# ARBITRATION AWARD

BETWEEN:

COUNCIL OF ATLANTIC TELECOMMUNICATION UNIONS (CATU)
(CEP LOCAL 410)
(hereinafter called the "Union")

AND:

ALIANT TELECOM INC.
(hereinafter called the "Employer"
or the "Company")

GRIEVOR: Barbara Ivany

COUNSEL: For the Union

Dana K. Lenehan, Q.C.

For the Employer

Michelle A. Willette

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on June 22, 23, and 24, September 15, 16, 17, and 18, and October 5, 2009. The parties agreed as follows:

1. The Arbitrator was acceptable.

2. There were no preliminary objections going to jurisdiction to hear the grievance.

3. The grievance procedure was properly followed or any requirements waived.

4. The Arbitrator would remain seized of the matter following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

The following exhibits were entered at the hearing:

Consent 1 - Collective Agreement between Aliant Telecom Inc. and Council of Atlantic Telecommunication Unions (CATU) effective September 20, 2004 to December 31, 2007

Consent 2 - Letter dated August 24, 2006 from Lori Walton, HR Specialist, Benefits, for the Employer to Barbara Ivany

Consent 3 - Grievance Form dated September 25, 2006

Consent 4 - Dr. V.R. Carrigan Medical Chart for Barbara Ivany

Consent 4A - Medical Chart organized chronologically

Consent 5 - Newfoundland and Labrador Medical Care Plan medical claims history for Barbara Ivany

MS - 1 Email dated June 26, 2002 from Mavis Stuckless to Judy Wheeler

MS - 2 Email dated May 24, 2002 from Mavis Stuckless to Dr. Oscar Howell

MS - 3 Email dated May 24, 2002 from Mavis Stuckless to Dr. Oscar Howell

MS - 4 Hand written note dated June 19, 2002 of Lila Foley

MS - 5 Medical note dated June 22, 2002 for Barbara Ivany by Dr. Carrigan

MS - 6 Email from Mavis Stuckless to Valerie Hodder

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| MS - 7 | Letter dated August 15, 2002 from Lila Foley, Operator Services Manager to Barbara Ivany |
| MS - 8 | Daily statistics reports on operators for Barbara Ivany |
| MS - 9 | Email dated September 25, 2002 re approval of unpaid leave of absence request for Barbara Ivany |
| MS - 10 | Email dated November 28, 2002 from Sandra Dawe to Janice White |
| MS - 11 | Email dated February 18, 2003 from Valerie Hodder to Mavis Stuckless with attached emails |
| MS - 12 | Barbara Ivany work station review |
| MS - 13 | Invoice for work station review and equipment, March, 2003 |
| MS - 14 | Email dated March 13, 2003 from Valerie Hodder to Mavis Stuckless |
| MS - 15 | Letter dated March 18, 2003 from Mavis Stuckless to Barbara Ivany |
| MS - 16 | Letter dated October 27, 2003 from Mavis Stuckless to Barbara Ivany |
| MS - 17 | Letter dated November 11, 2003 from Charles Shewfelt, National Representative, CEP to Mavis Stuckless |
| MS - 18 | Email dated February 4, 2004 from Sandra Dawe to Mavis Stuckless with attached emails |
| MS - 19 | Grievance form, grievance No. T-02-04, incident date August 15, 2002 |
| ES - 1 | Email dated July 20, 2005 from Dr. Oscar Howell to Elizabeth Spinney and attached emails |
| ES - 2 | Minutes of meeting of Placement of Restricted Employees Committee, January 31, 2006 |
| ES - 3 | Minutes of meeting of Placement of Restricted Employees Committee, May 16, 2006 |
| ES - 4 | Email dated July 13, 2006 from Elizabeth Spinney to Penney Fawcett with attached list of employees not on leave, but not at work |

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| ES - 5 | Letters dated August 24, 2006 to two employees from Lori Walton, HR Specialist, Benefits, re termination notice |
| ES - 6 | Bell Aliant Personal Leave of Absence Policy, updated December, 2008 |
| ES - 7 | Email dated September 21, 2006 from Elizabeth Spinney to Alex Boucher |
| ES - 8 | Email dated September 26, 2006 from Elizabeth Spinney to Patrick O'Brien and Helen Brennan |
| ES - 9 | Email dated October 4, 2006 from Elizabeth Spinney to Alex Boucher |
| ES - 10 | Email dated October 10, 2006 from Elizabeth Spinney to Alex Boucher |
| ES - 11 | Email dated October 13, 2006 from Elizabeth Spinney to Alex Boucher |
| ES - 12 | Letter dated November 10, 2006 from Patrick O'Brien, Director of Labour Relations and Recruiting to Mike Williams, CEP, Local 410 |
| ES - 13 | Email dated June 3, 2009 from Alex Boucher to Dr. Matthew Burnstein with attached emails |
| ES - 14 | Minutes of meeting of Placement of Restricted Employees Committee, February 12, 2007, with attached list of employees |
| ES - 15 | Emails dated September 28, 2007 from Sandra Dawe to Elizabeth Spinney and others |
| ES - 16 | Letter dated October 2, 2007 from Dr. Matthew Burnstein to Sandra Dawe and Elizabeth Spinney |
| ES - 17 | Letter dated October 26, 2007 from Patrick O'Brien, Director of Labour Relations and Recruiting to Phil Briffett, CEP, Local 410 |
| SD - 1 | Letter dated December 16, 2002 from Dave Curnew, Manager Industrial Relations to Tom Retieffe, CEP, Local 410 with response at Step 2 to grievance T-02-04 |
| SD - 2 | Email dated September 18, 2006 from Susan Holloway to Sandra Dawe re payments towards health and dental plans for Barbara Ivany |
| MB - 1 | Curriculum Vitae of Dr. Matthew D. Burnstein |
| MB - 2 | Medical chart on Barbara Ivany from Health and Wellness Department |

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| MB - 3 | Independent Medical Evaluation report on Barbara Ivany dated December 8, 2006 by Dr. Oscar Howell |
| CS - 1 | Collective Agreement between Newtel Communications, Newtel Mobility and CEP, Local 410, effective August 26, 1999 to December 31, 2001, excerpts |
| MW - 1 | Letter dated November 9, 2004 from Dave Curnew, Manager of Industrial Relations to Tom Retieffe, CEP, Local 410 re grievances settled or withdrawn |
| MW - 2 | Grievance form dated December 15, 2006 |
| MW - 3 | Grievance form dated October 11, 2007 |

**Nature of the Grievance**

The Union grieves the termination of Barbara Ivany from her employment on August 24, 2006. The Union claims that the Employer did not comply with its duty to accommodate the Grievor to the point of undue hardship. The Employer submits that it complied with its duty to accommodate the Grievor, but the Grievor failed to cooperate and failed to return to work following expiration of an unpaid leave of absence. The Union requested reinstatement of the Grievor with compensation, and an order directing the Employer to take steps to accommodate the Grievor. The Employer requested that the grievance be denied.

**Preliminary Issue of Evidence**

The parties raised an issue of admissibility of evidence at the start of the arbitration hearing. The Arbitrator heard submissions and made a ruling with respect to the procedure at the hearing. The issue concerned communications between the parties, and documents created after the date of the grievance, regarding the Employer's duty to accommodate the Grievor. The Employer claimed that the evidence was privileged on the basis of communications in the grievance procedure and the privilege that applies to settlement negotiations. In making the ruling on the reception of evidence at the hearing, I referred to the privilege that applies to communications in the grievance procedure, and the exceptions to the privilege, as noted in the arbitral jurisprudence. I advised the parties that it would be necessary to review the documents in dispute, hear evidence of the surrounding

circumstances, and then make a ruling on the issue of privilege. Therefore, the evidence was received at the hearing, subject to a ruling in the Award with respect to whether or not the disputed evidence would be considered by the Arbitrator. This issue will be addressed later in the Award.

**Collective Agreement**

The relevant Articles of the Collective Agreement are as follows:

> Article 14 Discipline
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> 14.01 No employee will be subjected to disciplinary action without just and sufficient cause.
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> Article 28 Benefits, Sickness Absence & Placement of Restricted Employees
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> Sickness Absence
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> . . .
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> 28.12 It is agreed that the rehabilitation of sick and injured employees is a priority. The Company and the Council will participate in programs that will enable early and safe return to work. Such programs may be in conjunction with the applicable Workers' Compensation Program, Insurance Carrier or other appropriate agencies. The rehabilitation plan or modified work arrangements will be based on the employee's functional capability, input from the employee's existing health care providers, and other health care professionals as deemed necessary by the Company.
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> . . .
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> 28.18 Employees with insufficient net credited service to receive sickness benefits, and employees who have exhausted their SDB entitlement and have not been approved for LTD, may be granted a leave of absence without pay for a period not exceeding one year. The employee will not accrue service or seniority during the period of leave beyond thirty (30) days. If the employee is able to return to work prior to the expiry of their leave, they will be entitled to apply for SDB for a different illness after they have been back at work for thirty (30) consecutive calendar days, or for the same illness after they have been back at work for ninety (90) consecutive calendar days.
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> . . .
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> Permanent Placement of Restricted Employees
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> 28.20 The purpose of this Article is to permanently place regular employees who are restricted from performing their normal role. Employees considered under this Article must be certified by the Company doctor in consultation

with the employee's physician to be permanently restricted from performing the core functions of their current classification for medical reasons.

a) No employee will be displaced by the placement of a restricted employee and under no circumstance is the Company obligated to create a job. In addition, no employee will be placed without Council consultation and approval. The Company agrees to advise the Council should there be a requirement to subsequently move the employee to another position.

b) Employees who qualify, may be placed in a vacant position without a job posting, provided they have the ability to perform the functions of the job. If training is required, it will not normally exceed six (6) months unless mutually agreed to by the Company and the Council. Employees placed through this process will have up to a six (6) month trial period prior to permanent placement.

. . .

f) The Company and the Council will make best efforts to place a restricted employee, but cannot guarantee placement.

g) Placement of an employee under this Article will be detailed in writing, and signed by the Company, Council and the employee, before the employee is placed.

**Evidence**

The witnesses called by the Company were Mavis Stuckless, manager of operator services, Elizabeth Spinney, manager of labour relations and recruitment, Sandra Dawe, labour relations consultant and Dr. Matthew D. Burnstein, medical doctor. The witnesses called by the Union were Charles Shewfelt, Union national representative, Dr. V. Ronald Carrigan, medical doctor, Barbara Ivany, the Grievor and Mike Williams, chief steward, CEP Local 410.

The Grievor, Barbara Ivany, was terminated from her employment by letter from the Company dated August 24, 2006, which stated, in part, as follows:

> You had been on a Personal Leave of Absence (LOA) from September 10th, 2002 to October 7th, 2002. However, you failed to return to work as required following the expiration of that leave. As a result, your employment was terminated effective September 10th, 2002. I am writing at this time to confirm that termination.

At the arbitration hearing, the Employer stated that it considered the effective date of termination to be August 24, 2006, and not the date stated in the letter. The Employer considered the Grievor to be absent on unpaid leave up to the date of termination.

The Grievor is 50 years of age, single and has three children. She commenced work with the Employer in 1986. She held the position of operator at the Allandale Road Building in St. John's. She also worked in the message exchange at the Fort William Building in St. John's for about 5 years, ending in 1992. Her supervisor at the Allandale Road Building was Mavis Stuckless. For a period of time, the operator services manager position was shared between Mavis Stuckless and Lila Foley.

Barbara Ivany testified that she has had pain in her neck and shoulders since about 1995. She was absent from work on short term sickness benefits from April, 2001 to April, 2002. She applied for LTD benefits, but her application was denied. In April, 2002 she was medically cleared to return to work on an easeback program. Her hours of work per day started at 4 hours and increased to full time over a 6 week period, commencing on April 9 and ending on May 17, 2002.

The easeback program was set up by the Employer under the direction of its Health and Wellness Department. At that time the chief medical officer for the Company was Dr. Oscar Howell, who had an office in the Fort William Building. The other staff at the Health and Wellness Department, at the relevant times, included Val Hodder, nurse, and Alex Boucher, team lead. Dr. Howell left his position with the Company in May, 2006. The position was vacant until December 2006 when Dr. Matthew Burnstein was hired as the chief medical officer.

The Grievor testified that in the Spring of 2002, after her short term sickness benefits expired, she felt that she had to return to work for financial reasons. She attended the easeback program, which lasted for 12 weeks. During that period, she had a lot of pain in her neck, hip and shoulders. She had to stretch and move around once or twice per hour. In order to move around, she unplugged her headset and moved away from her operator position.

Mavis Stuckless testified that she was concerned about the Grievor's health and her excessive amount of break time. At Ms. Stuckless' request, Dr. Howell conducted a medical review. Dr. Howell recommended a reduction in the Grievor's hours of work to half time, gradually increasing again to full time. Ms. Stuckless testified that on June 19, 2002, she and Lila Foley met with the

Grievor about her frequent breaks. The Grievor saw Dr. Howell again and he advised her to take time off work. Her family doctor, Dr. V. Ronald Carrigan, recommended that she return to work on a schedule of day shifts only. She returned on July 22, 2002, but was still having pain and taking frequent breaks. The Employer monitored the amount of time that the Grievor's headset was plugged into her operator position from June 11 to July 31, 2002. The records indicated that she spent approximately 5 to 6 hours per day in position, less than the required 7 hours per day. The Employer decided that the Grievor would be paid only for the hours she actually worked in position. The Employer sent the Grievor a letter dated August 15, 2002, which stated as follows:

> As you are aware your Sickness Disability Benefits have been exhausted and you have been denied LTD. Aliant Telecom has continued to assist you to work with your medical problems by allowing you to work day shifts.
>
> Since June 10, 2002 you have received compensation for full time hours. However, you are not working full time hours. Therefore, effective today we will only pay hours actually worked, ie you will not receive compensation for break times over and above those covered under the collective agreement. We have no intention of claiming reimbursement for any hours not worked up to and including the above effective date.

Sandra Dawe testified that she was a labour relations consultant for the Employer in 2002. Mavis Stuckless told her that the Grievor was taking frequent breaks and leaving her position, and this was making it difficult for the Company to meet the regulated performance standards. Ms. Dawe said that she drafted the August 15, 2002 letter for the signature of Lila Foley. Ms. Dawe said the letter was based on the fact there was no medical evidence to support the Grievor's frequent breaks.

The Union filed a grievance, number T-02-04, alleging that the effect of the letter was to arbitrarily reclassify the Grievor to part time. That grievance is not before the Arbitrator, but evidence about the grievance is part of the factual background. The Grievor testified that she attended a grievance meeting in December, 2002. The Employer's reply to grievance T-02-04, dated December 16, 2002, stated that it would try to obtain a placement for the Grievor in the clerical unit, and if the Grievor, due to illness, could not work full time hours, she would be paid only for the hours actually worked.

Ms. Dawe said that the Employer attempted to place the Grievor in a clerical unit. Ms. Dawe sent an email to Janice White, HR consultant on November 28, 2002 asking that she look for a clerical

placement. Ms. Dawe testified that it was difficult to find a clerical job because the Company had reduced the total number of clerical jobs.

The Grievor testified that, after the grievance meeting in December, 2002, she requested a meeting with Sharon Duggan, vice president of human resources. At the time, the Grievor did not believe that anything was being done for her. The Grievor testified that Ms. Duggan told her that the Company would do what it could to find a suitable position for her.

The Employer's records indicate that the Grievor was on personal unpaid leave of absence effective from September 10, 2002, with an expected return date of December 16, 2002. In early 2003, following consultation with the Health and Wellness Department, the Employer proposed to the Grievor that she accept a position in the SOST Centre at the Allandale Road Building. The position was described by the Employer as a clerical type position in operator services. The duties of the position included arranging hospital patient telephone service, audio conferencing, and marine ship to shore calls. The position required the Grievor to use a headset connected to her work station. The Employer arranged for a work station review by an occupational therapist. The Grievor met with the occupational therapist for about one hour at the SOST Centre on February 20, 2003. She was asked about various changes to the work station. She did not tell the occupational therapist that she did not believe the position at the SOST Centre was suitable. The Grievor testified that after she left the meeting at the SOST Centre, she decided she could not tolerate the position on a daily basis. She did not believe the position allowed adequate flexibility for her to move around or take a break. She did not consider the position to be a clerical position. She had previously worked in the SOST Centre, and she found the work demanding. She did not immediately communicate her decision to the Employer.

Ms. Stuckless testified that, as a result of the work station review, the occupational therapist made recommendations for changes to the work station. The changes included use of an articulating keyboard tray which was height adjustable, increasing the height of the desk and providing an incline board. The Company purchased equipment and made the recommended changes to the work station. Dr. Howell recommended an easeback program, with a gradual return to full time hours over 5 weeks, and maintenance of the same shift for the first 90 days. Ms. Stuckless sent a letter to the Grievor dated March 18, 2003, outlining the return to work conditions. The letter stated as follows:

> This letter is to confirm the conditions around your return to work program which we have discussed verbally. The Company is accommodating you in a clerical type function in the SOST Centre at 50 Allandale Road. Your start date is Monday, March 24, 2003; the accommodation allows you to work day shifts only for the first three months, after which you will be expected to work the regularly scheduled shifts similar to your co-workers.
>
> Here is the easeback program which has been developed by our Health and Wellness Group:
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> Week 1 - 4 hours per day
> Week 2 - 4 hours per day
> Week 3 - 6 hours per day
> Week 4 - 6 hours per day
> Week 5 - Full time
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> Your duties in the SOST Centre will be answering the main switchboard number, handling marine and ship to shore calls, time and charges calls from hotels, and duties associated with hospital patient telephone service.
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> Also, in keeping with our practice before you went off work earlier this year, we will only pay hours actually worked, ie you will not receive compensation for break times over and above those covered under the collective agreement.

Ms. Stuckless said that she discussed the contents of the letter with the Grievor on or about the same day she sent the letter. Ms. Stuckless said the Grievor did not report to work on March 24, 2003, the scheduled start date. She had no further conversation with the Grievor.

Barbara Ivany testified that after she received the letter, she told Ms. Stuckless and Ms. Dawe that she was unable to perform the duties in the SOST Centre. She asked Ms. Dawe for another job that she could tolerate. Sandra Dawe testified that the Grievor told her in a telephone conversation that she was not coming back to work.

Sandra Dawe testified that she prepared a letter from the Company to the Grievor dated October 27, 2003. The letter was stated to be a follow-up to the March 18, 2003 letter, and a conversation in which the Grievor indicated that she was not returning to work in the position offered. The letter

stated that the Company considered the Grievor to be absent from work on an unpaid leave of absence. The letter repeated the offer of a position in the SOST Centre. The letter, signed by Mavis Stuckless. included the following statement:

> Please contact me immediately to inform me of your intentions. If I don't hear from you by November 7, 2003, I am by this letter informing you that your leave of absence will be terminated effective the same date. In the event that you do not return to work or are unable to provide new medical information, we will consider you to have resigned from the Company and we will proceed with filling your position.

Ms. Ivany testified that after she received the October 27, 2003 letter, she called Ms. Stuckless and told her she was unable to function in the SOST Centre position. She then contacted Charles Shewfelt, National Representative for CEP. She understood that the matter would be handled by the Union, and that the Union and the Company would try to find a position for her that she could tolerate. She expected that her unpaid leave of absence would continue indefinitely until a position was found for her.

Charles Shewfelt testified that the Union was not involved with the attempted placement of the Grievor in a position at the SOST Centre in March, 2003. In response to the Company's letter to the Grievor dated October 27, 2003, he sent a letter to Ms. Stuckless dated November 11, 2003. The letter confirmed their discussion and advised that the Grievor had a chronic illness and had a medical appointment with a specialist in January, 2004. The letter stated that the parties would be in a better position to discuss the conditions of a return to work after the Grievor's medical appointment. The letter advised that the Union would grieve any termination of the Grievor's leave of absence. The letter also asked the Employer not to communicate directly with the Grievor without Union representation.

Sandra Dawe testified that it was unusual to have a request from the Union that the Employer not communicate directly with an employee. After that letter, any request by the Company for updated information about the Grievor was made to a Union representative. Ms. Dawe testified that she assisted the Employer's bargaining team during collective bargaining in 2004. The bargaining unit members went on strike from April, 2004 to September, 2004. Upon settlement of the strike, the parties agreed to the terms of the 2004 to 2008 Collective Agreement. Mr. Shewfelt testified that

the Grievor gave the Union a note from Dr. Carrigan dated May 14, 2004 for the purpose of receiving strike pay and being excused from picket duty on medical grounds. He said the Grievor told him in 2004 that she was consulting with medical specialists, and there was no change in her condition. Ms. Ivany testified that she did not recall any further discussion with the Employer about her return to work from late 2003 to the Summer of 2006.

Pursuant to the Collective Agreement, the Union and the Company formed a Placement of Restricted Employees Committee in 2005. Members of the committee included Charles Shewfelt, Union representative and Elizabeth Spinney, manager of labour relations and recruitment. A list entitled "Employees requiring permanent placement" was prepared for the purpose of discussion by the Committee. Barbara Ivany's name was not included on the list. Mr. Shewfelt informed Ms. Spinney by email on July 14, 2005 that Ms. Ivany was an operator off work without LTD and that she should be included for review by the committee. Ms. Spinney then requested an updated report about the Grievor from Dr. Howell. He replied that the Health and Wellness team worked extensively with Ms. Ivany from 2001 to 2003, but he had no current knowledge of her situation. The minutes of the Placement of Restricted Employees Committee meeting, dated January 31, 2006 include the following entry with respect to the Grievor:

> Barbara Ivany: An operator who has exhausted her benefits. This employee should either be back at work on an approved Leave of Absence or terminated. Action: Chuck Shewfelt will facilitate an FCE with this employee through Dr. Howell's office.

Mr. Shewfelt testified that after the January 31, 2006 meeting he did not immediately make contact with the Grievor. Her situation was discussed again at the committee meeting on May 16, 2006. The minutes for that meeting state as follows:

> Barbara Ivany: Dr. Howell has still had no contact from this employee. Chuck Shewfelt will contact her and advise she needs to contact AH&W.

Ms. Spinney explained that the committee could override the provisions of the Collective Agreement, if necessary, to place a restricted employee in a position. Mr. Shewfelt testified that soon after the May 16, 2006 meeting, he called the Grievor and asked her to contact the Health and Wellness Department. Barbara Ivany testified that in June, 2006, Mr. Shewfelt asked her to call Dr.

Howell and set up an appointment for an evaluation. She called Dr. Howell's office twice. On the fist call she was told they would get back to her with an appointment. She called a second time to check on the appointment. She called Dr. Howell's office after she received the letter of termination in August, 2006. She was uncertain if she called Dr. Howell's office before she received the letter of termination.

Ms. Spinney testified that as of July, 2006, the Employer had not received an updated medical report for the Grievor. Ms. Spinney sent an email to the Union, dated July 12, 2006, with an attached list of employees who were described as "not on leave but not at work". The email stated that the employees on the list would be contacted and given the option of returning to work or resigning. Barbara Ivany was included on the list. Ms. Spinney testified that she made the decision to send the Grievor the letter of termination dated August 24, 2006. Ms. Spinney testified that the Grievor was terminated effective from the date she commenced her leave of absence. Ms. Spinney said that the Grievor was terminated because there was no indication that she could return to work. The Employer had attempted to accommodate the Grievor in 2003 and there was no information as to whether the Grievor needed accommodation in 2006. The Grievor was not contacted and given the option of returning to work or resigning, because two previous attempts to have the Grievor return to work had been unsuccessful.

Mr. Shewfelt testified that the Union did not expect the Employer to send a letter of termination to the Grievor in August, 2006. The Employer's actions were inconsistent with the Union's expectation, which was that the Employer would review the Independent Medical Evaluation report. The Union discussed the matter with the Employer, and then filed a grievance.

Evidence was presented with respect to events that occurred after the filing of the grievance. The evidence was received at the hearing, subject to a ruling by the Arbitrator as to whether or not the evidence was privileged and ought to be disregarded. After the grievance was filed, the Company agreed that the Grievor would have an Independent Medical Evaluation ("IME") report completed. The Union agreed not to process the grievance pending the result of the IME. At that time, Dr. Howell had left the position of chief medical officer, but arrangements were made, with the agreement of the parties, to have Dr. Howell complete the IME from his private office.

The Grievor was examined by Dr. Howell on December 8, 2006, and his Independent Medical Evaluation report was provided on the same date to the Health and Wellness Department. The report

was based on an interview, physical examination and review of documents. The IME report states, in part, as follows:

> Conclusions:
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> Ms. Ivany is a very pleasant 47 year old former operator with Aliant Telecom Inc. She has a many year history of chronic pain disorder dating back to 1991 and has been away from the workplace since September 2002. Ms. Ivany has been declined long term disability benefits which was upheld on appeal. Subjectively, she reports constant daily diffuse pain not following any particular dermatome distribution. Objectively, she demonstrates multiple fibrocytic tender points with positive Tinel's sign at the left elbow and slight decreased range of motion in the cervical spine. Range of motion is well within functional limits and there is no evidence of significant neurovascular deficit. Functionally, she is doing most of her activities of daily living at home and attends the gym every second day following flexibility, aerobic training and resistance training program. Psychosocial issues include a divorce from her husband with a gambling problem, raising three children on her own, and receiving community health benefit.
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> Diagnoses:
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> 1. Chronic pain disorder - fibromyalgia type
> 2. ?ulnar neuropathy (mild).
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> . . .
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> 4. <u>Do the subjective complaints correlate with your objective findings? If not lease explain the discrepancies</u>. I could find no objective evidence of impairment at this assessment other than the positive Tinel's sign in the left elbow and some non anatomic sensory deficit in the left forearm and hand. She does have high scores on her Pain Disability Index indicating high perceived level of disability and on her PCS indicating significant catastrophic pain thought. Ms. Ivany is primarily limited by her processing of pain.
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> . . .
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> 6. <u>Based upon your examination and review of the medical records, what are the current medical restrictions and limitations?</u> Ms. Ivany is not limited by medical impairment per se but rather from her psychosocial profile and difficulty coping with pain. She is active in her activities of daily living though does have to pace herself. She is not restricted from any specific activity but would be limited in strength and endurance, and would require flexibility to sit, stand and rest periodically. There is no contraindication to her gradually achieving full time work based on this clinical assessment but it would require a slow and steady progression of activity over a 12 week period.

. . .

11. Please clearly indicate any specific accommodations that are required or that would enable Ms. Ivany to return to work. As outlined above Ms. Ivany is limited only by her pain. There is no medical contraindication to commencing a return to work but this would need to be done in a modified time and task routine over a 12 week period. She would require a work station review and appropriate ergonomic set up with opportunity for stretch breaks every 30 minutes.

Barbara Ivany testified that she was prepared to follow Dr. Howell's recommendations and attempt to return to work on a modified basis over a 12 week period. Ms. Spinney testified that she did not see the IME report prior to the arbitration hearing, but she was informed about the content of the report by Alex Boucher and Dr. Matthew Burnstein of the Health and Wellness Department. Alex Boucher sent an email to Ms. Spinney dated January 16, 2007 stating that he had received the IME report. His email advised that the Grievor should be able to attempt a gradual return to work over a 12 week period with appropriate support and setup, and there was no medical contraindication to work. The minutes of the meeting of the Placement of Restricted Employees Committee, held on February 12, 2007, state, with respect to Barbara Ivany, that there was no medical restriction that would prevent her from working, and the matter would be dealt with through the grievance process. Mr. Shewfelt testified that it was appropriate to remove the Grievor from the Committee's list, based on the report from Dr. Howell. Ms. Spinney received an email from Dr. Burnstein on October 2, 2007 in which he described the cost of a work station assessment and a work hardening program. He said that the Health and Wellness Department could make the necessary arrangements. He suggested a 6 week work hardening program followed by a 6 week gradual return to work.

Ms. Spinney testified that, because the IME said there was no contraindication to return to work, then there was no disability that needed to be accommodated. The Company determined that, as a result of the IME, there was no duty to accommodate the Grievor. The Company considered that in 2002 and 2003 the Grievor did not respond to attempts to integrate her back into the workforce. The Company denied the grievance by letter dated October 26, 2007 signed by Pat O'Brien, director of labour relations and recruiting. The letter stated that, based on the Independent Medical Evaluation, there was no disability that prevented the Grievor from reporting to work.

Dr. Matthew Burnstein was appointed chief medical officer for the Company effective December 6, 2006. He reviewed the Health and Wellness Department chart for the Grievor. The chart included

various medical reports and test results. He noted that an x-ray taken April 18, 2001 showed minimal narrowing of disk space at C5-C6. The report of Dr. Murray, neurologist, dated July 16, 2001, stated that it was difficult to complete an objective assessment because the Grievor did not give her best effort. The report of Dr. Maroun, neurologist, dated September 12, 2001 observed musculoligamentous strain and recommended physiotherapy. The report of Dr. Shawn Hamilton, rheumatologist, dated January 21, 2004, stated the Grievor had chronic neck and shoulder pain and mechanical low back discomfort. His physical examination indicated reduced range of motion in the neck and right shoulder. An x-ray dated January 21, 2004 noted mild osteophytes in the space between L3-4 and L4-5. An MRI of the cervical spine dated December 24, 2004 noted mild neural foramina narrowing at C5-C6 secondary to disk osteophytes complex, with possibility of nerve entrapment. The report of Dr. Maroun, dated February 25, 2005, noted neck pain, left radiculopathy with some complaints due to discs and observed that traction may provide relief. The report of Dr. Flynn, anaesthetist, dated March 22, 2006, described an IV lidocaine infusion for pain with no change noted on followup. Dr. Burnstein commented on the December, 2006 IME report of Dr. Howell. He noted that the physical examination indicated reduced range of motion in the neck and shoulder, but this may not restrict the activities on the job. Dr. Burnstein commented that a functional capacity evaluation report in the file, dated 18 December 2001, stated the Grievor was self limiting and not giving her best effort during testing. Dr. Burnstein testified there was an adequate work station review. He said the Grievor requires temporary accommodation to facilitate a return to work. His impression of the Grievor's medical history from 2002 to the present was that she may still have chronic pain syndrome, and her functional capacity has improved. He recommended treatment for chronic pain syndrome, depression and pain management, including medication, exercise and normal routine and structure.

Dr. V. Ronald Carrigan is the Grievor's family physician. He testified that the Grievor presented to him in 2001 with neck and back strain problems. On April 16, 2001 he observed muscle spasm and decreased range of motion in the neck. He referred the Grievor to various specialists. He described the Grievor's current condition as a musculo skeletal problem that has not changed for many years.

During her period of absence on unpaid leave, the Grievor continued to have group insurance benefits. She testified that she did not pay any group insurance premiums. She has made insurance claims and received benefits. Sandra Dawe testified that the Company was paying both the employee and Company portion of the premiums. She said this was an oversight because normally an employee on leave without pay pays both portions of the premium.

**Employer Submission**

The Employer submitted that it had met its obligation to accommodate the Grievor to the point of undue hardship. The Employer referred to case authority on the duty to accommodate, in particular, the decision of the Supreme Court of Canada in *Syndicat des Employé-es de Techniques Professionnelles et de Bureau d'Hydro Québec, Section Locale 2000 v. Hydro Québec* [2008] 2 S.C.R. 561, 174 L.A.C. (4th)1 ("*Hydro Québec"*) . In that case the Court clarified the meaning of an employer's duty to accommodate, and stated it was not necessary to show it was impossible to accommodate the employee. The Court also stated that the duty to accommodate must be assessed from the beginning of the absence from work, having regard to all the circumstances, and not based only on the facts available on the date of dismissal. The Employer referred to the duty of an employee to cooperate with an employer's efforts to accommodate her and to accept reasonable accommodation. If a reasonable proposal is turned down by the employee, then the employer's duty is discharged (*Renaud v. Central Okanagan School District No. 23* [1992] S.C.R. 970 (S.C.C.) (1992) 95 D.L.R. (4th) 577 ). The Grievor failed in her duty to facilitate the implementation of the Employer's proposal for her to return to work in March, 2003. The Employer had acted reasonably to meet its obligations. The Employer placed the Grievor on leave of absence. The Employer looked for clerical positions, but there were none available. The Employer reasonably relied upon medical advice from its chief medical officer, the Health and Wellness Department and the occupational therapy report on the work station review. The Employer accommodated the Grievor in 2002 by assigning appropriate work to her, facilitating easeback programs, and scheduling her to work the day shift. The Employer offered a return to work in March, 2003. The Grievor gave no indication to the occupational therapist, or to the Employer, that she did not intend to return to work after she attended the work station review. The Grievor did not accept the terms of a reasonable accommodation proposed by the Employer. After the letter from the Employer to the Grievor in October, 2003, the Union set up barriers to communication to the Grievor by requiring that all communication be sent to the Union. The Employer made inquiries about the Grievor to a Union representative in 2004, but did not receive any response. The Grievor did not attend scheduled appointments with medical specialists in 2004. The Placement of Restricted Employees Committee agreed to place the Grievor on its list of employees. The Union representative, Mr. Shewfelt, agreed at the Committee meeting to contact the Grievor to arrange an appointment with the chief medical officer, Dr. Howell. The Grievor did not contact Dr. Howell until after she received the letter of termination. If the Grievor is entitled to any compensation, it should be paid by the Union, because the Union assumed responsibility for communication to the Grievor. At the time the Grievor was

terminated in 2006, the Company had no indication that she would return to work in the future. The result of some of the medical tests indicated a lack of effort by the Grievor and her responses were not anatomically appropriate. The Employer maintained its objection to admissibility of the Independent Medical Evaluation report by Dr. Howell in December, 2006, and other evidence that was post grievance. In the event such evidence was to be considered by the Arbitrator, then the Employer submitted that the Independent Medical Evaluation report showed no change in the Grievor's medical condition, meaning that she had been always capable of returning to work. The parties had agreed that the IME report did not support placing the Grievor on the Restricted Employees list, because the report showed she was not permanently restricted within the meaning of Article 28.20. The Employer agreed to obtain the IME report to investigate the claim that the Employer had terminated a permanently restricted employee. However, the IME showed there was no permanent restriction. The Employer requested that the grievance be denied and the termination of employment be upheld.

**Union Submission**

The Union submitted that the Employer had not met its obligation to accommodate the Grievor to the point of undue hardship. The Union agreed that the *Hydro Québec* case was the leading authority on the duty to accommodate. It was important to look at the Grievor's history of medical issues and absences from work and consider the information available to the Employer at the date of termination of employment. When the Grievor returned to work in 2002 she took frequent breaks from her work station. The Employer informed the Grievor it would not pay her for the time she was absent on breaks. The Union filed a grievance. The Employer recognized the need to look for a clerical position, but did not offer one. The duties of the position offered in the SOST Centre were more strenuous than the Grievor felt she could perform. She would be the only person there at times and would be unable to take a break. The Grievor knew her condition. The offer by the Employer had not reached the point of undue hardship. In the Fall of 2003, when Mr. Shewfelt asked the Employer to communicate with the Grievor through the Union, there had been a grievance filed. In 2004, the Grievor attended medical appointments. Also, in 2004 the parties were occupied with collective bargaining, dealing with a strike, and setting the terms of a new collective agreement. Under Article 30 of the collective agreement in effect at the time the Grievor started her leave of absence, there was no limit to the length of the leave of absence. The one year leave of absence in the current Article 28 was not in effect at that time. The Employer continued to pay both the Employer and employee portion of the Grievor's group insurance premiums during the entire period

of her absence. In July, 2006, the Union and the Grievor were in the process of arranging for an Independent Medical Evaluation. At that time, the Employer advised the Union that employees on a list, including the Grievor, would be given the option to return to work or retire. It was inconsistent with that notice for the Employer to terminate the Grievor's employment in August, 2006. The Union submitted that the Independent Medical Evaluation report of December, 2006, and other post grievance evidence, should be admitted and considered by the Arbitrator. The Union relied on *Dominion Colour Corp. and Teamsters Loc. 1880* (1999) 83 L.A.C. (4th) 330 (Ellis). The Employer's continuing obligation to accommodate the Grievor took priority over any obligation arising under a grievance or settlement privilege. According to arbitral authority, an arbitrator is not bound to follow the technical rules of evidence and procedure. After the grievance was filed, the Company had agreed to be guided by the result of the IME report, but the Company did not follow the IME. There was no undue hardship for the Employer to give the Grievor an opportunity to return to work on easeback over a 12 week period as outlined in the IME. The Grievor testified that she was willing to return to work under the terms in the IME. The Employer should have given her that opportunity and should not have denied the grievance in October, 2007. The Employer was responsible for the delay from the date it received the IME report until it gave a response in October, 2007. The Union was not responsible for the Employer's actions. Whether or not the Grievor was on the Restricted Employee list under Article 28 there was still a duty to accommodate her. The Union requested an order that the Grievor be reinstated in her employment and be paid compensation from July, 2006.

**Considerations**

The Grievor was terminated from employment by letter dated August 24, 2006. At that time, the Grievor was absent from work on leave of absence without pay. Her leave of absence commenced on September 10, 2002. The Employer offered the Grievor an opportunity to return to work in March, 2003. The Grievor did not return to work at that time. The parties dispute whether or not the Employer complied with its duty to accommodate the Grievor.

The Arbitrator will discuss the following issues: (1) Did the Employer have a duty to accommodate the Grievor, and if so, did it meet that duty? (2) When considering the first issue, should post grievance evidence be considered by the Arbitrator? and (3) What redress, if any, is appropriate in the circumstances?

Arbitrators have the authority to apply the duty to accommodate. Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 7:6120, states as follows:

> It is now recognized that, in reconciling the interests of employers and employees who are afflicted with an illness or disability (or an analogous condition like being pregnant) that inhibits their ability to do their jobs, arbitrators must have regard to those provisions in human rights legislation that prohibit discrimination in employment because of a physical or mental disability. To avoid a finding of discrimination, an employer must show that, prior to terminating an employee whose poor attendance or work performance is caused by an illness or injury that falls within the legislative definition of "disability" or "handicap", it has done everything that could reasonably be expected of it in trying to accommodate that person's needs.

The requirements of the duty to accommodate are set out in decisions of the Supreme Court of Canada. In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union* [1999] 3 S.C.R. 3 ("*Meiorin*"), the Court first required that an employee establish that an employer has adopted a standard or practice that discriminates on a ground protected by human rights legislation. Once a *prima facie* case of discrimination is established, then the onus shifts to the employer to satisfy that it has met its accommodation duty, which means: (1) that the standard or practice is rationally connected to the performance of the job; (2) that the standard or practice was adopted in good faith, and (3) that the employer has been unable to accommodate the employee to the point of undue hardship.

The duty to accommodate an employee with a disability has been applied by arbitrators and human rights tribunals. The first requirement is to determine whether or not the employee has a disability. There is an issue in this case as to whether or not the Grievor has a disability that requires accommodation. The Brown & Beatty text, at paragraph 7:6120, notes that the Courts, arbitrators and human rights tribunals have adopted a liberal interpretation of the meaning of disability. The text states that disability includes "pain" and disorders that are only "temporary and transient". The Supreme Court of Canada has directed that "disability" be given a liberal interpretation. In Lynk, *Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada*, in R. Echlin & C. Paliare, eds., *Law Society of Upper Canada Special Lecture 2007: Employment Law* (Toronto: Irwin Law, 2008) ("*Lynk*, *Disability and Work*"), the author states as follows, at page 220:

> The Supreme Court of Canada, when reading both the Charter and human rights statutes, has held that "disability" must be read liberally, purposively and contextually in order to accomplish the constitutional goal of equality. In *City of Montreal*, [*Quebec v. Montreal* [2000] 1 S.C.R. 665], L'Herureux-Dubé J. for the Supreme Court provided a definition of "handicap" (which has an identical meaning in law as "disability") which comes as close as any recent judicial and tribunal attempt in capturing its modern evolution as a social-political concept: [para. 79]
>
> > A "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all of these circumstances that determines whether the individual has a "handicap" for the purposes of the [Quebec] *Charter*.

The meaning of disability in any case is subject to interpretation having regard to the statutory definition of disability in the applicable human rights statute. Section 3(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "*Act*"), the applicable statute, lists "disability" as a prohibited ground of discrimination. Section 25 of the *Act* states that "disability" means "any previous or existing mental or physical disability".

In the event that an accommodation duty arises in this case, there is no issue with respect to the first two parts of the three part test to be met by the Employer, as set out in *Meiorin*. In other words, it is not disputed that the Employer's requirement that employees attend at work and perform duties is rationally connected to workplace operations, or that the requirement was created in good faith. The third part of the test is at issue in this case, namely, whether or not the Employer has accommodated the Grievor to the point of undue hardship.

The standard to be met by the Employer, and the meaning of undue hardship, has been the subject of a recent decision of the Supreme Court of Canada. In *Syndicat des Employé-es de Techniques Professionnelles et de Bureau d'Hydro Québec, Section Locale 2000 v. Hydro Québec* [2008] 2 S.C.R. 561, 174 L.A.C. (4$^{th}$) 1 ("*Hydro Quebec*"), the Court discussed the standard for proving undue hardship and the time for assessing the duty of accommodation, and stated the following:

> (A) Standard for Proving Undue Hardship
>
> . . .
>
> 12 . . .What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take

as many forms as there are circumstances. This is clear from the additional comments on undue hardship in *B.C.G.E.U.* (para 63):

> For example, dealing with adverse effect discrimination in *Central Alberta Dairy Pool, supra*, at pp. 520-21, Wilson J. addressed the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship. Among the relevant factors are the financial costs of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also *Renaud*, [[1992] 2 S.C.R. 970], at p. 984, *per* Sopinka J. The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, as Cory J. noted in *Chambly*, [[1994] 2 S.C.R. 525], at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".

13 As these passages indicate, in the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship. L'Heureux-Dubé J. accurately described the objective of protecting handicapped persons in this context in *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville)*, [2001] 1 S.C.R. 665, 2000 SCC 27 (S.C.C.), at para. 36:

> The purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms. With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do the job.

14 As L'Heureux-Dubé J. stated, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

15 However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform

work in exchange for remuneration. The burden imposed by the Court of Appeal in this case was misstated. The Court of Appeal stated the following:

> [TRANSLATION] Hydro-Québec did not establish that [the complainant's] assessment revealed that *it was impossible to [accommodate] her characteristics*; in actual fact, certain measures were possible and even recommended by the experts.
>
> [Emphasis added; at para. 100.]

16 The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work

17 Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties - - or even authorize staff transfers - - to ensure that the employee can do his or her work, it must do so to accommodate the employee. Thus, in *Syndicat des employés de l'Hôpital général de Montréal c. Sexton* [2007] 1 S.C.R. 161, 2007 SCC 4 (S.C.C.), the employer had authorized absences that were not provided for in the collective agreement. Likewise, in the case at bar, *Hydro Québec* tried for a number of years to adjust the complainant's working conditions: modification of her workstation, part-time work, assignment to a new position, etc. However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.

. . .

(B) Time of Accommodation

20 The Court of Appeal held that the duty to accommodate had to be assessed as of the time the decision to dismiss the complainant was made.

. . .

21 In the instant case, the Court of Appeal applied a compartmentalized approach that was equally inappropriate . A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation.

There is also an issue in this case as to whether or not the Grievor met her duty to facilitate the search for accommodations. There is a duty on an employee to cooperate in the search for reasonable accommodation. This issue is discussed in *Renaud v. Central Okanagan School District No. 23* [1992] 2 S.C.R. 970, where the Supreme Court of Canada states as follows:

> Duty of Complainant
>
> 50 The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this court in Simpson-Sears Ltd. At p. 555 [S.C.C.], McIntyre J. stated:
>
>> Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.
>
> 51 This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *Simpsons-Sears Ltd.* The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

The obligations on an employee to facilitate accommodation are also discussed in *Lynk*, *Disability and Work* at page 242 as follows:

> The case law to date articulates four requirements with respect to the employee's responsibilities: (1) they must actively co-operate with the employer in locating potential accommodations, (2) if offered a reasonable accommodation, they must provide a persuasive reason as to why the proposal cannot be accepted, (3) they are required to accept a reasonable accommodation offer that satisfied the employer's operation needs if their legitimate concerns have been sufficiently addressed, and (4) if they decline to accept a reasonable accommodation, the employer's accommodation duty is normally extinguished.
>
> In the application of these principles, legal decision-makers have regularly held that an employee with a disability is entitled to a reasonable accommodation, not necessarily a perfect accommodation, and she may have to accept some discomfort or inconvenience in the accommodation process.

The Arbitrator will consider the facts of the case and apply the legal principles discussed above. The first issue to consider is whether or not the Grievor had a disability at the time the Employer decided to terminate her. If the Grievor did not have a disability, then there is no need to consider the issue of accommodation, as it is the presence of a disability within the meaning of human rights legislation that gives rise to the duty to accommodate. It is important to consider the relevant medical evidence when determining whether or not the Grievor had a disability. In this regard, it is necessary to consider whether or not post discharge evidence, in particular, the Independent Medical Evaluation ("IME") report prepared by Dr. Howell ought to be considered by the Arbitrator.

The Employer disputed the admissibility of post grievance evidence, and relied on the privilege that applies to communications in the grievance procedure, and the privilege that applies to settlement negotiations (*Meyes v. Dunphy*, 2007 NLCA1, 262 Nfld. & P.E.I.R. 173 (NLCA). In the arbitration process it is important to give effect to the grievance communication privilege. The purpose of the grievance communication privilege is to encourage open discussions by the parties with a view to settlement of the dispute. (*Upper Canada District School Board v. E.T.F.O.* (2007) 160 L.A.C. (4th) 433 (Simmons), *York (City) Board of Education and C.U.P.E., Local 1749-B* (1989) 9 L.A.C. (4th) 282 (H.D. Brown)). Arbitrators have also applied exceptions to the grievance communication privilege. The issue is discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 3:4342 as follows:

> . . . arbitrators have generally treated all discussions, whether they relate to settlement or something else, as privileged regardless of whether there is express

> agreement that such discussions are "without prejudice". Accordingly, if an objection is made as to the admissibility of discussions in the course of the grievance procedure, any such statements will not be admitted as evidence. . . . However, where the document in question is part of the formal grievance record, such as management's written reply, it may be admitted into evidence, . . . Likewise, where the issue was management's accommodation as required by the *Human Rights Code*, it was held that that too gave rise to an exception to the privilege normally attached to grievance procedure discussions.

The exception to the privilege related to the duty to accommodate was applied in *Dominion Colour Corp. and Teamsters, Local 1880* (1999) 83 L.A.C. (4$^{th}$) 330 (Ellis). In that case, the arbitrator noted that the duty to accommodate continued post grievance on the facts of that case.

The IME report was based, in part, on an examination of the Grievor by Dr. Howell on December 8, 2006. The report is also based on Dr. Howell's review of medical records that predated the date of the grievance. The IME report is relevant to the issue of whether there was a disability as of the date of termination. The IME report may be admitted and considered by the Arbitrator without violation of the privilege of communication during the grievance procedure or the litigation communication privilege. The report itself was not a protected communication, and it is unnecessary to consider any communication made in the grievance procedure about the report or the circumstances surrounding the report. Alternatively, if the report itself is privileged, then the exception related to the duty to accommodate applies. Therefore for the purpose of considering the issue of disability, and the duty to accommodate, the Arbitrator will admit into evidence and consider the IME report of Dr. Howell.

The Grievor has a history of pain in her neck and shoulders since 1995. She was absent from work on short term sickness benefits for one year from April, 2001 to April, 2002. She was assessed at that time and cleared to return to work on an easeback program starting at 4 hours per day and increasing to full time over a 6 week period. The easeback program was recommended by the Employer's Health and Wellness Department. When the Grievor attempted to return to work in the June, 2002, she experienced pain in her neck, hip and shoulders. She was taking frequent breaks. Adjustments were made to the easeback program, based on recommendations of Dr. Howell, the chief medical officer at the time, and also based on recommendations of the Grievor's family doctor. The Grievor left the workplace in September, 2002 and did not return. The Employer referred to medical reports that suggested the Grievor did not give her best effort during examination or testing.

However, there was objective evidence of medical impairment. Dr. Howell's IME report notes "chronic pain disorder - fibromyalgia type, limit in strength and endurance, and need for flexibility to sit, stand and rest periodically". The IME report states that the Grievor could gradually achieve full time work, but would require adjustments to the work station and stretch breaks every thirty minutes. The report of Dr. Maroun, neurologist, dated February 25, 2005, noted left radiculopathy with some complaints due to discs and stated that traction may provide relief. An x-ray report showed mild osteophytes in disc spaces. An MRI of the cervical spine showed mild neuroforamina narrowing with possibility of entrapment of nerves. Dr. Bernstein, the Employer's current chief medical officer, testified that he would recommend treatment for chronic pain syndrome, depression and pain management.

Having regard to all the evidence, I find that the Grievor had a disability within the meaning of human rights legislation, and within the meaning of the judicial and arbitral jurisprudence. The disability gives rise to a duty to accommodate.

The next issue to consider is whether or not the Employer met its duty to accommodate the Grievor at the date of the Grievor's termination in August, 2006. In this regard, it is appropriate, having regard to *Hydro Quebec,* to review the efforts by the Employer to accommodate the Grievor from 2002 to the date of termination in 2006. The Arbitrator will also consider whether the Grievor met her duty to cooperate with the efforts at accommodation.

In 2002, the Employer facilitated a return to work on an easeback program, in accordance with recommendations of the chief medical officer and the Health and Wellness Department. The Grievor participated in the easeback program, but took frequent breaks from her operator position. The Employer advised the Grievor that it would pay only for hours worked. The Union filed a grievance alleging improper reduction of pay. In September, 2002, the Grievor commenced a leave of absence without pay. The leave of absence continued until her employment was terminated in August, 2006. At a grievance meeting in December, 2002, the Union and the Employer discussed efforts to accommodate her return to work. The Employer's human resources department made inquiries to look for a clerical position, as requested by the Grievor, but there was no clerical position found. In March, 2003, the Employer offered a position in operator services that it believed had mostly clerical duties. The Employer offered an easeback program in consultation with the Health and Wellness Department and arranged for a work station review to be conducted by an occupational therapist. The Grievor met with the occupational therapist and discussed various adjustments to the

work station. The Employer purchased the equipment and made the adjustments recommended by the occupational therapist. The Employer expected the Grievor to return to work, but she did not return on the expected date. She then advised the Employer that she would not be returning to work in that position.

I find that the Employer made a reasonable effort to accommodate the Grievor in March, 2003. The Grievor did not provide a persuasive reason not to accept the proposal and attempt to return to work. The Grievor did not cooperate with the accommodation efforts. However, the Employer's accommodation duty was not extinguished. The Grievor continued on an unpaid leave of absence. In the fall of 2003, the Employer wrote to the Grievor stating that if she did not return to work her employment would be terminated. The Union responded that the Grievor had a medical appointment with a specialist in January, 2004, and the parties would be in a better position to discuss the conditions of a return to work after that time. The Employer's duty to accommodate the Grievor continued, with the particulars of the accommodation efforts subject to the outcome of further medical appointments. The Employer did not review current medical information prior to the termination of the Grievor's employment in August, 2006, although the Employer had accepted the need to obtain further medical information. It was agreed at meetings of the Placement of Restricted Employees Committee in 2006, that the Grievor would obtain an independent medical evaluation report from the chief medical officer. The Employer should not have terminated the Grievor's employment without having first reviewed the medical evaluation or, alternatively having determined that the Grievor would not facilitate the accommodation after being given a reasonable opportunity to cooperate. The Employer did not give any indication to the Grievor or the Union that the Grievor had a deadline to obtain the IME report or that her employment would be terminated if she failed to obtain the report. The Grievor could not recall attempting to contact Dr. Howell about the IME before she received the letter of termination. She did contact Dr. Howell about the IME after she received the letter. In the absence of the IME report, the Employer did not have current medical information to assess its accommodation duty. Having regard to all the circumstances, the Employer violated its duty to accommodate the Grievor, when it terminated her employment in August, 2006.

It is appropriate to restore the Grievor to the employment status that she had prior to the termination. Her status at that time was that she was absent from work on an unpaid leave of absence. Therefore, it is appropriate to reinstate the Grievor's employment as of the date of termination with the status

of an unpaid leave of absence. It is also appropriate to direct the Employer to comply with its duty to accommodate the Grievor.

It is not appropriate to make any decision on compensation at this time. The Arbitrator will reserve any decision on the issue of compensation. When the Grievor was offered reasonable accommodation in March, 2003, she did not return to work and did not cooperate with the effort at accommodation. The Grievor testified that she will cooperate with the return to work proposed in Dr. Howell's report, and the order of reinstatement will provide her with that opportunity. It is unnecessary to decide any issue of compensation before the Grievor returns to work. If the parties are unable to agree on any issue of compensation, then the Arbitrator retains jurisdiction in that regard.

## Decision

The Grievor had a disability and the Employer had a duty to accommodate the Grievor within the meaning of human rights legislation and the judicial and arbitral authorities. The Employer did not meet its duty to accommodate the Grievor at the date of her termination in August, 2006. It is ordered that the Grievor be reinstated in her employment effective from the date of termination with the status of a leave of absence without pay. The Employer shall comply with its duty to accommodate the Grievor. The grievance is allowed as stated. There is no order with respect to compensation at this time. The Arbitrator retains jurisdiction on the issue of compensation.

**DATED** this 18th day of January, 2010.

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James C. Oakley
Arbitrator