer also pointed out that Article 8.07, reads:

Employees shall have the right to grieve against suspensions and alleged unfair treatment on promotion and transfer, and such grievances may be submitted in the first instance at Step 3.

Ms. Peet, then Acting Director of Human Resources, denies discipline was intended or imposed. She testified she had accepted the letter (GP #1) from the Union, and that "based on this letter we went straight to a grievance committee meeting." Asked whether that move directly to Step 3 could have happened under the instant Agreement in any circumstances other than disciplinary, Ms. Peet noted that the Employer's response to the grievance was that there was no violation. In her view, it is not possible to conclude that an agreed meeting at Step 3 necessarily shows that the Employer accepted the matter was disciplinary, since there had never been a complaint about missing steps. She also noted that the move to Step 3 might also be possible "if the Regional Manager is involved", but she did not know whether the Regional Manager was actually involved on this occasion.

During testimony for the Employer, Ms. Mullins was asked whether she thought WW#1 was disciplinary in nature. She said:

I do not. It is not disciplinary. It was not intended to be such. If it had been disciplinary it would clearly say so. There would be reference to EAP, and a reference of it being put on the file. There would be a signature portion for the employee to have noted and that he had understood the letter.

The Board also notes the testimony of Ms. Royle who, as Executive Director of Workers Services Compensation and Health Care, was the then senior administrator who had actually met with the Grievor, via teleconference, to tell him of the Employer's decisions and plans in his regard after the 2004 Court of Appeal decision was made known.

On the question of whether the Employer action was disciplinary, Ms. Royle testified that termination was, in fact, discussed by the Employer, ("In 2004 yes, in 2002 no."), and the decision was taken not to dismiss Mr. Woolfrey. She testified, in part, as follows:

I can't recall why, but Wade was not there. We'd offered a representative from St. John's, but he did not want anyone from St. John's. So we started the telecon-

ference by reassuring Brian that his job was safe. He wasn't going to be fired or anything like that. And Brian became very upset as to why I would say that. That we couldn't fire him. Yes, very upset. But he just heard of the outcome the day before, and it's not surprising. I responded – because I felt upset too – that we could fire him, but we weren't going to. But that for reasons, primarily because he was in a position of trust and for the credibility of the organization, that he could not do case management work.

At that point we offered him the position of Business Analyst. With his skills and ability Brian would be qualified and able to do that. However, our thinking on it was that it would be in St. John's. Brian became very upset again, and said he wanted to go back to case management. It was his career and what he loved to do. He did not want to move to St. John's. His family was established in Corner Brook. We ended that by asking What other posts he would propose? Case management or anything that involved injured workers or decision making, was not an option. That's when that call ended. He did not want the Business Analyst job. I felt, and still do, that he has all the skills to do it; but he did not get into it, he was so upset. Case management was his chosen career: what he wanted.

Ms. Royle described her comments during the teleconference as having been intended to be "reassuring" on the security of Mr. Woofrey's job. But the actual communication of that reassurance, according to Ms. Royle's account of it, did not address the separate and broader issue of discipline. Discipline is not limited to firing. Ms. Royle testified that she had responded to the Grievor's comment that "we couldn't fire him" by asserting "that we could fire him, but we weren't going to." This exchange was not likely, in the Board's view, to provide the Grievor reassurance on the more general issue of his vulnerability to other forms of discipline, including job related action.

Ms. Royle testified that, having reassured him his job was safe, she proceeded to tell him ... for reasons, primarily because he was in a position of trust and for the credibility of the organization, that he could not do case management work.

The Board notes that while Ms. Royle's recollection describes her reassurance as focussed on the question of termination, not discipline, Ms. Peet recalls the reassurance as more broadly relating to "discipline." In her view, however, the question of whether removal from Case Management is disciplinary or not is to be answered in terms of what had already happened in 2002. In 2004 the decision, in her view, was to "maintain the *status quo*." In fact, Ms. Peet's March 23, 2004 letter (WW #1) invokes that same 2002 event when it refers to "Judge Leblanc's decision" as the occasion on which "we agreed that you would take on a position that did not

involve client contact and you were reassigned..."

There is persuasive evidence, however, that the uncontested 2002 decision was taken based upon a specific term: *viz.*, the completion of the appeal. The evidence shows that, on the one hand, the Employer made no commitment as to his return to the case management position; and, on the other hand, that Grievor and Union had not resisted his earlier removal for a specific term: *i.e.*, pending completion of the appeal process. By the time of the 2004 meeting that term had expired. The appeal was completed, and the Employer had decided not to appeal to the Supreme Court of Canada. Thus, in the Board's view, "maintain the *status quo*" is not quite accurate as a full description of what was happening in 2004. But is "discipline" more accurate?

The question the Board must determine is whether the Union has proven that this was, *prima facie*, discipline as that term is used in Arbitral Jurisprudence? The Board notes that Brown & Beatty *Canadian Labour Arbitration*, 4th Edition at para. 7:4210 offers the following direction on "The nature of disciplinary sanctions":

In some cases, employers deny that the action they took was disciplinary, in lieu of defending the appropriateness of the penalty imposed. They may admonish and express disapproval to employees in ways that are not to be deemed disciplinary. Negative job evaluations and warnings that are not documented in an employee's record, for example, are usually considered not to be disciplinary in nature.

In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.

Where an employee's behaviour is not culpable and/or the employer's purpose is not to punish, whatever action is taken will generally be characterized as non-disciplinary. On the basis of this definition, arbitrators have ruled that suspensions that required an employee to remain off work on account of his or her health, or pending the resolution of criminal charges, were not disciplinary sanctions. Similarly, transfers and demotions for non-culpable reasons, the revocation of a civil servant's "reliability status", financial levies that were compensatory rather than punitive, shift assignments designed to facilitate closer supervision, and deeming an employee to have quit his or her employment, have all been characterized as non-disciplinary. For the same reason, counselling and warning employees about excessive but innocent absenteeism have generally not been regarded as disciplinary. On the other hand, it has been held that even where an employee falls ill during the course of serving a disciplinary suspension and is in receipt of sick pay benefits for part of the time he or she is off work, that hiatus will not alter the disciplinary character of the employee's suspension.

A disciplinary sanction must at least have the potential to prejudicially affect an employee's situation, although immediate economic loss is not required. Suspensions with pay, which have the essential objective of correcting unacceptable behaviour, for example, would still be regarded as disciplinary even though they do not sanction the employee financially. A reprimand, warning or other notation on a record that can be used against the employee in the future usually will be enough, although some arbitrators have held that merely cautioning an employee that discipline may follow if the situation does not change is not itself a penalty that can be grieved.

On this account, in which this Board concurs, the "essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part..."

On reviewing the evidence and argument it might appear that there was one continuing "behaviour on an employee's part" that the Employer might have been taking steps "to correct". Witnesses spoke of the Grievor's reluctance to "let it go", or get beyond a feeling that he had been "wronged by the court and by the employer". Ms. Royle did declare that the Employer "could fire" Mr. Woolfrey; and other evidence shows the Employer did consider discipline, albeit briefly. Clearly too, Mr. Woolfrey has suffered losses, and continues to have WW #1 on his file impeding career advancement. So there might appear to be evidence that Employer may have been only pretending not discipline him, or perhaps had simply allowed a *de facto* disciplinary regime to develop without taking appropriate measures to control or prevent it.

The Board sympathises with these managers, who were obviously faced with a truly extraordinary set of circumstances. The Board notes management's concern for exposure to liability, and their sense of urgency expressed during the March 18th meeting in their encouraging the Grievor to make a very quick decision about the Business Analyst job in St. John's. The March 18th meeting took place the morning immediately following the 2004 Court of Appeal Decision which was, on all accounts, a shock to all concerned.

The Board also sympathises with Mr. Woolfrey whose personal and work circumstances were clearly compromised in many significant ways and for an extended time. The Board notes the difficulties the Grievor and the Union faced in communicating their varying perceptions of what was happening. The Employer felt discipline was an option, but clearly had taken an early and firm decision not to impose it. Mr. Woolfrey was nonetheless shocked, and felt threatened, by the Employer's view that it "could" discipline him in his circumstances.

The Employer wanted Mr. Woolfrey to get beyond what they saw as his feeling of having been "wronged by the court and by the employer", to "let it go", and to stop wanting "... this not to have happened: this situation fixed, like someone who has lost a leg." As one witness put it, "What Brian wants is ... for the court not to have made the decision that it made."

But there is evidence to show that "What Brian wants" is what, in his and the Union's view, the Collective Agreement requires the Employer to provide. It is undoubtedly true, on the evidence, that what both Mr. Woolfrey and the Employer wanted was "for the Court not to have made the decision that it made." However there is evidence that shows that it was not so much the Courts' decisions, but the Employer's decisions independent of – albeit consequent on – the Courts' decisions, that were the focus of Mr. Woolfrey and the Union. They saw, and continue to see, the "purpose and effect of" (*cf. Brown & Beatty Canadian Labour Arbitration*, 4th Edition at 7:4210) the Employer's actions as disciplinary.

For the Employer, the core issue was to manage a radically complex situation in as compassionate and productive a way as possible. But for the Grievor, the core issue was the unresolved threat and perceived injustice in the Employer's view that it "could discipline." In the Grievor's view, the Employer's conduct, including failure to return him to case management and provide meaningful work or access to promotion, revealed a disciplinary intent and coercive threats that were masked by the language used. The Union claims a continuing disciplinary process was underway that ignored its responsibilities to Mr. Woolfrey under Article 51 and other articles. There was clearly a communication gap. It is not hard to understand how the Grievor and the Union might interpret the Employer's actions as discipline masquerading as *bona fide* damage control.

But the Board has found no persuasive evidence to show either that the Employer actually saw the Grievor's working behaviour as "bad", or was seeking to change his work habits. There is persuasive evidence that the Employer regarded, and treated, Mr. Woolfrey as a valued and capable employee with a clear employment Record. There is no evidence to show that the Employer was, consciously or unconsciously, explicitly or implicitly, seeking to change the Grievor's behaviour. The Employer reviewed its discipline option, arguably occasioned by the 2004 Court decision confirming fraudulent misrepresentation, and chose to reject that option.

However confusing communications and relations became between the Employer, the Grievor and the Union, the Board can find no evidence that the Employer ever actually revised that decision not to discipline or ever actually did discipline the Grievor.

The Board also notes that the Union and the Grievor did not resist the 2002 decision in respect of his case manager position. This suggests the removal decision was seen by the Union and the Grievor in 2002 not as disciplinary but as an administrative accommodation to circumstances in which all found themselves.

Thus, the Board finds that, on the balance of probabilities, the essential characteristic of discipline, "intention to correct bad behaviour on an employee's part..." is not proven. The Union has not established *prima facie* that the Employer's actions were discipline.

Violation of Article 51 CRIMINAL OR LEGAL LIABILITY? This article reads:

The Employer shall defend, negotiate or settle civil and/or criminal claims, suits or prosecutions arising out of acts performed by an employee in the course of her duties, provided that the Employer is satisfied that the employee performed duties required by the Employer, and/or the employee acted within the scope of her employment.

If the situation in which Mr. Woolfrey finds himself is not the result of discipline, is it the result of the Employer's failure to observe the requirements of Article 51?

The Board notes that evidence relating to the findings of Mr. Bartlett's investigation, his confirmation that no new facts had been revealed at the 2002 Court process, and the Employer's actions based on his findings, all establish that "the employee acted within the scope of (his) employment". Therefore the Employer was under the mandatory requirement ("shall") to defend, negotiate or settle civil and/or criminal claims, suits or prosecutions arising out of the Grievor's acts as reviewed by Mr. Bartlett.

Uncontested evidence shows that legal Counsel retained by the Employer also defended the Grievor at the 2002 hearing. The Grievor was provided his own legal advisor to review that 2002 decision, but was again represented at the 2004 appeal by the Employer's lawyer despite having requested his own lawyer. The Employer then unilaterally decided it would not proceed further to appeal the matter to the Supreme Court of Canada, and informed the Grievor of its decision at the March 18, 2004 meeting. The Grievor was not given a copy of the 2004 Decision by the Lawyer who represented him and the Commission, or by the Commission, or by anyone

else, until May, by which time the period in which an appeal might be made had elapsed. (He had been given a copy of the 2002 Decision by Ms. Mullins.)

The Union alleges the Employer violated Article 51 by failing to defend the Grievor in choosing not to appeal to the Supreme Court of Canada and in not negotiating or settling the claims of the complainant, who continued to act in a manner adverse to the Grievor's interests.

The Union did not argue that the Employer had deliberately withheld the 2004 Decision from the Grievor, but did allege that the Employer negligently failed to complete its duty to "defend, negotiate or settle" in failing to secure the Grievor's right privately to defend himself by appeal to the Supreme Court through not providing him a timely copy of the 2004 Decision.

The Employer responded that, in its view, there is no violation of Article 51 since the Employer did defend the Grievor at two levels of court, and was under no contractual obligation to take the matter to the Supreme Court, since nothing in the Collective Agreement requires the Employer to do so. To rule that the Article requires a Supreme Court of Canada appeal would be to read something into the Collective Agreement that is not there, which the Board is barred from doing. The Employer also pointed out that jurisprudence requires the Union, as the one making the claim, to show that its interpretation is superior to the Employer's.

The Employer also argued that, had he wanted one, Mr. Woolfrey was able to secure his own copy of the 2004 decision as it is a public document, and that the Employer immediately provided it once it learned he did not have one.

The Board notes that the Union does not interpret the article to say that the Employer was required to appeal to the Supreme court, but rather that the Employer was required to "defend, negotiate or settle." Ms. Royle testified that she knew of no attempts on the Employer's part to "negotiate or settle" with the complainant.

The Board notes there is no doubt that the Employer did defend the Grievor, as required by Article 51, to the Trial and Appeal Divisions. That defence failed. The evidence is that the decision was then taken not to appeal the matter further to the Supreme Court of Canada. The Board has already noted the communication problems that appear to have arisen from the manner in which that decision was taken and communicated to the Grievor, and from the Grievor's not having been given copy of the 2004 Decision in a timely manner.

But the Board is seized of questions about contractual responsibility, not questions about communication style as reviewed through the Board's leisurely lens of hindsight. Contractually, the Employer chose the defence option under Article 51. That course of action ultimately had the effect of eliminating the "negotiate or settle" options, since the Court Decision in 2002, upheld in 2004, finally decided the matter in favour of the complainant, thus precluding negotiation or other settlement. In these circumstances, once the defence route on which the Employer had set out was exhausted, so too was the "negotiate or settle" option.

The Board notes the Union's claim that Employer acted negligently in not completing its duty to "defend, negotiate or settle" since it failed to secure the Grievor's right privately to appeal to the Supreme Court in not providing him a timely copy of the 2004 Decision. With respect, the Board declines to make any finding on this aspect of the matter. It was not specifically raised in the grievance, and evidence and argument were insufficient to ground a determination as to who, of many possible persons and agencies involved, was properly responsible in this matter.

Thus, given the actual facts of the situation, the Employer had met all its contractual obligations under Article 51. The Board finds that the Employer did not violate Article 51.

Violation of Article 52 **NO DISCRIMINATION** Article 52.01 reads:

The Employer agrees that there shall be no discrimination with respect to any employee in the matter of hiring, wage rates, training, upgrading, promotion, transfer, layoff, recall, discipline, classification, discharge, assignment of work or otherwise by reason of age, race, religion, religious creed, political opinion, colour or ethnic, national or social origin, gender, sexual orientation, marital status, physical disability, mental disability, nor by reason of her membership or activity in the Union.

The Union alleges the Employer discriminated against the Grievor.

The Board notes that Article 52 specifies a defined schedule of grounds on which the Collective Agreement prohibits discrimination, and can find no evidence to show that the Grievor has suffered discrimination based on any of those grounds.

The Board notes that the Union also argued, more broadly, that the Employer's behaviour toward the Grievor was discriminatory, as demonstrated by the different way in which it treated Ms. Dale Kavanagh, the Case Manager involved in the 2003 *Mandavia* case.

The Board has considered *Mandavia*. The Board notes that, while there are similarities, there are also differences in these cases such that it the Board makes no finding of discriminatory

behaviour based on the evidence of *Mandavia*.

Violation of Article 53 SEXUAL AND PERSONAL HARASSMENT Article 53.01*(b) reads:

For the purpose of this Article, harassment is defined as:

(i) Harassment based on race, religion, religious creed, sex, marital status, physical or mental disability, political opinion, colour, or ethnic, national or social origin, is any behaviour that is directed at, or is offensive to a member, endangers a member's job, or academic standing, undermines performance or threatens the economic livelihood of the member.

The Union alleges that the Employer harassed the Grievor in that he was subjected to intrusive and threatening phone calls at home during sick leave, and that his doctor had received a request for medical information which threatened termination of his sick leave benefits.

As noted above, the unprecedented complexity and urgency of the situation created by the 2004 Appeal Decision made communications very difficult, and also had other effects as shown in the evidence. Mr. Woolfrey found his sugar levels affected, and went on sick leave under his Doctor's care on March 19, the day following the meeting with Ms. Royle and Ms. Peet. After his return from sick leave, the Grievor had some candid conversations with Ms. Mullins, elements of which he interpreted as threatening. While the Board recognises the Grievor's understandable sensitivity to intrusion in his circumstances and condition, the Board is not persuaded on the evidence that the Employer's actions violated the Collective Agreement by harassing the Grievor.

The Board also notes Article 53 also sets out a schedule of grounds on which personal harassment is prohibited, and finds no evidence of personal harassment on any of those grounds.

Other Applicable Articles: Violation of Article 8.07?

Article 8.07 reads:

Employees shall have the right to grieve against suspensions and alleged unfair treatment on promotion and transfer, and such grievances may be submitted in the first instance at Step 3.

The Board notes that Ms. Peet pointed to Article 8.07 as one possible non-disciplinary context for her agreeing to proceed to Step # 3 in response to the Union's request (GP #3). Ms. Peet also explained the March 23, 2004 decision that "the Commission will not be returning you to your *position*..." (emphasis added) arose in the context of "Judge LeBlanc's decision" in 2002 when "... we agreed that you would take on a *position* (emphasis added) that did not involve client contact and you were reassigned...." (WW #1) The definition of transfer is as follows:

2.01 For the purpose of this Agreement ...

(dd) "transfer" means the movement of an employee from one *position* to another which does not result in promotion or a demotion. (emphasis added)

Thus, based on all the evidence reviewed above and on the Employer's view expressed in GP # 3 and WW #1, the Board finds that the events in 2002 and 2004 constituted a "transfer" in that it was "movement ... from one position to another." The Grievance itself is expressly triggered by the Employer's "March 23, 2004 decision" and explicitly refers to Ms. "Glenda Peet, Dir. H.R.", whose letter of that date (WW #1) conveyed that "decision."

The Board notes that the Union vigorously argued that this series of events must come to an end. The Union opened its argument by pointing out that "It has to end somewhere." In the Union's view, the ten year period of disruption the Grievor has suffered from 1997 on – through the temporary isolation that followed the Trial decision in 2002, and then imposed without term after the Appeal decision in 2004, and on to an Arbitration process in 2006-7 – is unfair in the circumstances established by the evidence.

Based on the evidence reviewed above on the balance of probabilities, the Board concurs. The Board notes, in particular, the March 23, 2004 letter (WW #1) placed on the Grievor's file with the effect, as Ms Mullins' and other evidence made clear, of perpetually screening him out of consideration for client-service related positions or promotions for which he applied.

The Board notes that Ms Peet testified:

The letter would not be used in competition. We don't look through the personal file in a competition. In a competition they would not go back to the personal file. But the decision from the court would be used. Client contact exclusion would need to be considered. That would be a factor in that competition.

The letter (WW #1) clearly invokes "Judge LeBlanc's decision" to which it explicitly refers, and the fact that the "Court of Appeal recently upheld" it, as the context for the unconditional refusal: "The Commission will not be returning you to the case manager position." The Board also notes that Ms. Peet's testimony suggested, in effect, that the decision was perhaps not as unconditional as it appeared when, on being asked whether Mr. Woolfrey would be eligible for consideration for client contact jobs she answered "*Right now* (emphasis added) he would not be, based on the court case and the appeal." Also, when describing to the Employer's position on

whether the decision not to return the Grievor to case management was temporary or permanent at the time of the teleconference on March 18, (five days before sending WW #1), Ms. Peet said:

... we decided to maintain the *status quo*... It was at that point in time what we felt had to be done; not that it was a permanent decision. This was going to be a longer term decision.

But Ms. Mullins made it clear that WW #1, including its references to the Trial and Appeal Decisions and its implications for return to his case manager position or other client-related jobs, (*cf.* BW #1, also copied to the Grievor's "Personal File") was not subject to any time limit, and could only be removed by decision of an Arbitration Board.

The Board finds the letter (WW #1) was, and continues in itself and in its effects to be, unfair. It contemplates no changes in the Grievor's or other circumstances, or even the simple effect of the passage of time.

The Board also notes that the evidence reviewed above shows the Grievor's use of sick leave from March to September 2004 was, on the balance of probabilities, due to pressures and circumstances associated with the "unfairness" found above.

Remedies and Damages?

The Board notes that the Union sought aggravated damages for the Grievor's experience as set out in the evidence, argument, and findings above. The Board has carefully considered this issue in light of the evidence and the Arbitral Jurisprudence the Parties provided.

The Board notes that Brown & Beatty Canadian Labour Arbitration, 4th Edition reads at 2:1410 **Damages**

Unless the agreement provides otherwise, in assessing damages arbitrators have followed and utilized the same common law principles that are applied in breach of contract cases. Thus, the basic purpose of an award of damages is to put the aggrieved party in the same position he or she would have been in had there been no breach of the collective agreement. This general principle is subject to three basic qualifying factors. In the first place, the loss claimed must not be too remote, that is, it must be "reasonably foreseeable". Secondly, the aggrieved party must act reasonably to mitigate his loss. Finally, the loss or damages must be certain and not speculative. As expressed by one arbitrator:

Stated in the abstract, the relevant principle is quite clear. The purpose of damages for breach of contract is not to punish but to compensate, and the function of compensation is to place the aggrieved party in a monetary position as near as possible to that in which he would have been had the contract been performed.

Accordingly, arbitrators have generally held that they do not have the authority to assess punitive damages. As was stated in one award:

It is desirable at this point to point up a distinction between the imposition of penalties and the award of damages. It is a distinction taken, and in this Board's view, properly taken, in the award in *U.A.W. & C.C.M. (Re)* [(1951), 3 L.A.C. 837 (Laskin)]. This board, sitting as a civil tribunal to resolve contract interpretation disputes, has no punitive function but is charged only with redressing private wrongs arising from breach of obligations assumed as a result of negotiation. The board's remedial authority, if it has any, must be addressed to the vindication of violated rights by putting the innocent party, so far as can reasonably be done, in the position in which he or it would be if the particular rights had not been violated. The redress, if any can be given, must be suited to or measured by the wrong done. A board of arbitration is not, however, a criminal court. True enough, it may play a role in passing upon or modifying a penalty imposed by an employer as a matter of discipline, but in so doing it is merely assessing the permissible limits of employer action taken under the ... agreement and not fashioning a penalty to reward an innocent party.

More recently, however, in light of the Supreme Court of Canada decision in *Vorvis*, some arbitrators have awarded punitive and aggravated damages in the rare circumstance where they are deemed appropriate. As well, while arbitrators have accepted the general common law rule that damages should be restricted to remedying monetary loss and ought not to be awarded for hurt feelings or loss of reputation which may flow, for example, from an unjust discharge, damages for the tortious infliction of mental suffering have been awarded against an employer...Where there has been a failure to accommodate a disabled employee, damages should be awarded only where the employer acted in a "particularly egregious, outrageous or malicious manner", one arbitrator has stated.

The Board recognises that the Grievor has suffered and has acted with personal dignity and professional courage in the face of the limitations he has faced. The Board has found there an unfairness in WW #1. The Board therefore recognises certain specific losses are to be addressed.

The Board also recognises the Employer too was caught in unexpected, exceedingly complex circumstances to which it responded, despite awkward communications, by trying to accommodate its own and the Grievor's mutual needs with understanding, compassion, and sustained genuine respect.

The Board is not persuaded therefore that the "rare" or "particularly egregious, outrageous or malicious" conditions for aggravated damages, as set out in the Arbitral Jurisprudence and in Brown & Beatty above, obtain in the instant matter.

The Board's objective in its decision is, as far as is possible, to make the Grievor whole in light of the facts found above, and to establish conditions that will enable the Parties to move forward with this difficult situation now behind them based on the mutual respect and productive, professional relationship the Board has been privileged to observe throughout the entire hearing. The remedies set out below flow from the finding of unfair transfer made above.

The Board finds specific damages are to be established and paid on the principles established in Brown & Beatty *Canadian Labour Arbitration*, 4th Edition para. 2:1410:

.... the basic purpose of an award of damages is to put the aggrieved party in the same position he or she would have been in had there been no breach of the collective agreement. This general principle is subject to three basic qualifying factors. In the first place, the loss claimed must not be too remote, that is, it must be "reasonably foreseeable". Secondly, the aggrieved party must act reasonably to mitigate his loss. Finally, the loss or damages must be certain and not speculative...

The Board notes some evidence of unpaid overtime benefits for which the Grievor would have been eligible under the Collective Agreement had he been returned to the Case Manager position in March 2004. The Parties are directed to examine the facts, and that any such unpaid overtime benefits relating to the Case manager position be paid.

The Board has found that the sick leave entitlement used by the Grievor between March and September, 2004 was reasonably attributable to his not being returned to case Management.

Finally, the Board is also aware from the evidence that there may be damages payable arising from his having applied for positions to which he had contractual access under the Collective Agreement but from which he was improperly screened out by virtue of the Employer's decision which the Board has found to have been unfair.

DECISION

Therefore, in light of the foregoing considerations the Board finds that

THE GRIEVANCE IS SUSTAINED. THE BOARD ORDERS THAT:

THE MARCH 23, 2004 LETTER (WW #1) IS TO BE REMOVED FROM THE GRIEVOR'S PERSONAL FILE AND NO LONGER USED AGAINST HIM.

THE GRIEVOR IS TO BE RETURNED TO THE POSITION OF CASE MANAGER, EFFECTIVE MARCH 23, 2004.

DAMAGES ARE TO BE PAID ON THE PRINCIPLES OUTLINED ABOVE RELATING TO:

any unpaid overtime benefits for which the Grievor would have been eligible;

return of sick leave entitlement used in the period March - September 2004;

any loss resulting from the unfairness found above that is attributable to the Grievor having been screened out of positions to which he was entitled under the Collective Agreement.

The quanta of the above damages are to be set in negotiation between the Parties as agreed at the outset of this hearing. Should the Parties fail to reach agreement within (60) calendar days, any issues of quantum will be referred to the Board for determination, as was agreed at the outset of this hearing.

Respectfully submitted as the decision of the Board:

for the Union:

Mr. Bob Diamond

for the Employer:

Mr. Denis Mahoney, LLB

Chair:

Mr. John A. Scott

June 26, 2007