

IN THE MATTER OF: Human Rights Act, R.S.N.S. 1989, c. 214, as amended

-and-

IN THE MATTER OF: The Complaint of Pearl Kelly v. Nova Scotia Liquor Corporation

Before Lynn Connors, Q.C., Chair of the Board of Inquiry

DECISION

Ms. Kelly, the Complainant, filed her complaint against her employer, the Nova Scotia Liquor Corporation, hereinafter referred to as “the Corporation”, with the Human Rights Commission on the 3rd day of March, 2009. She alleged in her complaint form that she was discriminated against in her employment (a) because she was a woman and (b) because she suffers from a disability being depression and situational anxiety. The hearing of this matter was delayed as the original Board of Inquiry Chair who was assigned subsequently determined that she was in a conflict of interest. The matter was subsequently referred to me. The hearing dates were July 2 – 5, 2013, August 21 – 23, 2013, April 1 – 4, 2014, and June 12 – 13, 2014, and July 7, 2014.

I am late in filing this decision. There are a number of reasons. The first is that there was approximately three weeks of evidence and submissions stretched over the course of a year. The number of documents and the transcripts are voluminous. I work as a lawyer in small town Nova Scotia. There are time constraints involved in such a practice and I have to the best of my ability allowed for a careful review of all of the Exhibits and the transcripts in full before rendering a decision. The issues are important to the Parties and I felt it was better to be late in rendering a decision than to render one within the time frame mandated, and not canvass the issues thoroughly.

History

Pearl Kelly, who is the Complainant in this matter, is a native of Antigonish, Nova Scotia. She began her employment history as a casual employee with the Corporation, on June 29th, 1994. Ms. Kelly commenced work with the Corporation shortly after graduating from high school. On July 3rd, 1995 she became a regular part time employee at the Antigonish store, and October 5th, 1998 she became a regular full time employee, employed at the Kingston store.

Ms. Kelly’s first maternity leave commenced on March 15th, 1999 while she was working as a clerk in the Kingston store and she returned to work on September 20th, 1999.

Ms. Kelly then received a promotion to Manager 1 November 13th, 2000 and transferred to the Barrington Passage store, and commenced her maternity leave for her second child January 3rd, 2001.

While on maternity leave, Ms. Kelly was transferred to the Annapolis Royal store on April 30th, 2001. On July 9th, 2001 she was promoted to a Manager 2, while on maternity leave and transferred to the Pictou store. On January 2nd, 2002 Ms. Kelly returned to work from her maternity leave as a Manager 2 in the Pictou store. On September 1st, 2003, Ms. Kelly received a promotion to a Manager 4 and transferred to the New Glasgow store. She left work on January 29th, 2004, as the result of a maternity leave, and returned to work September 5th, 2005 as a Manager 4 in the New Glasgow store. During her time in the New Glasgow store, as a result of a decrease in sales, Ms. Kelly's store was reclassified from a Class 4 Store to a Class 3 store effective April 1, 2006. Ms. Kelly's store was further reclassified to a Class 2 Store, effective April 1, 2007. Ms. Kelly remained a Manager 4 throughout. On May 5th, 2008 Ms. Kelly was transferred to a Class 2 Store in Stellarton from New Glasgow. Despite the reclassification of the New Glasgow store, and the transfer to a Class 2 Store in Stellarton, throughout Ms. Kelly retained her status as a Manager 4 and her salary remained the same.

During this time period, Ms. Kelly's performance was reviewed, as was the normal course for employees of the Corporation. Her early performance appraisals were fully satisfactory, which meant that she met all of the requirements of the position. The only higher level of assessment was "exceeds position requirements", meaning that an employee performed above expectations for the position. Ms. Kelly's performance appraisal for 1995-1996 was "fully satisfactory", her performance appraisal from October of 1998 - February of 1999 was "fully satisfactory". Ms. Kelly's performance appraisal from 2002 - 2003 was again, "fully satisfactory", her performance appraisal from January of 2002 - May of 2002 was again, "fully satisfactory". Ms. Kelly's 2003 - 2004 performance appraisal was conducted by Danny McMillan, who was Ms. Kelly's then Regional Manager. Ms. Kelly's performance appraisal was "fully satisfactory" and she had successfully completed her four months of a probationary period as a Manager 4. During this time period Ms. Kelly had successfully completed two management oriented university courses offered at Saint Francis Xavier University.

In November of 2004 Ms. Kelly was pregnant, and as she had done in the past, she applied to work at the wine fair. The wine fair was an offsite event that the Corporation held annually with their suppliers. Billy Forbes was a Key Account Representative with the Corporation and was not Ms. Kelly's immediate supervisor. He handled staffing for

the wine fair. It was Ms. Kelly's evidence that Mr. Forbes told her when she applied for the wine fair that "I don't think that it is an appropriate place for you to be". This was because she was pregnant.

Ms. Kelly reported this statement to her then Regional Manager, Danny McMillan. It was her evidence that Mr. McMillan did nothing, and it was Mr. McMillan's evidence, which was not very clear, that he did recall having a conversation with Ms. Kelly. He stated that Ms. Kelly raised the issue of her inability to work at the wine fair and Mr. Forbes comments with him. His evidence was there was a discussion but it was really more about her ability to lift, because she was pregnant.

Ms. Kelly ended up working at the wine fair in a different capacity. Her evidence was that she raised this wine fair incident with Roderick J. MacDonald, Vice President of Human Resources, at a corporate function at the Lord Nelson Hotel in Halifax. It was Mr. MacDonald's evidence that he did remember the conversation, remembered that Ms. Kelly worked at the wine fair in a different capacity than what she had applied for, but that from his perspective, there were no human rights concerns as a result of that conversation.

Subsequent to Ms. Kelly's promotions within the Corporation, the phrase "Pregnant Pearl in Pictou" was heard. This phrase became part of Ms. Kelly's work life prior to her performance issues.

Ms. Kelly applied for the position of Regional Manager in July of 2006. This was the position that Donald Whittemore was hired for and he became her immediate supervisor as Regional Manager. Ms. Kelly did not receive an interview for this position. This was the first time that Ms. Kelly did not receive an interview for a position that she applied for, and did not receive the position that she applied for. It was Ms. Kelly's evidence that she applied for the position for the interview experience.

The 2005-2006 performance appraisal marks the beginning of Ms. Kelly's difficulties with the Corporation. Up until that point, as is evidenced in her performance appraisals, the comments concerning her employment with the Corporation were glowing.

Ms. Kelly's 2005 – 2006 performance appraisal, for the first time in her employment history dropped from "met standards" to "met most standards but still needs development in some areas". This performance appraisal was completed by Paul Rapp, Ms. Kelly's then Regional Manager. Ms. Kelly took exception to comments made by Mr. Rapp in relation to certain aspects of her performance appraisal, which resulted in a meeting to

review the performance appraisal between Mr. Rapp, Ms. Kelly, and her new Regional Manager, Donald Whittemore.

Subsequent to the completion of Ms. Kelly's performance appraisal on June 22nd, 2006 and her comments being filed concerning her performance appraisals on September 8th, 2006, Ms. Kelly filed a grievance concerning her request for a transfer to the Antigonish store on October 27th, 2006. On October 30th, 2006, Donald Whittemore, her Regional Manager, wrote to Michelle Kehoe, her ERO, denying the grievance. This triggered an email from Ms. Kelly to Mairi Arthur, Manager of Human Resources Services, and Craig Sutherland, Vice President of Operations for the Corporation. The result was a meeting between Ms. Arthur, Ms. Kelly, and Mr. Sutherland in November of 2006, and the direction that Ms. Kelly should prepare a development plan to work on her short comings as identified in her performance appraisal.

In 2006-2007, Ms. Kelly's performance appraisal was that she "met most standards but needed development in some areas". This performance appraisal was completed by Mr. Whittemore, her Regional Manager.

It was during this time period that Mr. Whittemore, as Ms. Kelly's Regional Manager, began taking notes concerning his meetings with Ms. Kelly, and taking notes and photographs concerning his store visits.

In July of 2007, another request was made by Ms. Kelly, for a transfer to the Antigonish store, which was subsequently denied and grieved. The reason the denial of the transfer was alleged performance issues. In settlement of the grievance, the Corporation provided to Ms. Kelly a list of competencies that she had to work on. This resulted in Mr. Whittemore writing to Ms. Kelly on November 20th, 2007 setting out the list of competencies that Ms. Kelly needed to address, and how to address them.

In December of 2007 and January of 2008, Mr. Whittemore had two separate meetings with Ms. Kelly.

On April 21st, 2008, Mr. Whittemore wrote to Ms. Kelly advising of his decision to transfer her to the Stellarton store.

This lateral transfer, which was categorized as being for a non disciplinary purpose, again resulted in spiralling deterioration of Ms. Kelly's relationship with the Corporation. On May 6th, 2008, there was a theft in the store, which occurred when Ms. Kelly was not

present. On May 17th, 2008, a vehicle drove into the front window of the store, which resulted in property damage to the store.

When she began work in the Stellarton store in May of 2008, Ms. Kelly perceived that there was an Occupational Health and Safety issue, which she reported to the Department of Labour, as opposed to reporting it through internal corporation channels. The result was an OHS Report of Workplace Inspection, a Compliance Notice, an Employee Discriminatory Action Complaint, a Report of Workplace Inspection, and a further Compliance Order dated June 6th, 2008. This further resulted in a grievance being filed by Ms. Kelly, because Ms. Arthur and Mr. Whittemore met with her on May 27, 2008, without an ERO being present, and gave her a two day suspension. The grievance was successfully argued and won, the two day suspension was rescinded and the disciplinary letter has been removed from Ms. Kelly's employment record.

What then occurred was a series of letters dated October 20th, 2008, concerning alleged gossiping, and a further letter dated December 17th, 2008 concerning the wine incident, which resulted in Ms. Kelly attending at her local emergency department for her hospital.

In August and September of 2009, with the assistance of her union, a Return to Work Protocol was negotiated in a mediation process between Ms. Kelly, her union, and the Corporation. Ms. Kelly did not return to work as she subsequently received a medical report from a psychiatrist saying she was completely disabled and unable to return to work, and subsequently qualified for long term disability benefits.

Issues to be Resolved

Counsel for Ms. Kelly set out in his closing argument six examples of discrimination against Ms. Kelly by the Corporation in her workplace. It is his submission that the evidence is clear and persuasive that Ms. Kelly received adverse differential treatment because (a) she is a woman, and (b) because she suffers from a mental disability, depression, and situational anxiety, that was caused by the Corporation. The examples of the discrimination are as follows:

1. The wine fair incident;
2. The "Pregnant Pearl in Pictou" acronym;
3. The failure to provide an Assistant Manager while Ms. Kelly was in the position of a Manager 4, in comparison to other male Manager 4s in the region;
4. Her performance appraisals versus other male Manager 4 performance appraisals;
5. The transfer to the Stellarton store and subsequent discipline;

6. Did Ms. Kelly suffer from a disability, was she discriminated against as a result, and was there a duty to accommodate?

Credibility Issues

There are significant credibility issues in this case. A number of witnesses have testified and have provided diametrically opposed evidence to that of Ms. Kelly on substantial points. Counsel for the Corporation has brought to my attention Faryna v. Chorny [1951] B.C.J. No. 152; [1952] 2 D.L.R. 354 (B.C.C.A.) at paragraph 10-12 of the decision:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. Raymond v. Bosanquet (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him

to be telling the truth” is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

Further, as was stated in Nova Scotia Teachers Union v. Nova Scotia Community College [2006] N.S.J. No. 64; 2006 NSCA 22 (N.S.C.A.) at paragraph 38:

There is nothing wrong with an arbitrator believing one witness and disbelieving another. What the arbitrator should do, as stated in Farnya, is making a finding in harmony with the preponderance of probabilities overall, a finding based “not on one element only to the exclusion of others, but based on all the elements” of the evidence by which it can be tested.

The Legal Onus for Establishing Discrimination

The onus is on the Complainant to establish that she was discriminated against based on an enumerated ground. The Complainant must establish a *prima facie* case on the balance of probabilities. The employer then can rebut the onus, and then the onus shifts to the Complainant to show that the explanation is not reasonable but amounts to a pretext or a disguise for the Respondent’s otherwise discriminatory conduct. (See Ontario Public Service Employees Union v. Ontario (Ministry of Labour), (Waraich Grievance) [2009] O.G.S.B.A. No. 1, at paragraph 77)

There are three steps to the Complainant establishing that she has established a *prima facie* case on the balance of probabilities. The first is that the Complainant falls within a protected ground of characteristics. The second is the establishment of the adverse treatment. The third is that the protected ground or characteristic is a factor in the adverse treatment. As is stated in Canadian Broadcasting Corp. v. O’Connell, 1991 Carswell Nat 342, C.L.L.C. 17, 016, 136 N.R.226, 20 C.H.R.R.D/369 (F.C.C. A.D.), the Federal Court of Appeal, Appeal Division upheld the reliance on “circumstantial evidence and the establishment of adverse differentiation with a policy or practice depriving or intending to deprive them of employment because they were women”. Linden J.A. writing for the majority, upheld the review tribunal decision:

In summary, the tribunal found that the evidence supported prima facie case of discrimination. The burden then shifts to the employer to provide a reasonable explanation for the actions which cause the women to be differentiated from the men. On the balance of probabilities, the explanation tendered by C.B.C. did not adequately explain the differential treatment; furthermore, in applying the concept of the shifting burden of proof

announced in the Israeli case, supra, the argument raised by C.B.C. in respect to producer discretion was pretextual and was not of sufficient import to explain a system which is described by the Tribunal as failing “to create conditions in which employment equality is possible because traditional sentiment is allowed to get in the way of job opportunity for women”.

Further, in paragraph 16 of the decision:

In conclusion, it should be mentioned that being held responsible for a violation of the Canadian Human Rights Act does not necessarily imply any conscious wrong doing or malicious intent... Such discrimination can occur advertently.

I can, in determining whether or not there is a *prima facie* case on a balance of probabilities, look at circumstantial evidence and look at context, as opposed to focusing on the intent of the employer. In Jagait v. IN TECH Risk Management, [2009] HRT0 779 (CanLII), 2009 HRT0 779, the following comments were made at paragraphs 18-19 setting out the appropriate task for determining whether an Applicant has established a *prima facie* case:

The onus is on the applicant to establish a prima facie case of discrimination. A prima facie case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a finding in the applicant's favour in the absence of an answer from the respondent: see Ontario Human Rights Comm. V. Simpsons-Sears, 1985 CanLII 18 (SCC), 1985 CanLII 18 (S.C.C.), at para. 28. Upon establishing a prima facie case, the burden shifts to the respondent to prove a balance of probabilities, that its actions were not discriminatory.

It is well-established that the threshold for establishing a prima facie case of discrimination is not high, discrimination is often not overt, the employer may have knowledge of facts or possess evidence of discrimination that is not accessible to an employee whose employment is terminated, and that is many, if not most, cases the burden will shift to the respondent to provide a non-discriminatory reason for its actions. On the other hand, where the applicant has failed to establish a prima facie case, it is neither legally correct nor, in my view, fair, just and expeditious to shift the burden to the respondent to prove a non-discriminatory reason for its actions. In the case at hand, I am

not satisfied, after hearing the applicant's evidence, that she has established a prima facie case of discrimination.

Further, in Tanzos v. AZ Bus Tours Inc. 2008 CarswellNat 4327, 2007 CHRT 33, 61 C.H.R.R. D/128, in the decision of the Canadian Human Rights Tribunal the following comments were made in paragraph 30 of the decision:

In a complaint under the Act, the burden of proof is on the complainant to establish a prima facie case of discrimination. The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, the test may be formulated as follows:

An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences of hypotheses.

Further comments were made at paragraphs 31-32 of the decision:

What is the appropriate test to be applied when determining a prima facie case? In Canada (Armed Forces) v. Canada (Human Rights Commission), 2005 FCA 154 (F.C.A.), the Federal Court of Appeal stated that the legal definition of a prima facie case does not require the complainant to adduce any particular type of evidence to prove that she was a victim of a discriminatory practice. A flexible test is more appropriate.

According to Quebec (Commission des droits de la personne & des droits de la jeunesse) c. Montreal (Ville), [2000] 1 S.C.R. 665 (S.C.C.), at p. 701 [also referred to as "Mercier"], in order to establish a prima facie case, a complainant has to (a) prove the existence of a distinction, exclusion or preference in the decision not to employ or continue to employ; (b) that the distinction is based on a real or perceived disability; and (c) that the distinction, exclusion or preference had the effect of nullifying or impairing the complainant's right to the full and equal exercise of human rights and freedoms.

Ample case authority has been provided to establish management's right to manage and correct its employees and that I cannot presume that a negative employment appraisal is in and of itself, grounds for establishing that the Complainant was discriminated against.

Alleged bullying and/or harassing behaviour is not in and of itself, substantiation of discrimination.

Newfoundland and Labrador Teachers' Assn. v. Nova Central School District (Cole Grievance) [2013] N.L.L.A.A. No. 6, states at paragraph 81 of the decision:

With respect to whether conduct amounts to harassment in the workplace, the Board refers to the standard described in British Columbia and B.C.G.E.U. (1995) 49 L.A.C. (4th) 193 (Laing) (the "B.C.G.E.U" case), as follows:

In these times there are few words more emotive than harasser. It jars our sensibilities, colours our minds, rings alarms and floods adrenaline through the psyche. It can be used casually, in righteous accusation, or in a vindictive fashion. Whatever the motivation or reason for such a charge, it must be treated gravely, with careful, indeed scrupulous, fairness given both to the person raising the allegation of harassment and those against whom it is made.

The reason for this is surely self-evident. Harassment, like beauty, is a subjective notion. However, harassment must also be viewed objectively. Saying this does not diminish its significance. It does, however, accentuate the difficulty of capturing its essence in any particular circumstance with precision and certainty.

For example, every act by which a person causes some form of anxiety to another could be labeled as harassment. But if this is so, there can be no safe interaction between human beings. Sadly, we are not perfect. All of us, on occasion, are stupid, heedless, thoughtless and insensitive. The question then is, when are we guilty of harassment?

I do not think that every act of workplace foolishness was intended to be captured by the word harassment. This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts or foolish words, where the harm, by any objective standard, is fleeting. Nor should it be used where there is no intent to be harmful in any way, unless there has been a heedless disregard for the rights of another person and it can be fairly said "you should have known better."

Further, the following comments were made at paragraph 90 of the decision:

The Board also refers to 655369 BC Ltd. and U.F.C.W., Loc. 1518 (Morman) [2007] 90 C.L.A.S. 94 (Larson), where the arbitrator, after quoting from the B.C.G.E.U. case, discusses whether criticism of an employee by a supervisor is harassment, as follows:

Even severe criticism of an employee by a supervisor who is genuinely attempting to deal with a perceived performance problem is not harassment: Re Religious Hospitaliers of St. Joseph (1995) 50 LAC (4th) 225 (Simmons). Nor is it necessarily harassment where an employee is demonstrated to have been improperly disciplined by a supervisor or other supervisory action is shown to be unjustified. Supervisors have a right to be wrong provided that they act in good faith and not for an improper purpose. Poor judgment or wrong action is not discriminatory per se. It only becomes harassment when it done in a seriously hostile or intimidating manner or in bad faith.

In Vale Inco Ltd. (Manitoba Operations) v. United Steelworkers, Local 616 (Macumber Grievance) [2013] N.G.A.D. No. 8, paragraph 83 states:

“it is well established in arbitral law that the employer’s supervisory role must be considered in assessing whether conduct by a manager amounts to harassment”. Workplace tensions and clashes do occur between supervisors and bargaining unit employees and this in itself does not constitute harassment. There is a difference between an ordinary “employment bruise” which may result from a troubled workplace relationship and true harassment.”

Further, paragraph 84 of the decision states:

It is widely accepted that harassment does not include the exercise of management rights in good faith...

Further, the following comments were made at paragraphs 85 - 86 of the decision:

Another principle arising from the cases referred to by the Employer was that to make an allegation of harassment is a serious matter, is not to be trivialized, and usually the actions of the Employer must be sufficiently egregious to constitute harassment even though it may be a single act.

Overall, the cases state that one has to look objectively at the conduct complained of. In this particular case, the Employer submitted that the Grievor himself did not believe he was being harassed at the time.

A. DISCRIMINATION BASED ON GENDER

1. The Wine Fair

a. Evidence

Billy Forbes was a Key Account Representative with the Corporation. He was not subpoenaed to testify by either of the Parties. In November of 2004, Ms. Kelly was pregnant and she applied to work at the wine fair, as she had done previously. The wine fair normally took place in November on a weekend and in Halifax. Ms. Kelly's evidence was that she had applied to work at the onsite store. She then testified:

*8 A. I went and I applied to...I put my name forward to work the wine...the on
9 site store at the wine show...the Wine Fair, and I received a phone call from
Billy*

*10 Forbes specifically telling me that...he said, well, aren't you pregnant?
And I said, yes,*

*11 Billy, I am. And he said, I don't think that's an appropriate place for you to
be.*

12 Q. Okay. And was there any further discussion or...

*13 A. I...when I received that phone call from Billy, after I got off the phone
with*

*14 Billy, and stuff, he just said...I called the regional office. I talked to Dean
MacIsaac, who*

15 was the regional assistant, who passed the phone on to Danny MacMillan.

16 Q. All right.

*17 A. I told Danny MacMillan all over again the conversation that Billy
Forbes*

*18 had called me, and that he had...he had...and what he had said, you know,
it's not an*

19 appropriate place for you to be, you know, pregnant. And Danny MacMillan said, well...

20 and I'm like, yeah. Like Danny, I said this is wrong. And he's like, okay, and that's it,

but he didn't do anything else.

It was the evidence of Ms. Kelly that she raised the wine fair incident during her meeting with Ms. Arthur and Mr. Sutherland in November of 2006.

Ms. Kelly made the following statements concerning her disclosures to Mr. Sutherland and Ms. Arthur over the wine fair incident:

4 A. The grievance that I filed got closed because at the time I had a meeting
5 with Craig and Mairi, and I had at that meeting outlined all my concerns,
again, about

6 Billy Forbes, and...and went through it. Actually at that meeting Billy
did...Mairi Arthur

7 and asked me why...why I didn't say something to somebody. And I told her
I did tell

8 somebody all this, and she said who? And I said the VP of Human
Resources, Roddy.

9 Q. Yeah.

10 A. And they just stopped and looked at each other, her and Craig...

Ms. Arthur and Mr. Sutherland denied that there was any mention at any point in time of the wine fair incident by Ms. Kelly to them.

Mr. McMillan testified concerning the wine fair incident:

2 Q. Do you ever recall discussions...you asked me what those discussions
3 were about...the discussions were about the Wine Fair?

4 A. Yes, okay. Yeah, I know what you're getting at.

5 Q. Do you recall when those discussions occurred?

6 A. While I was the Regional Manager.

7 Q. Okay.

8 A. *The exact time, no, I don't.*

9 Q. *Do you recall which year the Wine Fair was?*

10 A. *If I was the Regional Manager it would've been a Wine Fair 2005 or 2006.*

11 Q. *Okay.*

12 A. *I'm sorry, no, it would've been 2003 or 2004.*

13 Q. *Okay.*

14 A. *Yes.*

15 Q. *And what were the nature of the discussions you had with Ms. Kelly*
16 *about...*

17 A. *So we're on that one, Ms. Kelly was expecting a child, and...*

18 Q. *Was she at work at that point in time?*

19 A. *Off and on.*

20 Q. *Okay.*

A. *Yes, I don't remember exactly but I know there was times she was at work*
2 *and there's times she wasn't, so...rather be off and on.*

3 Q. *Yes.*

4 A. *So...so, yes, I do recall her going to me and saying that she...that Bill*

5 *Forbes, possibly someone else, Rick deViller I think, Bill Forbes said it*
6 *wasn't a good*

7 *idea for her to work the Wine Fair this year.*

8 Q. *Okay.*

9 A. *Yeah.*

10 Q. *Do you recall where that discussion occurred?*

10 A. I'm pretty sure it was in my office, yes.

11 Q. That's the office you described, the one in New Glasgow next to the store?

12 A. Yes, next to one of the stores. I can't recall the exact one, so...

13 Q. And did Ms. Kelly suggest that she was harassed or bullied or
14 discriminated by Mr. Forbes?

15 A. No. No. No, she did express that he mentioned that she shouldn't be...it
16 wouldn't be safe to work the store.

17 Q. Okay.

18 A. But no, didn't say I'm bullied or harassed or sexually...no.

19 Q. Did...did you offer to do anything about it?

20 A. I recall at the time was...I do remember having a conversation and
saying,

you know, it's probably because, you know, you were expecting, it was a
concern, but if

2 you want...I do recall saying do you want me to follow up?

3 Q. Yes.

4 A. Yes. What happened after that I...I have to be honest with you, I don't
5 remember the exact details. I do know that she was offered to work, or
someone

6 phoned her up or...

7 Q. Yeah.

8 A. ...but she was offered to work there at a different role, so...

9 Q. Did she ever take you up on your offer to follow up about that?

10 A. I don't recall.

11 Q. Do you recall following up about it?

12 A. I don't recall following up, no, I don't, but like I said Pearl did end up
13 working that Wine Fair. Whether it was her doing or my doing, I just...I
don't recall doing
14 it, so following up.

The Chair asked the following questions in relation to the wine fair:

19 A. No, she didn't say the explanation, but just me and Pearl having a
casual
20 conversation was, you know, it's probably...and I don't recall if Pearl was
five months,
six months, seven months expecting, but I do...I worked the Wine Fair a lot, I
do know
2 it's...it's like ridiculous amount of lifting there.

3 Q. Hm...mm.

4 A. So it's just me and Pearl having conversation was, you know, it's
probably
5 that part of it where there was concern.

6 Q. Hm...mm.

7 A. Yeah, yeah, and I, you know, she ended up working it and I do recall
8 saying, you know, do you want me follow up or anything. I just don't
remember what
9 happened after that. It'd be the...

10 Q. So if she...did that not trigger any concerns with you from an HR
11 perspective? I mean the Corporation has got policies in place in relation to
harassment and
12 discrimination...

13 A. Yeah.

14 Q. ...and she's clearly female and she's clearly pregnant.

15 A. Yes, yeah, yeah.

16 Q. And it's been suggested to her that she not work at some form of a

17 corporate event, so would that not to you as her immediate manager raise
some kind of

18 HR concerns?

19 A. I didn't to me...my answer is no because the conversation was...our
20 conversation was around all the lifting.

1 Q. Pardon me?

2 A. Our conversation was around, you know, probably because of all the
lifting

3 and...and the concern with...we're talking about serious lifting here. So, no,
because

4 the conversation was more along around this do you want me to follow up,
so this

5 wasn't a done deal. There's other things you can do at the Wine Fair.

6 Q. Okay.

7 A. Right? So, yeah, no, so I was obviously...I was definitely not supporting
8 denying her working at the Wine Fair, 100 percent no, and I don't think that
Mr. Forbes

9 was at the same time, yeah.

10 Q. Okay. So if Ms...Ms. Kelly in her testimony had a very different version
11 of...of...

12 A. Okay.

13 Q. ...the conversation with Mr. Forbes, so did you make any notes or
14 anything of any of this at that time?

15 A. I did not 'cause...

16 Q. You didn't view this as a...as a HR...potentially an HR issue in light of
the

17 Corporate policy?

18 A. I didn't...it's not viewed...there's no mention of this as discrimination
and

*19 Danny can you do something right away, this is wrong, or they're like this
no mention of*

*20 that because it was still in the process. And I don't know what happened
but at the end*

*of the day whether I called Rick DeViller or Pearl did or something, I we
talked about it*

2 and said...someone said would you like to do this job? Right?

Roderick J. "Roddy" MacDonald, who is the Vice President of Human Resources for the Corporation, holds a B.A. from the University of Toronto in Economics and Computer Science and an M.B.A. from Saint Mary's University. He is also a certified Human Resources Professional. He has an extensive career in Human Resources; he came to the Corporation in 2002 and was hired as the Vice President of Human Resources. His evidence on the wine fair incident is as follows:

*5 Q. Mr. MacDonald, did you ever recall a discussion with Ms. Kelly about
the*

6 wine fair...a wine fair?

7 A. Yes.

8 Q. Can you tell us...can you first tell us when this would've occurred

9 approximately?

10 A. My recollection of it was that it was at the managers conference at the

11 Lord Nelson Hotel.

12 Q. Hm..mm.

13 A. I'm not clear on...on the exact year of that but...

14 Q. I'm just thinking can you tell us...is this awhile...is this a recent

15 conversation or what it was?

*16 A. No, this is quite awhile ago now, yeah, this is quite awhile ago. And I
can*

*17 picture the two of us standing at the back of the room by kind of where the
soundboard*

*18 and everything was...was set up, and sort of a service corridor behind us
and we were...*

19 we were both standing side by side back there and I remember that..and I remember

20 the location perhaps I'm not sure whether Pearl was right there when this happened but

1 I remember because in that service corridor behind me I remember seeing a mouse and

2 being startled by a mouse in the hotel service corridor. So I kind of picture that place

3 where I was standing. And my recollection is that Pearl was unhappy because she

4 wasn't being scheduled to work at the...at the wine fair.

5 Q. Hm..mm.

6 A. And, you know, it's a scheduling matter, so I...I wouldn't... that's not

7 something I would get involved in. We were...we were chatting about it and as far as I

8 knew she was going to continue to pursue that on with the operations folks, but that she

9 wanted to work at the wine fair.

10 Q. Did she discuss anything in that conversation about not being allowed

11 because of her pregnancy?

12 A. I don't remember any comment about pregnancy. I remember that she

13 wanted to work at the wine fair and wasn't...wasn't allowed...you know, allowed to.

14 Q. During that discussion did she raise any issue of discrimination?

15 A. No, no, no.

16 Q. Did she raise any issue of harassment?

17 A. No.

18 Q. And, Mr. MacDonald, as a man discussing with a woman, you know what

19 if she didn't use the word 'harass' or 'discrimination', would you have picked up on the

20 discussion?

1 A. Oh, yeah, for sure. I mean the culture in an organisation and those kinds
2 of things, that's...that's high on my radar. It's in my code of ethics from the
CHRP, it's

3 part of what...what HR folks kind of are conscious of. There's no question
someone

4 does not have to come and use certain code words to say, you know, and we
ignore

5 them if they don't use those words, that's not the case. If...if Pearl or anyone
had come

6 to me and said that, you know, that they...they described a situation where
what was

7 happening there was discrimination either from the way they've described it
to me or

8 clearly they were feeling that's what it was regardless of the words they
used, that

9 would've triggered me to follow up on that.

10 Q. Do you remember her referencing a Mr. Billy Forbes at all during that
11 discussion?

12 A. Bill was involved in organizing the wine fair so I expect his name came
up,

13 yeah.

14 Q. Would his name have come up, you know, In tandem with the
description

15 of discriminatory or harassing...

16 MR. MASON: That's very leading on an important point.

17 THE CHAIR: It is actually.

18 MR. PROCTOR: Well, would his name have come up at all with any
19 allegations of any wrongdoing, improprieties...

20 MR. MASON: It's still leading but...

1 THE CHAIR: It is but it's out now.

2 MR. PROCTOR: Can you describe what..how his name came up in that
3 discussion?

4 A. Well, I'll back up and say there were no allegation...the point I was
making

5 before there were no allegations of...or even descriptions of something that
might be

6 discriminatory or...or harassing. As I understood it, Bill was...or understand
it..Bill was

7 the one who was organising the scheduling of who was going to work at the
wine fair,

8 and so it was with Bill that..that Pearl was not happy that she wanted to
work at the

9 wine fair and...and...and wasn't going to.

10 Q. Had there been any such description or allegations, what would you
have

11 done?

12 A. Well, I would've followed up to get more information. I would've...I
mean if

13 that's...if that was why someone, you know, what might start out as a
scheduling issue,

14 if the reason that person was not being scheduled was on some prohibitive
ground like

15 that, then I'd have been all over that.

There is something in the evidence of Mr. MacDonald that simply does not ring true. Why would a manager of a liquor store in New Glasgow have a conversation with the Vice President of Human Resources if it wasn't to bring up the fact that she was initially unable to work the wine fair because she was pregnant? Why would the discussion be around scheduling issues?

I find that Ms. Kelly raised the issue of not working at the wine fair with Mr. McMillan directly, and with Mr. MacDonald. I find as well, that she established a *prima facie* case that she was discriminated against by the Corporation because she was not originally slated to work the wine fair because she was pregnant. The circumstance, however, was corrected and there is no evidence of any negative impact upon Ms. Kelly for the initial failure to schedule her to work the wine fair. It is circumstantial evidence of adverse treatment that has not been rebutted by the Corporation. It was clearly Ms. Kelly's

decision, in conjunction with her doctor, to determine whether or not she could or could not work, because there was lifting involved, at the wine fair. The situation resolved itself and Ms. Kelly did work in the wine fair in a different capacity so there is no evidence of any lasting adverse treatment in this particular incident.

b. Legal Argument

Counsel for the Corporation submits that this incident is statute barred. As result of an amendment to the Human Rights Act effective July 1, 2008 the Complainant had one year from the event to file their complaint. As a result, Counsel for the Corporation submits that this incident cannot be relied upon as a ground of discrimination.

Section 29 of the Human Rights Act states at sub paragraph 2:

Any complaint must be made within twelve months from the date of the action or conduct complained of, or within twelve months of the last incidence of the action or conduct if the action or conduct is ongoing.

Counsel for the Corporation relies on the decision of O'Hara v. British Columbia (Human Rights Commission) [2002] B.C.J. No. 887, for the proposition that the wine fair incident is not a continuing violation; the following comments are made at paragraph 18 of the decision:

In coming to its conclusion that the complaints were not "continuing complaints", I am satisfied that the Commission had regard to the particulars of each of the complaints and correctly applied the law as set out in Lynch v. B.C. Human Rights Commission, [2000] B.C.J. No. 1999. In that decision, Mr. Justice Hutchinson adopted the reasoning of the Manitoba Court of Appeal In Re The Queen in Right of Manitoba and Manitoba Human Rights Commission et al (1983), 2 D.L.R. (4th) 759 (Man C.A.), where Philp, J.A. for the court held at p. 764:

What emerges from all of the decisions is that a continuing violation (or a continuing grievance, discrimination, offence or cause of action) is one that arises from a succession (or repetition) of separate violations (or separate acts, omissions, discriminations, offences or actions) of the same character (or of the same kind). That reasoning, in my view, should apply to the notion of the "continuing contravention" under the Act. To be a "continuing contravention", there must be a succession or repetition of separate acts of

discrimination of the same character. There must be present acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.

Further, in Izaak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission) [2014] N.S.J. No. 63, at paragraph 21 of the decision, Justice Bryson made the following comments:

Although Human Rights legislation enjoys a special status in Canadian Law, such legislation is not exempt from the normal principles of statutory interpretation.

Further, at paragraph's 32-33 of the decision, Justice Bryson stated:

By interpreting s. 29(2) of the Act to facilitate Commission policy, the Board effectively allows the Commission to amend the Act. Even if the Commission's policy had the force of law - which it does not - it would have to be consistent with the Act which the Commission has to apply. The Commission's policies and practices must accord with the Act. It is not the other way around.

While the outcome in this case is unfortunate for Mr. Patterson, it is the inevitable result of the Legislature's clearly expressed intention that a 12 month limitation should run from the conduct complained of, and the failure of the Commission to address the complaint within that limitation period. Moreover, the Legislature provided an alternative. Section 29(3) of the Act permits the Director to extend the limitation period in "exceptional circumstances" as more fully described in that subsection. If there were no "exceptional circumstances" in this case, one wonders why the complaint was not addressed in a timely way.

Further, in Exxon Mobile Canada Ltd. v. Carpenter [2011] N.S.J. No. 649, Justice Moir stated at paragraphs 58-69 of the decision:

The statutory limitation prevents Ms. Carpenter from putting forward a distinct incident from her distant past as a violation of the Human Rights Act...

Evidence of older conduct would only be admissible to prove ongoing misconduct, not a specific violation.

c. Conclusion

I therefore find that the wine fair incident is statute barred and therefore, cannot be relied upon to prove a specific violation of the Act, nor is it evidence of an ongoing complaint. It is, however, evidence to prove ongoing historical conduct by the Corporation.

2. "Pregnant Pearl in Pictou"

a. Evidence

Ms. Kelly in her complaint to the Human Rights Commission stated:

It was also during this period of 2003 – 2008 that it also became the standing joke among male managers and other male employees that whenever I received a promotion, I would get pregnant.

It was the evidence of Ms. Kelly that the expression "Pregnant Pearl in Pictou" was heard and said on a regular basis within the Corporation. She testified that she reported it to Mr. Whittemore and raised it with Danny McMillan and Paul Rapp . It is the submission of Counsel for Ms. Kelly that once she started to raised this discriminatory comment, the undermining of her position within the Corporation began. Ms. Kelly testified on this issue at length:

13 Q. And had you ever been promoted throughout your career while you were

14 on maternity leave?

15 A. Oh, yes.

*16 Q. Okay. And had you heard any comments around the Nova Scotia Liquor
17 Corporation about this?*

*18 A. Yes. Actually comments were made all the time about when...and
19 actually I remember one when I was in Pictou when the EES guy had come
over to do
20 some security.*

1 Q. EES? I'm sorry...

2 A. That's a security system with the NSLC.

3 Q. All right.

4 A. Quinton was his...was his name. I can't remember his last name, but he
5 had...he had come to the store one day and he had said, but you're
called...you're

6 PPP. And I said PPP? And he said "Pregnant Pearl in Pictou", and I...and
stuff. Well,

7 he said that's what they call you in Truro. And I said what, and stuff, and he
said, yeah,

8 that's what Rex calls you in Truro.

9 Q. And who's Rex?

10 A. Rex Barnhill would've been another Class 4 male manager, and he was
11 also a ERO

12 Q. All right.

13 Q. All right. And this was reported to you when that you were Pregnant
Pearl

14 in Pictou?

15 A. Oh, the comment was made when I was in...when I was in Pictou, but
the

16 comment I had heard numerous times in and off of work, but I never had a
direct person

17 say it to me until I went to a managers' conference...not a managers'
conference...a

18 managers' meeting in Truro. The managers' meeting in Truro, actually Rex
Barnhill had

19 went and said about me being pregnant and stuff. And he also at one point
said, well,

20 you can't get the Regional Manager's job because you're not pregnant,
right? So...but

Rex did mention, and he did make the statement about me being 1 pregnant,
and he...he

2 said Randy Veinot is another...how come when Randy, who was a clerk in
Rex's store

3 who I have worked with in the Valley, he said how come every time that
Rex...Randy

4 goes over to your store or goes over to help you, you end up being pregnant?
Or you're

5 around him. And I...I said, what do you mean, and he's like, well, every time
that I send

6 him over there, the next thing I hear you're pregnant.

7 Q. All right. And were there other persons in this manager's meeting that...

8 A. There was. There was...all the managers from Region 3 would've been
9 there.

10 Q. How did that make you feel?

11 A. I felt horrible about it, but I couldn't act that way because I knew that it
was

12 supposed to be ha-ha-ha. You can't say anything about Rex, he so union
and he's so

13 high in the union there's no point. Rex, at one point, had told me I
shouldn't draw any

14 more attention to myself than need be.

15 Q. All right. Did you ever report it to your manager or...

16 A. I...I did report it...I reported those comments. Actually the latest time
that

17 I reported the comments being made was to Donny Whittemore.

18 Q. All right.

19 A. And...May of '07 Donny Whittemore had come to my store and had
20 requested information from me about my husband being in the Antigonish
store and

1 having a discussion with Ronnie LeBlanc, the manager of that 1 store. And
when Donny

2 had asked me about the incident, I had specifically told Donny I said...I
guess I have to

3 elaborate as to what had taken place so you'll know.

4 My husband had come home from work one day and he had told me, he said,

5 you know I heard this, Pearl, that you're nothing but a shit disturber, you're
pregnant
6 every time you're promoted. And I said it's nothing I haven't already heard.
I've...I've
7 heard it, right. And he said it's wrong. When he did...when I said whatever,
right.
8 There's not much I can do at this point because they're not going to listen to
me
9 anyway. And when ...when Francis was in the Antigonish store, he had a
10 comment to make to Ronnie, and somewhere along the lines Donny
Whittemore...it
11 was reported to him about Francis' actions, and Donny Whittemore came
to the store
12 and said to me, he said, your husband was in the Antigonish store. And I
said, yes, he
13 brung (sic) down a camera for the rep that had left it and he went and
picked up the
14 camera because he was in New Glasgow. He had already been in
Antigonish and he
15 left his camera there. And he said he had words with ...with Ronnie, and I
16 said...I said I guess so. I don't know. And he said, you don't know, Pearl?
And I said,
17 no, I don't know where my husband heard it because he didn't tell me. He
didn't tell me
18 who said it or anything else. I told him it's, Donny, I already know what
has been...it's
19 not the first time I've ever heard it, it's...but I am very much sick and tired
of hearing
20 people saying that I'm pregnant every time I get promoted.

1 Q. And what did Mr. Whittemore do at that time?

2 A. Mr. Whittemore was more concerned about me getting the information
3 from my husband as to who he had heard it from, and asked me to ask my
husband and
4 to call him with the information. I returned home that night and I asked my
husband, I

5 said Donny was in, he wanted to know where you had heard it. And my husband had

6 told me, he said, tell Donny to call me. What's his number, I'll call him. And I said no,

7 Francis, I'm not giving you Donny's number. I said it's not going to do any good. I said

8 they're just going to use this against me anyway somewhere down the line. So I didn't

9 bother.

10 Q. Okay. And did Mr. Whittemore ever report back to you that he spoke to
11 Mr. LeBlanc about the comment?

12 A. No, he never asked me again for any more information regarding this.

13 Q. This...these comments about being pregnant, maternity leave and so on,
14 how often did you hear those comments in 2004 and 2005?

15 A. They were...they were frequent. There were...I guess depending on
16 where I was and what event was taking place and who was basically saying them, right,

17 that's when I would hear them. Like I said a lot of it is hearsay that, you know, I had

18 some people say it to me. I also heard them say it and my...there's stuff in
19 there...nobody's listening to me. In '07 and when I mentioned it to Donny I had already

20 previously mentioned issues to...in '06 and '04, there was...I had already raised

concerns...I had already raised concerns with Danny MacMillan and I stuff when Donny

2 was my boss, when Paul Rapp was my boss, and nothing was being done. So like I

3 said to my husband, I said, it really doesn't matter anymore, they're not listening to me.

4 Q. All right. And how was that making you feel?

5 A. I felt demoralised, demeaned, and completely...I was frustrated, I was

6 hurt, and I just felt like I'm hopeless. This is...this is hopeless, they're not
listening to
7 me at all.

Counsel for the Corporation asked Ms. Kelly the following questions:

4 Q. And if I were to suggest to you that you in fact made that joke, would that
5 be accurate?

6 A. No. I would be the one that would be on receiving end of that joke, and
7 that I would end up, and as I state here, Rex Barnhill, and his...right...it was
Rex

8 Barnhill that ended up mentioning the joke. Any time that this thing...this
comment was

9 made, it wasn't that I joked about it in the sense that you're trying to express
here, Mr.

10 Proctor. The fact of the matter is if I didn't...if I raised an issue or I felt
that if I made out

11 that it was anywhere demeaning or I felt that I was being demeaned, or...or
my rights

12 were being violated, it wasn't going to be shunned upon. Right? Rex was a
man that

13 very, very into it, status within the liquor corporation it took up two years,
and I had

14 testified that I had a lot of respect for the man. So anytime that those
comments were

15 made, and if they were made, the only natural...you couldn't show your
real emotion to

16 it, and I...and stuff...and that's what I did. You would have to just accept
that it was

17 said, and that's what I was doing. It was like, you know, yeah, okay. It
wasn't that I was

18 not hurt by the comments or anything else. The comments were being made.
I was

19 just trying to appease the area just to make sure that people didn't think
that it was

20 bothering me as much as it was.

Q. So if there were evidence that, you know, someone I said, yeah, I heard the

2 joke, but I heard it from Ms. Kelly and after she told it to me she laughed,
does that

3 sound accurate?

4 A. No, I wouldn't've...I wouldn't've said it at all. I know what it was. I know
5 that people have said that I've been pregnant every time I've been promoted,
and I can

6 be honest with you, I had said that, oh, people have said that you're
pregnant and stuff.

7 But in all honesty the only part of...any time that I would've laughed about it
to make it

8 look it wasn't a serious issue as it was, was to make myself realise that if I
make this out

9 to be an issue with the organisation or with anybody, they're not going to
believe me,

10 they're not going to care, and that's how I felt.

11 Q. And you testified already about Mr. Barnhill who was...apart from
this...a

12 contemporary, on the equivalent he's also a manager, but also you never
notified the

13 union about that, about Mr. Barnhill?

14 A. I had a discussion with my union rep about Mr. Barnhill and a couple of
15 statements that he had made to me, and stuff. But it was a touchy ground
because he

16 was the area representative, and he was very influential in his position.

17 Q. Did you or did you not raise it to the union?

18 A. I can't recall if I did or I didn't. I do recall, like, raising an issue about
Mr.

19 Barnhill, but I can't recall if I...I...I've got a very good memory but I
cannot recall if I

20 raised the issue of him saying the joke.

Paula LeBlanc, who was subpoenaed to testify by Ms. Kelly, worked in head office. She was in a secretarial position and her evidence was that she heard that statement, being

"Pregnant Pearl in Pictou" and comments linking Ms. Kelly's pregnancy to her promotion were made regularly in her presence while she worked in head office.

A number of witnesses were called on behalf of the Corporation. Derek Atwater, who attended at the New Glasgow store for the sole purpose of conducting a regularly scheduled store audit, stated:

7 Q. Okay. Did you have any discussions with Ms. Kelly in the office that day?

*8 A. Yeah. We exchanged pleasantries and I told her that I was surprised to
9 see her in that store as I wasn't aware that she was promoted to that location
because*

*10 store operations does not notify us when they promote managers to...to
different stores,*

*11 so I expressed surprise and she commented to me that she was promoted to
that*

*12 position, and the comment went every time I get promoted I get pregnant,
or every time*

13 I get pregnant I get promoted.

14 Q. And she brought that up?

15 A. Yes.

16 Q. Is it possible that you brought that up in any way?

17 A. No, it's not.

18 Q. Okay. And you distinctly recall her saying that?

*19 A. Yes. I don't recall the exact order, it was either every time I get...I get
20 promoted I get pregnant, or every time I get pregnant I get promoted.*

*1 Q. And is it..did you inquire about her pregnancy or anything about her...is
2 that something that you had brought up...to bring up this level of
conversation?*

*3 A. No. No, it was said in a joking jovial manner. It was not a serious
4 comment on her behalf.*

5 Q. Okay. And how did you react or respond to it?

6 A. Oh, I would've laughed. It...I found it to be comical and so I'm sure I
7 would've laughed.

8 Q. Okay. Did she say anything else about her pregnancy or promotion after
9 that?

10 A. The only thing that I can recall is she made the comment, the next time I
11 get pregnant I'm going to be the Regional Manager, or I'm going to be the
regional
12 manager next time I get pregnant.

13 Q. And once again she brought that comment up?

14 A. Oh, yes. That is the main reason why I remember because at the time I
15 was interested in applying for a Regional Manager's job myself.

16 Q. Okay. And so you just...you distinctly remember her making the
comment
17 about Regional Manager?

18 A. Yes.

Suzanne Gordon is currently employed by the Corporation as a Manager 2 in New Glasgow. She was the Assistant Manager in New Glasgow from September 2004 until February or March of 2005. She ran the store on her own as an acting Manager 2 until she went to Pictou in September of 2005. After a number of stints in various stores in the region, Ms. Gordon was transferred to New Glasgow in May of 2008 in an acting role. She has been the manager in New Glasgow since 2008. She testified:

Q. You've never heard another employee say "Pregnant Pearl in Pictou"?

A. I have never heard anybody say "pregnant Pearl". The only person I have heard refer to Pearl's pregnancy was Pearl herself.

Lynda White is a resident of Westville, Pictou County and is retired from her employment with the Corporation. She became a manager with the Corporation in 2004. She was in an acting manager role in the Stellarton store from 1988 – 2000. She was also in an acting manager role in the Stellarton store from 2008-2010. She stated:

10 Q. Have you ever heard the comment pregnant Pearl?

11 A. Yes, I have.

12 Q. And can you tell us the circumstances of where you heard that comment?

*13 A. We could be at a managers meeting, we could be at a union meeting, I'm
14 not sure. I've heard Pearl say it herself.*

15 Q. So I was going to ask you, who have you heard say that comment?

*16 A. I've heard...I had...I've heard Pearl say it and I believe I've actually
heard*

17 another retired manager say it.

18 Q. Okay, who was the other retired manager?

19 A. Rex Barnhill.

*20 Q. And so can you tell us the circumstances of which you've heard Ms.
Kelly*

I say it?

*2 A. I think we'd just be in a social situation like at a meeting at lunch time or
at*

*3 a union meeting and it would just come out, oh, I guess If I want to get a
promotion I get*

4 pregnant again, you know, pregnant Pearl, and she'd laugh.

5 Q. And she would say that?

6 A. Yeah.

7 Q. And she would laugh about that?

8 A. Yeah.

Lynda White further stated:

19 A. Yeah, yeah, and I've heard Pearl say it herself.

20 Q. Yeah, you heard Pearl say it on one occasion, is that right?

1 A. Definitely one.

2 Q. Yeah, yeah. And you've heard other managers, you mentioned Mr.

3 Barnhill has said it.

4 A. Yeah.

Mr. Danny MacMillan, who was Ms. Kelly's Regional Manager was asked:

A. Have you ever heard the joke, Ms. Kelly referred to as "Pregnant Pearl in Pictou"?

Mr. MacMillan responded "no" to that question. He was further asked:

Q. Have you ever heard the joke that every time Pearl gets pregnant, she gets promoted?

A. Yes. I heard that from Ms. Kelly.

Mr. Rapp was also asked the question:

Q. Have you ever heard her referred to as "Pregnant Pearl in Pictou"?

His response was:

A. I have never heard that before.

In cross-examination Mr. Whittemore was asked:

Q. You heard about "Pregnant Pearl in Pictou"?

A. Never heard it before.

Q. No one has ever reported it to you?

A. No.

Mr. Sutherland was asked in his evidence the following question:

Did she say she was referred to as "Pregnant Pearl in Pictou?"

Mr. Sutherland's answer was "no".

Ms. Donna Braniff, who was Ms. Kelly's witness, stated in her evidence:

She gets promoted when she's pregnant. I can't remember who I heard it from.

Counsel for the Corporation submitted that Rex Barnhill was Ms. Kelly's "union brother" and any comments that he made at a managers meeting would not be the ultimate responsibility of the employer to correct. I respectfully disagree. The evidence is clear that the statement was made by an employee of the Corporation at a Managers meeting. There is also evidence that is uncontroverted from a former employee, being Paula LeBlanc that the statement was made regularly at head office.

I find as a fact that the statement "Pregnant Pearl in Pictou" was generated by the comments of Mr. Barnhill at a Managers' meeting and the acronym was known in the region. In making that finding I rely on the evidence of both Ms. Kelly, Ms. LeBlanc, and Ms. White. I also find, that Ms. Kelly made comments herself to the effect of, "whenever I get pregnant I get a promotion". There is ample evidence to support this finding. Further, and despite the fact that it is hearsay, I accept the evidence of Ms. Kelly concerning a discussion that Ronnie LeBlanc, Manager in the Antigonish store had with Ms. Kelly's husband after he dropped a camera off at the Antigonish store. I also accept Ms. Kelly's evidence that Mr. Whittemore was more interested in finding out what her husband Francis had discussed with the Antigonish Manager, Mr. LeBlanc, than addressing the real issue, which was the statement that linked Ms. Kelly's promotion and her pregnancy and the fact that it was repeated to Ms. Kelly's husband by the Manager of the Antigonish store.

b. Legal Argument

Counsel for the Respondent relies on the decision Moore v. Play It Again Sports Ltd. [2004] N.S.H.R.B.I.D. No. 2, which was upheld by the Court of Appeal in Nova Scotia Human Rights Commission v. Play It Again Sport Ltd. [2004] N.S.J. No. 403 (C.A.). In this decision the Complainant alleged that she was discriminated against because of her aboriginal origin and that the actions of her employer were in violation of section 5 (1) (d) (q) of the Human Rights Act. In the formal complaint, the Complainant stated that on a number of occasions while she was at work she was greeted and referred to as "kemosobe" by her employer. The word "kemosobe" is a reference to the Lone Ranger/Tonto television series. The Complainant was offended by the term and found it demeaning and insulting to her aboriginal origin. The Complainant's evidence was that she told her employer that they could refer to her as "Nitap" the Mi'kmaq word for

“friend”, but that they could not refer to her as “kemosobe”. Evidence was lead by the Respondents that they referred to other individuals of non aboriginal heritage as “kemosobe” as well, and they took the term to mean “friend”.

The Board of Inquiry found in favour of the Respondent and the Complainant appealed to the Court of Appeal. The Court of Appeal stated at paragraph’s 84 and 85 of the decision:

In the face of Ms. Moore's knowledge as to what the Respondents understood by the term kemosabe, is it any wonder that the Board considered that the civil burden of proof required her to give some clear and unequivocal indication of her rejection of the appellation? Having regard to the context in which the Board was addressing the burden that rested on Ms. Moore, I am unable to conclude that it set too high a standard by stating that she should clearly and unequivocally show her disapproval, if in fact she disapproved.

If I am wrong in my conclusion with respect to the previous step taken by the Board, Ms. Moore's case must fail for another reason. The issue of whether Ms. Moore signalled her disapproval, and what evidence was needed to show this is trumped by the Board's further finding of fact that Ms. Moore was not in fact offended by the term kemosabe during the term of her employment. This finding, reached by the Board as a credibility finding in the face of all of the evidence, was not shown to be erroneous in law. Ms. Moore was not offended. She bore no burdens, obligations or disadvantages not imposed on others. She was not denied access to opportunities, benefits or advantages available to others. See s. 4 of the Act, ante para.56.

Counsel for the Corporation argued that because Ms. Kelly repeated the statements herself, they cannot be found to be offensive or in violation of the Human Rights Act. In fact, the Corporation’s defence to the allegation is that a number of its employees heard Ms. Kelly make the same types of comments about herself in a jovial joking manner. Secondly, it is the Corporation’s position that Ms. Kelly was clearly not offended by the comments as she made them herself in the workplace.

c. Conclusion

Ms. Kelly, in her evidence, stated that she did not take any steps in relation to the “Pregnant Pearl in Pictou” acronym because she was in effect just trying to get along in her workplace and felt that nothing would come of it. I suspect as well, that her

statements made to various other employees of the Corporation as a form of self deprecating humor. That does not mean that she was comfortable with the comment, or that she liked it. Unfortunately for Ms. Kelly, the Court of Appeal decision in Play It Again Sports Ltd. made it very clear that there is a requirement for some clear and unequivocal indication of her rejection of the appellation. Further, the Court of Appeal found in Play It Again Sports Ltd. that the Complainant was not offended and she bore no burdens, obligations, or disadvantages on others as a result of the appellation “Kemosabe”. However, no one else in the employ of the Corporation was referred to as “Pregnant Pearl in Pictou” nor was there any evidence of any other comments being made about other Managers and/or employees of the Corporation obtaining their promotions as a result of pregnancy. Further, the linkage of career advancement and pregnancy has a negative connotation, the implication being that Ms. Kelly got her promotions because she was pregnant, and not because of on her abilities. This is what distinguishes Ms. Kelly’s appellation from “Kemosabe” and the fact situation in Play It Again Sports Ltd. I find that the statement was in fact made by a fellow employee, Rex Barnhill, at a Managers meeting where Ms. Kelly was present, as well as Ms. White. It was made to Ms. Kelly’s husband by a fellow Manager, Ronnie LeBlanc. It was also heard by Paula LeBlanc in head office and the statement was made to Ms. Kelly by an employee of the Corporation who worked in EES and repeated the statement to Ms. Kelly while she was working in the Pictou store, who told her that the origin of the statement “Pregnant Pearl in Pictou” came from Rex Barnhill in the Truro store. I find that Mr. Whittemore was aware of this statement based on his conversation with Ms. Kelly concerning her husband’s conversation in the Antigonish store with Mr. LeBlanc.

Therefore, I find that the comment was made in relation to Ms. Kelly and that it was also made by Ms. Kelly as a way to get along in her workplace. I find that there is enough circumstantial evidence to establish a *prima facie* case on the balance of probabilities that the statement was made. The Corporation has not lead evidence to rebut that finding. I distinguish this case from the decision of our Court of Appeal in Play it Again Sports Ltd. as noted above.

3. The Question of an Assistant Manager

a. Evidence

Paragraph 6 of Ms. Kelly’s complaint states:

While I was a manager at the New Glasgow store, 2003 to 2008, I was not provided with an assistant manager as per the collective agreement for any

length of time. In the fall of 2003, I received an assistant, Hal Murrell, for one month. In the spring of 2004, I received another assistant, Doug Bain, who was my assistant for 13 weeks. In the fall of 2004 Suzanne Gordon became my assistant and was in that position with me for approximately a month, until I went on maternity leave. On the same day I returned from maternity leave in January 2006 for approximately 6 weeks until she was removed permanently to run the Stellarton store. At this time, Paul Rapp told me that the Pictou store (class 2) would be getting an assistant because they needed one more than I did. I remained without an assistant since that time and was informed that I have an assistant on paper but she works in another store. During the winter of 2006-2007 there was a competition for assistant managers. The New Glasgow store was not identified as a location receiving an assistant manager. At that time two of my employees, Donna and Joann, had competed to be put assistant managers. Joann was successful and offered an assistant managers job at the Elmsdale store (class 3).

The Collective Agreement which governs Store Managers for the Corporation provides that a Manager 4 in a Class 4 Store is entitled to an Assistant Manager.

In tab 1, of Exhibit 18, there is a list of all of the Corporation's store locations province wide, the region the store is in, the time, the characterization of the management position, the employee number, and the name of the employee. In relation to Ms. Kelly, she is listed as being a manager, from 01/09/2003 – 04/05/2008. Harold Murrell was her Assistant Manager from 29/09/2003 – 23/11/2003 and Nicolas Bain was the Assistant Manager from 29/-3/2004 – 27/06/2004. The New Glasgow store was reclassified to a Class 3 Store on April 1, 2006. In total Ms. Kelly had an Assistant Manager for six months during her time in the New Glasgow store, out of the three years the New Glasgow store was classified as a Class 4 Store.

In comparison, Rex Barnhill who was the manager of a Class 4 Store in Truro, and who started in that position on 28/11/2002 and continued in that position until 01/05/2012 had as a Manager 1, Duncan McDonald starting in 30/06/2003 and according to the chart he continues on in that position. Tracey Etter, who was the manager in the Antigonish store from 28/11/2002 to 18/10/2004, had Wally Proctor as an Assistant Manager from 29/09/2003 – 28/03/2004 and then from 29/03/2004 – 13/08/2006. Wally Proctor continued to be an Assistant Manager in that same store from 14/08/2006 and continued in that position until 11/01/2011.

It was Ms. Kelly's evidence that she was not afforded an Assistant Manager while she was a Manager 4 because she was female and that other male managers in her region who managed Class 4 stores had Assistant Managers.

Mairi Arthur, who is the Manager of Human Resource Services for the Corporation, pointed out, in relation to Exhibit 18, tab 1, and in her testimony, that there were a number of male managers, both Manager 3 and Manager 4, in different regions of the province who did not have Assistant Managers, and went without them for extended periods of time, being Glen Nicks, John Lily, Scott Burke, and Greg Lake.

Ms. Arthur testified as to the mobility of Assistant Managers:

So if a store is assigned an Assistant Manager, there are several things that can disrupt that change. For example, Assistant Managers get transferred a lot of the time. They get promoted a lot of the time. If they are off on any leave they are not in the store. If we have to replace an Assistant Manager the process according to the collective agreement likely takes about three months. So in any store at any given time there are gaps as to whether there is an Assistant Manager there or not.

Further, Ms. Kelly in cross-examination admitted that Mr. Murell's departure as her Assistant Manager was not motivated by her gender. She acknowledged as well, that it was a classification of the store that determined whether or not you had an Assistant Manager. She admitted that she did not tell Danny McMillan that she thought the reason why she did not have an Assistant Manager was because of her gender. Ms. Kelly admitted that she had never grieved this issue. She also admitted that she never told Paul Rapp that she needed an Assistant Manager.

In his evidence Paul Rapp testified that he prepared Exhibit 2(b) tab 130 based on the Human Resources records that existed, and his evidence confirmed the contents of the document concerning the lack of a manager for a Margaret Moffat, Scott Burke, Glen Nick, and Greg Lake. It is important to note that some of these managers are Manager 3s and the stores are in different regions than Ms. Kelly. The Exhibit prepared by Mr. Rapp ranked the stores based on the amount of their sales; the point being that stores with higher sales numbers than the New Glasgow store managed by Ms. Kelly, were operating without Assistant Managers. Mr. Rapp further testified that despite the lack of an Assistant Manager, Ms. Kelly had seven staff in her store which was larger than some of the others.

Ms. Arthur, in response to the question in cross examination of whether the decision to find someone an Assistant Manager was based on gender, answered, "never". In cross-examination however, Ms. Arthur admitted that despite the difficulties in Ms. Kelly's store keeping Assistant Managers, Mr. Barnhill did not experience that difficulty, Mr. Etter did not experience that difficulty, nor did Mr. LeBlanc, who was a subsequent manager of the Antigonish store.

There are significant inconsistencies in the evidence of both Ms. Kelly and Mr. Whittemore on the issue of whether or not she refused or was even offered Joanne Kylie as an Assistant Manager. In Ms. Kelly's evidence at volume 1, page 59 she states:

Q. Did you ever refuse an Assistant Manager?

A. No, I have not.

Further, the following exchange occurred between Ms. Kelly and Counsel for the Corporation:

Q. Did you call Mr. Whittemore, in response to that, suggesting an Assistant Manager?

A. No.

Q. And more specifically do you recall him suggesting that he could transfer Joanne Killey as an Assistant Manager?

A. He never once mentioned Joanne Kylie to me.

Q. So he has never ... never proposed her as a potential Assistant Manager?

A. No, he has not.

Mr. Whittemore was asked the following questions concerning the issue of an Assistant Manager for Ms. Kelly:

1 Q. Did she raise that with you on more than one occasion?

*2 A. Yes. So this is the last time I can remember that I was driving home from
3 Amherst late one morning and I can remember exactly because I was about
to hit some*

4 black ice so I looked at the temperature gauge in my car which was dropping from one

5 to zero to minus one, raining hard and I was quite nervous and...and I was listening to

6 Pearl and I said, well, I can do something for you.

7 Q. Sorry, you were talking to her at this point in time?

8 A. I was talking to her, yes, on the phone.

9 Q. Yes.

10 A. And I said I can...I can get you an Assistant Manager, an up and coming
11 very strong manager, and Pearl asked me who it was and I said it was...her name is

12 Joanne Kylie, she's working at the Elmsdale store. She lives in New Glasgow and

13 would be thrilled to come back. And I said from all reports from her current regional

14 manager, and from her manager, that she is very strong and is doing very well there, It

15 would be a big help.

16 Q. Okay.

17 A. And Pearl said no, she didn't want her.

18 Q. And do you know why Ms. Kelly didn't want Ms. Kylie?

19 A. No, I don't.

20 Q. At that point in time...so what year would that have been?

1 A. That would've been the spring of 2007.

2 Q. So at that point in time the New Glasgow store was what class?

3 A. It was a Class...at that time it was still classed...no, Class 2, I think.

4 Q. And would it be common for the New Glasgow store that time to have an
5 Assistant Manager? A store that size, I should say?

6 A. No, there's other Class 2 stores around then that didn't have assistant 7 managers.

b. Conclusion

What is of concern, is the pattern that exists in Ms. Kelly's region, where a long established male Manager 4 in the Truro store and the male Manager 4 in the Antigonish store both consistently had an Assistant Manager and Ms. Kelly, in the same region with the same Regional Manager, did not. It was submitted on behalf of the Corporation that both the Antigonish and the Truro stores were the largest stores with greater sales numbers than the New Glasgow store when it was classified as a Class 3 Store and subsequently a Class 2 Store. Based on a regional analysis only, circumstantial evidence exists to establish a *prima facie* case that Ms. Kelly did not have an Assistant Manager because she was female. However, the evidence that was lead by the Corporation through its various witnesses, establishes that from a provincial analysis there was no basis to conclude that the decision not to provide Ms. Kelly with an Assistant Manager were based on gender. Ms. Kelly did not provide any other evidence and/or argument to establish that the Corporation's explanation was not reasonable and amounted to a pretext or a disguise of the Respondent's discriminatory conduct.

4. Performance Appraisals

Counsel for Ms. Kelly argued that Ms. Kelly, in her performance appraisals, was held to a higher standard than her male counterparts in her region. At paragraph 35 of the complaint form Ms. Kelly stated that she had been treated unfairly and held to a different standard than her male counterparts.

a. Ms. Kelly's Performance Appraisal and Mr. Barnhill's Performance Appraisal

There has been a significant amount of discussion concerning the performance appraisals conducted by Mr. McMillan, Paul Rapp, and Donny Whittemore, found at Exhibit 2(b) tab 51. Counsel for the Corporation pointed out a number of consistent themes in the 2003/2004 performance appraisal, the 2005/2006 performance appraisal, and the 2007 performance appraisal.

In the area of identifying staff, in the 2003/2004 performance appraisal prepared by Daniel McMillan, the following comment was made:

... I would like to see more focus on creative suggestive selling and developing

of sales culture from all employees even though there have been major strides in this area.

Paul Rapp in the 2006 performance appraisal made the following comments:

... However, some of our employees will require intensive coaching in order to meet the new standards. The store is no longer large enough to have employees specializing in one task. There is also a potential Assistant Manager vacancy in the store. Pearl should identify potential candidates and begin the grooming process.

... Her staff are improving their skills but more work needs to be done.

Pearl needs to concentrate on developing others in order to reduce her burden.

... However, at times Pearl tends to coddle her employees. Instead of challenging them to improve she often accepts them at their current level.

In the 2007 performance appraisal, prepared by Donny Whittemore the following comments concerning developing staff:

... Developing staff to meet customers' needs has become challenging.

... Developing some staff has been a challenge for Pearl.

In relation to prioritizing and store focus the following comments were made by Mr. McMillan in the 2003/2004 performance appraisal:

... More time is needed, however, focusing solely on her store and especially her employees.

... More focus is needed on time management as Class IV Stores need most of Managers commitment and time. Outside areas of interest during her work hours need to be reduced.

In the 2006 performance appraisal, Paul Rapp stated:

...Sometimes fails to separate priorities. Pearl needs to concentrate on execution and customer service at all times; no matter what else is going on.

You [Pearl] will have to focus on your team and store to be successful. More specifically, problem solving, developing your team and setting expectations for your team.

On the issue of acceptance of management direction the following comments are made by Mr. McMillan in the 2003-2004 performance appraisal:

...Sometimes Pearl has difficulty understanding why some decisions are made, but does agree after a discussion.

The following comment by Mr. Rapp in the 2006 performance appraisal:

...At times she tends to be a little headstrong, but always follows direction.

On the question of developing a sales culture, the following comments are contained in the 2003/2004 performance appraisal:

...There is still work to be done in developing sales culture in her store.

...More time and patience is warranted to develop all staff and to be sales oriented instead of task oriented.

In the 2006 performance appraisal the following was stated:

...However, she needs to work on fostering the growth of a sales force that is focused at meeting the needs of her customers.

The 2007 performance appraisal stated:

Work with and develop your staff (in areas such as selling skills, customer service, and product knowledge) to their full potential.

The difficulty with the performance appraisals is the evaluation of performance is largely subjective and in the hands of the Regional Manager. This is in the soft areas of the performance appraisal. Sales numbers largely speak for themselves, as was pointed out by Counsel for Ms. Kelly. What is interesting is the comparison of Ms. Kelly's performance appraisal and Mr. Barnhill, who is a Manager 4 in the Truro store, for 2007. Both were prepared by Mr. Whittemore. Mr. Barnhill's performance appraisal put his mystery shopper score as being 88.96. Ms. Kelly's was 88.92. Ms. Kelly missed her sales target by approximately \$46,000.00. Mr. Barnhill missed his sales target that same year by \$634,000.00. Mr. Barnhill in that year received a "met standards" performance

appraisal. Ms. Kelly received a “met most standards but needs development in some areas” performance appraisal.

Counsel for the Corporation provided a comparison of the 2003/2004 performance appraisals, 2005/2006 performance appraisals, and 2006/2007 performance appraisals for Ms. Kelly and Mr. Barnhill. On the question of customer service, Ms. Kelly’s 2003/2004 performance appraisal states:

Pearl is very focused on selling to customers. She is aware of the importance of improving the CSI and is focused on getting the staff on the same frame of mind.

On customer service Mr. Barnhill’s performance appraisal stated:

Rex is very focused on selling to customers. He is aware of improving the CSI and has all staff in the same frame of mind.

On the question of employee development in the 2003/2004 performance appraisals, Ms. Kelly’s performance appraisal stated:

Currently training employees in all areas of acting management. Again, more time and patience is warranted to develop all staff into being sales oriented instead of task oriented.

In relation to employee development in Mr. Barnhill’s performance appraisal stated:

Employees are being trained and informed of management expectations so the store will always be up to standards, especially during the absence. Rex is very open and encouraging in sending his employees on training seminars.

On the question of local economic development, Ms. Kelly’s performance appraisal stated:

Pearl is aware of our commitment to support local Nova Scotia suppliers. She will work with her employees on promoting local products. Data will be collected in September to monitor the results.

The following comments were made concerning Mr. Barnhill and local economic development:

All employees are aware of our commitment to support our local Nova Scotia

suppliers. Rex is focusing on increasing the sales of these products.

On the question of customer service orientation, the comments concerning Ms. Kelly were:

Pearl has a desire to meet all customer needs. Her employees have the same focus. I would like to see more focus on suggestive selling and developing a sales culture from all employees, even though there have been major strides in this area.

On the question of customer service orientation, the following comments were made concerning Mr. Barnhill:

A strong desire to meet customers' needs. Very patient and polite. Must get all staff on board to be sales people.

On the question of business mindedness, the following comments were made concerning Ms. Kelly:

Accepts the Corporations decisions and direction. Sometimes Ms. Kelly has difficulty understanding why some decisions are made, but does agree after a discussion. I would like to see Pearl enroll in a business management course, as this will aid in her understanding of corporate objectives.

On the question of business mindedness, the following comments were made concerning Mr. Barnhill:

Rex is aware of the Corporations goals and is focused on accomplishing them and suggesting ideas to improve them.

On the question of developing others, the following comments were made concerning Ms. Kelly:

Provides constructive criticism to staff and has a good interest to help in their development. Pearl needs to continue to teach her employees how the stores operate outside the Pictou County area so they will be open to new ideas.

In relation to developing others, the following comments were made concerning Mr. Barnhill:

Very patient trainer with an excellent knowledge of all management

responsibilities. I would like to see Rex identify and work with potential future managers.

On the question of interpersonal understanding, the following comments were made concerning Ms. Kelly:

Good understanding of others, both customers and employees. This is a challenging area for many Class IV Managers and also very important.

In relation to interpersonal understanding, the following comments were made concerning Mr. Barnhill:

Strong interpersonal skills. Rex has a rare, natural, gift of understanding different employees.

On the question of listening and responding, the following comments were made concerning Ms. Kelly:

Ms. Kelly has a healthy two way communication with her staff regarding areas to improve the overall operation of the store. More time is needed, however, focusing solely on her store and especially on her employees.

On the question of listening and responding, the following comments were made concerning Mr. Barnhill:

Very focused on the wellbeing of his employees. Open to new ideas and suggestions from anyone.

On the question of team leadership, the following comments were made concerning Ms. Kelly:

Well respected by staff as a good team leader. Good job at keeping members informed and sending direction. The main focus this year will be to ensure employee harmony and that all employees feel that they are contributing to the store.

In relation to team leadership, the following comments were made concerning Mr. Barnhill:

Excellent team leader in all areas. Very well respected by all employees and fellow managers.

In relation to the 2005/4006 performance appraisals prepared by Paul Rapp, the following comments were made concerning customer service:

Pearl demonstrates strong customer service skills. However, she needs work on fostering growth of a sales force that is focused at meeting the needs of her customers. They need to understand the importance of being engaged in customer service at all times.

In relation to customer service in the 2005/2006 performance appraisal, the following comments were made concerning Mr. Barnhill:

Rex demonstrates strong customer service skills. He was fostered the growth of a sales force that is focused at meeting the needs of all of his customers.

On employee development, the following comments were made concerning Ms. Kelly:

Employees are being trained and informed of management expectations. However, some of her employees will require intensive coaching in order to meet the new standards.

The following comments were made concerning employee development by Mr. Barnhill:

Rex actively seeks ways to enhance his skills and his employee's skills... Rex has managed to jump start the development of a few employees that others in the past have given up on.

In relation to the question of developing others, the following comments were made concerning Ms. Kelly:

Pearl needs to concentrate on developing others in order to reduce her burden.

In relation to Mr. Barnhill, the following comments were made:

Trains and challenges staff to become better employees. Community developing others and has all employees committed to the organization. Rex has the ability to influence his staff without being threatening or condescending. He is very patient and has excellent understanding of the manager's role.

On the question of directiveness, the following comments were made concerning Ms. Kelly:

All staff are very clear of Pearl's expectations. However, at times Pearl tends to coddle her employees. Instead of challenging them to improve, she often accepts them at their current level.

On the question of directiveness, the following comments were made concerning Mr. Barnhill:

All staff are very clear of Rex's expectations. Rex has set clear standards for all of his staff to follow and is not afraid to challenge them if they fall below expectations. Rex does an exceptional job addressing sub-par performance.

On the question of expertise, the following comments were made concerning Ms. Kelly:

Pearl has a vast amount of expertise. She has a broad range of knowledge in almost every area.

In relation to Mr. Barnhill, the following comments were made concerning expertise:

Possesses a complete understanding of the management role. Rex is a gifted leader.

In relation to interpersonal understanding, the following comments were made concerning Ms. Kelly:

A good understanding of different types of employees and customers.

The following comments were made concerning Mr. Barnhill:

A good understanding of different types of employees and customers. Rex has a natural gift in dealing with and understanding people.

In relation to the question of listening and responding, the following comments were made concerning Ms. Kelly:

Pearl is receptive to any direction I give her. At times she tends to be a little headstrong but always follows direction.

On the question of listening and responding, the following comments were made concerning Mr. Barnhill:

Rex is receptive to any direction I give. He is not afraid to ask questions or express his concerns. He is open to new ideas and working together. I would like to see meeting minutes on a monthly basis.

On the question of team leadership, the following comments were made concerning Ms. Kelly:

Has earned the respect of her employees. Works cooperatively with staff to develop a strong store team.

In relation to team leadership, the following comments were made concerning Mr. Barnhill:

Excellent team leader in all areas. Has earned the respect of his employees and managers in the region.

In the 2005/2006 performance appraisal, Ms. Kelly's appraisal was "met most standards but needs development in some areas". Mr. Barnhill's was "exceeded most job requirements".

In relation to the 2007 performance appraisal prepared by Mr. Whittemore, the following comments were made concerning customer service and Ms. Kelly:

Developing staff to meet customers' needs has been challenging.

In relation to Mr. Barnhill, the following comments were made concerning customer service:

Continues to develop staff to meet customers' needs.

In relation to employee development, the following comments were made concerning Ms. Kelly:

Has recruited and trained new employees. Developing some staff has been a challenge for Pearl.

In relation to employee development, the following comments were made concerning Mr. Barnhill:

Has recruited, trained, and developed competent employees.

In relation to supervisors comments the following were made concerning Ms. Kelly:

You will have to focus on your team and store to be successful. More specifically problem solving, developing your team, and set expectations for your team.

The following comments were made concerning Mr. Barnhill:

Strong leadership skills and you have built a strong team in your store. Being strong in those competencies will usually lead to a successful store.

Ms. Kelly's assessment was "met most standards but needs development in some areas". Mr. Barnhill's was "met standards", despite almost identical mystery shopper scores and Mr. Barnhill's significant shortfall in his sales target. Are the differences between Ms. Kelly's and Mr. Barnhill's performance appraisals because of their gender or because Mr. Barnhill has more years of experience in a managerial position with the Corporation?

There appears to be subtle differences in language when one compares and contrasts the performance appraisals of Mr. Barnhill and Ms. Kelly. The issue is the performance appraisals prepared by Mr. Whittemore. Both Mr. Barnhill and Ms. Kelly had mystery shopper scores that were close. Ms. Kelly only missed her sales target by approximately \$46,000.00. Mr. Barnhill missed his sales target in that same year by \$634,000.00. That is a significant sum in the operation of any business. No explanation was offered as to why Mr. Barnhill received a "met standards" performance having missed his sales target so substantially.

I find based on the comparison of the performance appraisals of Mr. Barnhill and Ms. Kelly prepared by Mr. Whittemore and the respective mystery shopper numbers and sales numbers, there is a *prima facie* case that Ms. Kelly received adverse treatment in relation to the performance appraisal conducted by Mr. Whittemore, which negatively affected her employment.

b. Evidence of the Corporation in Response

The Corporation lead a significant amount of evidence to establish that there were legitimate performance issues concerning Ms. Kelly.

i. The Phone Bills

There was evidence lead by the Corporation to attempt to establish that prior to the performance appraisal prepared by Paul Rapp, there were performance issues. One of the alleged performance issues was Ms. Kelly's phone usage.

There was evidence by both Danny McMillan and Paul Rapp concerning Ms. Kelly's alleged phone usage. Mr. McMillan stated

11 Q. Did you ever specifically address or discuss this directly with Ms. Kelly?

12 A. Yes, yeah. We had open conversation on it. Yeah, it was a development

13 issue...yeah, or a development area.

14 Q. Did you discuss it once with her or more than once?

15 A. Definitely more than once. I noted it on the PA and I do recall just in my

16 office of several conversations on it, are the minutes going down, so...and acceptance

17 that it was...that it was excessive, yeah.

18 Q. She...she did accept that it was...

19 A. Yeah. Yeah.

20 Q. Okay. Did you ever have opportunity to show Ms. Kelly actual phone

1 bills?

2 A. Yes.

Ms. Kelly, on the same issue testified:

20 Q. The...and if Mr. MacMillan comes here and testifies and says I spoke to

Pearl specifically about spending too much time on the telephone 1 compared to what

2 other managers are doing, is he says that is that accurate?

3 A. I'm going to say no.

4 Q. Okay. And your...your recollection is the discussion with Mr. MacMillan in

5 his office that day about the telephone was about these two phone lines issue you just

6 described, is it?

7 A. Yes.

8 Q. Okay. Okay. And I'm going to suggest that Mr. MacMillan spoke to you

9 about your usage of the phone on more than one occasion, more than that one meeting

10 in his office.

11 A. He's never showed me any telephone bills at all.

Paul Rapp's evidence on the question of Ms. Kelly's phone bills was as follows:

3 Q. And did you ever discuss those matters with Ms. Kelly?

4 A. Yeah, I can actually remember one occasion Ms. Kelly brought it up that, 5 hey, did you look at my phone bill lately? You know, it's really good this month, you

6 know, I can remember a conversation like that. That was initiated by her, yeah.

7 Q. So she had...she brought that up to you?

8 A. Yeah, yeah.

9 Q. Did you monitor her phone bills?

10 A. Yeah, yeah, I did just like I would monitor all the stores' phone bills. I paid

11 a little more attention to hers.

Ms. Kelly's evidence on the same point was as follows:

9 Q. Okay. And during Mr. Rapp's time, did the issue of you being on phone a 10 lot come up with Mr. Rapp?

11 A. No, it did not.

12 Q. Do you recall around the time Mr. Rapp started, of going up to him and
13 you saying to him, hey, I'm doing much better on staying off the phone? Do
you

14 remember having that conversation with Mr. Rapp?

15 A. No, I do not.

16 Q. So you've never brought up with Mr. Rapp that you were working on
your

17 staying off the phone issue that Danny had identified?

18 A. No.

It is important to note that the phone usage issue was not raised in any of Ms. Kelly's performance appraisals and there was no reference to them in the volumes of documents that have been produced throughout this proceeding. I find that phone usage was an issue for Ms. Kelly but not a serious enough issue to warrant reference to it in her various performance appraisals or by way of written communication from Mr. McMillan or Mr. Rapp.

ii. *The Development Plan*

As a result of her 2005-2006 performance appraisal and the subsequent comments being filed concerning her performance appraisals on September 8th, 2006, Ms. Kelly filed a grievance concerning her request for a transfer to the Antigonish store on October 27th, 2006. On October 30th, 2006 Mr. Whittemore, her Regional Manager, wrote to Michelle Kehoe, her ERO, denying the grievance. Ms. Kelly then emailed Ms. Arthur and Mr. Sutherland. The result was a meeting between Ms. Arthur, Ms. Kelly, and Mr. Sutherland in November of 2008 and the direction that Ms. Kelly should prepare a development plan to work on her alleged short comings, as identified in her performance appraisals.

There was a meeting on January 5, 2007 during which Mr. Whittemore allegedly coached Ms. Kelly on a development plan. She was given a two week deadline to produce the written development plan. Ms. Kelly did not produce a development plan on time and she admitted that she was late in doing so.

On March 12th, 2007 there was a letter sent by Mr. Whittemore to Ms. Kelly, being tab 6 of Exhibit 1 (a), which clearly sets out what the alleged issues were in relation to her performance. The letter makes reference to Mr. Whittemore's "efforts to help you develop in your role, improve your performance, and provide leadership to your staff". Based on the evidence I cannot find as a fact that any of these efforts occurred. The letter is not written in language that would suggest that Mr. Whittemore was sincerely interested in coaching Ms. Kelly to improve her performance appraisal, which was a clear suggestion of the evidence of both Ms. Arthur and Mr. Whittemore.

Ms. Kelly, in her proposed development plan, found at tab 47 of Exhibit 2(b), did not comply with what Mr. Whittemore was clearly looking for in his March 12th, 2007 letter.

Mr. Whittemore prepared a memo to file on January 5th, 2007 concerning his meeting with Ms. Kelly and the store review. In the memo he makes reference Ms. Kelly getting an "unsatisfactory PA". Submissions for Counsel for the Corporation throughout the course of the matter have been that there was nothing wrong with Ms. Kelly's PA.

There was a letter sent on March 16th, 2007 addressed deficiencies with staffing on the floor of the store. At the end of the letter it states "if you do not schedule properly and do not have adequate floor coverage in your store, disciplinary action may be taken". Mr. Whittemore, also during this time period, began the process of taking photos of the condition of Ms. Kelly's store and not sharing them with her. The notes and the photos that were taken in April of 2007 were not shared with Ms. Kelly. These notes and photographs continued to be made and taken through August of 2007. The fact that notes were now being kept, photos were being taken and concerns were being documented in writing in a disciplinary tone, clearly suggest that Mr. Whittemore was not happy with Ms. Kelly's performance. Mr. Whittemore admitted in his evidence that he was not sharing this information with Ms. Kelly. He was creating a paper trail.

It was the evidence of Ms. Kelly and a number of her staff that Mr. Whittemore was nitpicking her management of the New Glasgow store. Mr. Whittemore in his evidence pointed out that Ms. Kelly had inexperienced staff in the store over the Easter weekend and she was not working. Mr. Whittemore, in his evidence, made reference to an occupational health and safety concern in relation to the stacking of the beer in the cold zone. It was Mr. Whittemore's evidence that he came in, showed the staff how to pull pallets up against the wall and stack the beer so staff and customers would not hit their head on the racking in the cool zone. Mr. Whittemore noted staffing concerns on May 1st, 2007, which is the first day of the month, also concerns about the cold room floor, which was dirty and had not been maintained for days and the fact that the beer had not

been leveled off. This is documented in his notes at tab 42 of Exhibit 2(b). Mr. Whittemore testified as to an issue concerning a stock transfer with the Stewiacke store.

Ms. Kelly was asked a series of questions about the aforementioned photographs of the condition of the store, which was documented in the letter of April 21st, 2007. She didn't deny the condition of the store, admitted that some of the photographs showed conditions in the store which were not up to the Corporation's standards and then suggested that, that was not the condition of the store on a regular basis. Ms. Kelly stated the following:

The reason why I have this belief that Donny Whittemore nitpicks is because of how frequent he was in the store and what he was picking out, and what events were going on at the same time. It seemed that if there was an event going on, communications of the scene, which I agree upon, then the letters would start coming.

In relation to questions about the alleged staffing issues in March of 2007, Ms. Kelly stated:

*4 A. I had...I had scheduled people accordingly as much as I could. At the
5 same time that this was happening, we were building up our inventory so I
6 had to be at
7 the store to...to make sure that I was getting extra inventory in case the new
8 system
9 that came in had failed. There was a lot of work going on inside the New
10 Glasgow
11 store, like between the ordering extra stock...organising this SAP training,
12 and stuff, that
13 all happened within this time period. Second, which also coincided with the
14 promotion
15 of Joanne Kiley. When Joanne Kiley got promoted to management as the
16 assistant in
17 Elmsdale, that...her effective date ended up being the 19th of March which
18 took her out
19 of my system, right? So it wasn't this time frame, but it was the next time
20 frame, and I
21 believe he states between the 21st and something that I didn't have
22 somebody in. He
23 was very well aware of the sickness that was inside the store with Robert
24 Ferguson, and*

15 he also was very well aware that he now had taken my assistant out...my RPT out of it.

16 But my...he never gave me anybody or even attempt to say...or he never even told me

17 that Joanne Kiley was promoted. Right? I sat back and I had ended up calling Jackie

18 Cole and asking her when the start date was.

Further, in response to questions asked in cross-examination about staffing and the mystery shopper report during this time period, Ms. Kelly stated:

10 A. The reason why I remember this conversation is because as it states up
11 here, this was when the SAP had transferred over, and Donald Bell was at my store at

12 the same time. When I got this, and he had sent it and we discussed it in store, I had

13 told him, I said...I said, Donny, I said the mystery shop report isn't completely accurate.

14 And that was what I was explaining to him again is that, you know, I get what you're

15 saying about floor presence. I'm not saying that. I'm saying that this report isn't

16 accurate, and now you're coming and saying that the person wasn't on the floor or the

17 person wasn't acknowledged within the time frame that you're supposed to. The fact of

18 the matter is that was me... that was the person. I was in the office, I did
19 acknowledge them, and I was within the time frame of what the mystery shop. And the

20 fact of the matter is it wasn't being reflected in the answer, and I had...I...I...because I

1 remember Donald Bell being up there, and I said to Donny, I said I'll bring it up on the

2 camera for you. And he...he just left and started going to do the merchandising on it,

3 and Donald Bell just said, I know what you mean, girl. I know what you're saying. Just

4 drop it. And that's what he said.

In relation to the health and safety issue concerning the beer pallets Ms. Kelly stated:

... and you can't pull that pallet out like Mr. Whittemore is saying, and this what I mean about his ... his ... what he gets out of my conversation when I try to tell him, don't seem to be what he writes in his notes. They don't seem to be accurate, and it seems to be a difficulty between me and him as to him understanding what I'm saying.

It was Ms. Kelly's evidence in cross-examination that the issue was not the pallets in the store, but the signage that hung up overhead that clients and staff were hitting their heads on. In relation to the fruit fly incident, Ms. Kelly admitted that there were issues with fruit flies but she didn't recall Mr. Whittemore getting an exterminator to deal with the issue. She stated in cross-examination:

20 Q. Mr. Whittemore got suggest that all these little issues I've just taken you through are things that he would expect a Manager 4 to deal with by themselves.

2 What do you say to that?

3 A. What do I say to that? I'm saying to him that these issues were, and I believe a couple of them were health and safety issues so I had to address them. I

5 believe when he comes to the store if I have any concerns that I raise them to him,

6 which is what I was doing, right? On this occasion I was doing it, like any concerns

7 inside the store, well, you know, this would help, but you know, if you can't do it, fine. If

8 it's...it's just suggestions. I wasn't looking for him to come up with solutions to these

9 problems or anything else. I was just telling him, you know, if you had wheels on these

10 barrels it would be a lot helpful. I wasn't looking for him to say, well, you know, move

11 the...the filing cabinet or anything else and you can get in there. I already knew that

12 moving the filing cabinet and getting the pallet...trying to get the pallet in there wasn't

13 going to work. We've already tried that.

14 Q. Mr. Whittemore, if you look at the bottom of his notes, he's going to testify

15 as he's written here, "Pearl continues to struggle to solve small issues on her own." If

16 he says that would you agree or disagree with that?

17 A. I would disagree with that.

18 Q. And these are the types of things that you would consider to be nit picking,

19 correct?

20 A. I truly believe that he was making notes...this is the first time I've ever seen these notes, by the way, so if he had any of these concerns, I and these were how

2 the concerns on January 23, 2008, and his other concerns in December and all this,

3 why hadn't...why didn't he ever show me these concerns? Why didn't he ever bring

4 them to my attention? He's never brung (sic) these. They were never part of my

5 performance appraisal, they were never detailed. Right, if you... My performance

6 appraisal, he never suggested any...and showed me any of this stock material.

As a result of a Step 2 Grievance, because Ms. Kelly had made a request to be transferred to the Antigonish store and it was denied, there was a meeting at the head office in Bayers Lake. Craig Sutherland, Mairi Arthur, and Don Whittemore attended on behalf of the Corporation, and Michelle Kehoe was present as the ERO for the NSGEU as well as Terry Mackenzie, who was President for the local, and Ms. Kelly. The outcome of that meeting was a request by the NSGEU on behalf of Ms. Kelly, for a list from the Corporation of what Ms. Kelly had to do to improve her performance issues. As a result, Mr. Whittemore wrote to Ms. Kelly on November 20th, 2007 and sent her a list of what was required to work on. Subsequent to this letter being generated, Mr. Whittemore would have prepared a performance appraisal. The performance appraisal was reviewed with Ms. Kelly in the lunch room of the New Glasgow store. Her rating was "meets most

expectations but needs development in some areas”. Mr. Whittemore’s evidence was that Bruce Wallis was the Manager in the Pictou store, Darlene Richard, who was the Manager in Pugwash, Cathy Dorton who was a Manager 1 in Sherbrooke, all received a similar rating. Mr. Whittemore’s evidence was that in 2007 there were three Manager 4s being Ms. Kelly, Ron LeBlanc, and Rex Barnhill. It was Mr. Whittemore’s evidence that Mr. Barnhill was doing a better job than Ms. Kelly in the management of his store.

iii. The Store Audit

Derek Sinclair Atwater testified in relation to the preparation of the internal audit of the New Glasgow store. He has been employed as an internal auditor with the Corporation since 1986. He testified that in June of 2012 he became a Manager of Retail Audit Services. In his position as an internal auditor, he conducted compliance audits for the Corporation’s retail stores, contract audits for the agency stores, and contract audits with breweries, wineries, distilleries, and brew pubs. He is a member of good standing with the Internal Auditors Association. He testified that a compliance audit consists of review of cash and inventory and other areas of the operation of the store, including payroll, Occupational Health and Safety, Store Operational Procedures regarding cash control, cash handling, and bank deposits. On average it takes two – two and ½ days to complete a store audit with the actual store visit. Factoring in the pre-audit planning, travel, performing of the store audit, and the post audit, wrap up work, it takes approximately 35 hours to do a store audit. In the past, routinely two auditors would visit a store. He and Mr. Ed Connors conducted the audit of the New Glasgow store, which covered the period from 18 months prior to May of 2008. This is the time period that Ms. Kelly would have been the Manager of the New Glasgow store.

Prior to conducting the audit, Mr. Atwater and the Manager of the Internal Audit Department, Mr. Knox, both received phone calls from Ms. Kelly, asking them to do a full inventory of the New Glasgow store after she took over the management of the store. She was advised that a full inventory account was something that she and her staff could do, and was not in the mandate of the audit department. Ms. Kelly, in relation to the audit of Store 345 New Glasgow, dated May of 2008, found at Exhibit 2(b), tab 75, received an “unsatisfactory” audit. The reason for the “unsatisfactory” rating, was because audits heavily weighted towards shortages of inventory and levels of inventory. There was an “unsatisfactory” rating for shortage, breakage was given an “unsatisfactory” rating, cash and security was given a “satisfactory” rating. The store audit received four “unsatisfactory”, two “favorable”, and two “satisfactory”. The audit makes reference to there being paperwork and other confidential files thrown in boxes,

which should have been either filed properly or destroyed at the end of each fiscal period, being the end of each month.

I accept the evidence of Mr. Atwater concerning the findings of the audit and as well, the condition of the filing in relation to Ms. Kelly's responsibilities as Manager of the New Glasgow store.

iv. Discrepancy in Sales Numbers

Counsel for Ms. Kelly argued that because Ms. Kelly exceeded her sales target for 2008, the results of her performance appraisal and her alleged performance deficiencies could not be substantiated other than as a form of harassment and/or bullying behaviour because of Ms. Kelly's gender.

Roderick J. McDonald was asked about the discrepancy in the sales numbers for Ms. Kelly in 2008. He stated:

17 Q. 2B to Tab 51. I'm going to ask you to open Tab 2B...I'm sorry. Exhibit 2B

18 to Tab 51 and the last page of It.

19 A. Hm..mm.

20 Q. And I'm going to ask you to open Exhibit 18 to Tab 1. And at Tab 2B at 1 the last page where you left the performance objective page...

2 A. Yes.

3 Q. ...and you see the sales target for Ms. Kelly at that...

4 A. Yes, I do.

5 Q. And what is it?

6 A. \$5,786,000.

7 Q. And at Exhibit 18 do you see the financial year ending 2008?

8 A. Yes.

9 Q. What's the result there?

10 A. \$7,454,000.

11 Q. Do you have any idea of why that...the discrepancy in the...exceeding
her

12 target?

13 A. It was a...it was a curious gap, and I know I was...I was curious about...
14 about a score that would be that far over target. There's a few things that
affect a

15 store's sales and...and the budget so their...their target. When a...when a
new store is

16 introduced in an area there's always a period of two or three years where
it's very

17 difficult to budget what the...what the store sales are going to be until you
really know

18 the impact of that new store. You don't know where customers are going to
shop, and

19 so there's always some volatility in...in the accuracy of the budget when
you put a new

20 store in an area. And so there may be an element of that here that the...that
the sales

1 target was still in that area of still trying to figure out what should the right
targets be in

2 this area based on having introduced a new store. When I looked at the...the
sales, that

3 \$7...almost \$7-and a half million sales, a big chunk of that of the increase
from the

4 previous year is attributable to wholesale sales, so licensees and agency
stores the

5 year before because I had asked to sort of dig out these numbers...the year
before the

6 wholesale, the non-retail sales, were somewhere in the neighbourhood of
\$600,000...

7 \$700,000 and went up to like \$1.8-million.

8 Q. Just so I...just so I can stop you, and what you're suggesting so for the
9 financial year ending 2007, if we're looking at Exhibit 18, Tab 1...

10 A. Yeah.

11 Q. ...the wholesale sales there were about \$600,000?

12 A. Yeah, I think it was...sorry, it may have been \$800. It was...it was...it was,

13 yeah, I think it was closer to...closer to \$800, and...and then in the following year they

14 shot up, and then in the year after that they actually dropped back down again.

15 Q. And then they shot up to what in the year after?

16 A. They went up to almost a million and a half.

17 Q. And do we know why that happened?

*18 A. It's a combination...! wasn't able to break down between licensees and
19 agency stores, but on the wholesale side of the business so licensees and
agency*

*20 stores moving their sales to that store...moving their purchases to that
store.*

*1 Q. And I guess...so what we're looking at on...if we go back to Exhibit 2B,
2 Tab 51, the last page, that sales target of \$5-million, is that a...does that
include*

3 wholesale?

4 A. Yes, I believe so, yeah.

There is no objective explanation as to why there is a discrepancy between the projected sales for 2007-2008 as shown in Ms. Kelly's performance appraisal and what has been produced at Exhibit 18, tab 1 as actual sales. Despite Mr. MacDonald's attempt to explain the discrepancy I find that the increase in sales occurred while Ms. Kelly was managing that store. Further, there was no evidence lead to support Mr. MacDonald's assertion that the increase in sales was due to licensees in agency stores moving their sales to that store, other than Mr. MacDonald's own testimony. I am sure that a portion of the increase can be attributed to that and without knowing the breakdown I find that a portion of the increase in sales was attributed to the performance of the store under Ms. Kelly's management, as well as, additional licensee and agency sales.

v. *Summary and Conclusion of Performance Issues*

Upon review of the evidence concerning the performance issues of Ms. Kelly I find that there were indeed legitimate performance issues concerning Ms. Kelly that were documented, particularly by Mr. Whittemore while he was her Regional Manager and during the time period that the performance appraisal for 2006-2007 was conducted. The Corporation has led sufficient evidence to establish an explanation for the differences between Mr. Barnhill's and Ms. Kelly's performance appraisals. The Corporation has provided a credible and rational explanation on a balance of probabilities that its actions in the preparation of Ms. Kelly's performance appraisals, in comparison to Mr. Barnhill's, weren't discriminatory.

c. Ms. Kelly's Performance Appraisal and Mr. LeBlanc's Performance Appraisal

i. *Evidence*

Counsel for Ms. Kelly has suggested that the treatment of the Manager 4 of the Antigonish store, Ronny LeBlanc versus the treatment of the Complainant Ms. Kelly is an example of discriminatory conduct by the Corporation.

In evidence, at Exhibit 18, tab 4, is a four page letter written to Mr. LeBlanc on July 17th, 2007 listing all of his alleged significant shortcomings. It makes reference to a thorough investigation having been conducted and to there being issues in relation to communication, approach, and leadership. The letter also sets out a three part plan, which is in effect a development plan. The letter, written by V.P. of Operations, Craig Sutherland further states:

Mairi and I have discussed a three-part plan of action to address the issues identified during our investigations and ensure your long term success in Antigonish. This plan includes:

- *removing you from the day-to-day management of the store in the short term*
- *enrolling you in some professional development courses to enhance your material and leadership skills, and*
- *place you under another manager with a proven track record as a leader in a larger store who will act as your mentor.*

It is our feeling that all three parts of this plan are necessary in order to set you up for success.

To begin the implementation of our plan, I have determined that you will no longer run the day-to-day operations in Antigonish after this week. This is needed to diffuse some of the tension the present situation has created and will allow you to have the fresh start required to rebuild the team in Antigonish. Another manager, Scott Burke, will take charge of the Antigonish store in the short term. Although you are not running the store Scott, Wally, Don, Jude, and you will have weekly conference calls to discuss the Antigonish operation. This will keep you in touch with the activity in the Antigonish store. You will return to your duties in the store on October 1st.

Arrangements have been made for you to participate in several training courses that will help you develop your management and leadership skills:

<u>Course Name:</u>	<u>Date:</u>
<i>"The Supervisor as a Communicator"</i>	<i>August 7-8th,</i>
<i>"Core Skills for Supervisors"</i>	<i>September 10-11th,</i>
<i>"The Supervisor as a Coach"</i>	<i>September 13-14th,</i>
<i>"The Supervisor as a Team Leader"</i>	<i>September 27-28th,</i>
<i>"The Supervisor as a Motivator"</i>	<i>November 5-6th.</i>

These courses will develop you in key areas that require development and will better equip you to head the Antigonish store when you return in October.

Finally, I have decided that you will be working with Lorne Denny out of the Glace Bay store from now until October. Lorne has a proven track record of strong leadership and overall success in one of our larger stores. Having Lorne as a mentor will provide you with some insight into how strong leadership skills can lead a store to success. Lorne's employees are engaged in the company direction because of his leadership. Strong leadership is the key to realizing success in our larger stores.

When you have completed these three components of our plan, and return to your duties in the Antigonish store in October, Don and I will continue to closely monitor the situation. This will allow us to ensure that the previous complaints have been rectified and that all staff are engaged as a strong team in the store's day-to-day operations, that communication of you performance

expectations is clear and concise, and that all store employees feel they are being treated with respect and dignity. We will continue to illicit feedback about your performance as manager from store staff and the Assistant Manager. Don has also made a commitment to continue providing you will all the coaching support you require to ensure your long-term professional success. I am confident that by rebuilding your relationship with your team and polishing you overall business acumen you will achieve the success expected of a class IV manager.

Ron, in closing I would like to say that I know you have the desire and ability to lead Antigonish. With the assistance of the support presented above, I know you will be successful.

Mr. LeBlanc's performance appraisal from June 2007 until June 2008 is also found behind the correspondence of Mr. Sutherland. The format of this performance appraisal is different than the previous ones. However, the following comments contained at page 8, are relevant:

... Mystery shops continue to be a problem, mostly when management is out of the store, communication problems at all levels of our operation. Getting everyone on the same page, the same direction. Adapting to change in the organization. Staff understanding the role as a clerk. The opening of two new agency stores in the area has had an effect. Store not always ready for business, mystery shops, untrained staff, older and new staff. New system problems with FAP.

Mr. LeBlanc achieved a successful performance rating of 1, which means "meets most objectives". There is a schedule at the end of the performance appraisal, and in four areas Mr. LeBlanc occasionally exceeds competency levels, being (a) developing others, (b) analytical thinking, (c) initiative, (d) decisiveness, and (e) flexibility.

One wonders how someone like Mr. LeBlanc with the issues that were outlined in the letter of July 17th, 2007, could rate such an appraisal.

Counsel for Ms. Kelly submits that in effect, Mr. LeBlanc, who had significant alleged shortcomings in his performance, somehow received better treatment because (a) the Corporation actually conducted a full investigation before imposing discipline and (b) he was provided with a written development plan to comply with. This allegedly resulted in his "meets most objectives" performance appraisal for the time period of June, 2007 until

June of 2008. This is the same time period that he was investigated, removed from his store and directed to comply with the development plan that was laid out for him by the corporation.

Ms. Kelly on the other hand received no concrete direction on what was required of her in her development plan and was sanctioned when it was not forwarded to Mr. Whittemore on time.

ii. Conclusion

There is no rational explanation for Mr. LeBlanc's performance appraisal in 2007 – 2008 given the history that is documented in the July 17, 2007 letter, in comparison to Ms. Kelly's 2006 – 2007 performance appraisal and, as well, the documented issues that she was experiencing under the supervision of Mr. Whittemore.

I find based on the comparison of Mr. LeBlanc's performance appraisal for 2007-2008 and Ms. Kelly's performance appraisal for 2006-2007 that there is a *prima facie* case that Ms. Kelly received adverse treatment in relation to her performance appraisal conducted by Mr. Whittemore which negatively affected her employment. I also find that the Corporation has not lead sufficient evidence to dissuade me from my finding that Ms. Kelly received adverse treatment in relation to her 2006-2007 performance appraisal as compared to the performance appraisal for Mr. LeBlanc for the time period of June 2007 - June 2008, both of which were prepared by Mr. Whittemore. I further find that Ms. Kelly received adverse treatment because of the lack of support and direction she received in the preparation of her development plan, as compared to what occurred in the reformation of Mr. LeBlanc, which negatively impacted her employment. The Corporation has not lead evidence to establish a credible and rational explanation on a balance of probabilities that its actions were discriminatory.

5. Transfer to the Stellarton Store and Subsequent Incidents

It was submitted by Counsel for the Complainant that the transfer to the Stellarton store was a continuation of the discriminatory conduct of the Corporation against Ms. Kelly.

a. The Reason for the Transfer

On April 21st, 2008 Mr. Whittemore, Ms. Kelly's then Regional Manager, sent a registered letter to her home. The letter is found at tab 55 of Exhibit 2B. The letter states:

This letter is written in confirmation that you are being transferred to the Stellarton store, effective May 5th, 2008 as per our conversation of April 16th, 2008 and your email of April 18th, 2008.

It is important to me that all managers in Region 3 are successful. After careful consideration I believe managing a smaller store that is performing very well should help you be more successful, eliminate some of the stress you have been feeling, and enable you to achieve a favourable performance appraisal.

Your last three performance appraisals have been less than satisfactory. Several times during the past year, you have expressed to me that some staff are not very productive despite your attempts to have them improve their performance. You have also been very frustrated with the lack of quality vacation time you have been receiving (a lot of phone calls at home and having to come to work). In addition, there have been several meetings among operations staff, HR staff, the union, and yourself during which it was obvious that you are under considerable stress. Your new store has a team that works well together and understands their objective.

Pearl, this transfer is being done with your best interests and well being in mind. I believe it will bring you more success and operationally be more beneficial for the Corporation. It is non-disciplinary in nature and you will retain your status and salary as a Manager 4.

This letter from Mr. Whittemore makes reference to Ms. Kelly's performance appraisals having "being less than satisfactory". That has not been the assertion made by Counsel for the Corporation throughout the hearing.

Ms. Kelly testified concerning her transfer to the Stellarton store as follows:

*4 A. This is a transfer that...this is notice that he was transferring me to the
5 Stellarton store.*

*6 Q. All right. And did you know that he was going to be transferring you to
the
7 Stellarton store?*

8 A. What he...and the letter's dated April 21st. He came in and told me on

9 April 15th or 16th. They were just changing the chairs change that was going on at that
10 time.

11 Q. All right.

12 A. We had a meeting earlier in the morning of me and him and Pat
13 McGuire...I know there was somebody else there...about Robert Ferguson,
and about
14 how I was accommodating him. And...

18 A. And later on in the afternoon he came back, had a meeting with Neil
19 MacNeill and Robert. Neil MacNeill would be the ERO for the clerks.

20 Q. Yes.

A. And that he called me out back...oh, I believe Mairi I was there. You were
2 there. And called me out back and said to me...how did he say that to
me...he said,
3 you know there's an opening in Stellarton . And I said, yeah, I said...he said,
you know
4 Paul's going to the Valley, and I said yes. Well, we're going to put you
there. And I said
5 why me? And he said, because you're stale.

6 Q. Okay. And did you ask him what he meant by that or...

7 A. Yeah, I...I said stale? And I put it in an e-mail to him the next day asking
8 him to confirm that I was being transferred and if he could explain to me
what I
9 was...what he meant by the term stale.

10 Q. Yes...

1 Q. And had you asked for the transfer to the Stellarton store?

2 A. No, I did not.

Ms. Kelly testified concerning how she felt about the transfer to the Stellarton store as follows:

*5 A. I took it as it was degrading, humiliating, and he...he did it because he
6 wanted to. He just wanted to get rid of me out of the New Glasgow store.*

7 Q. And how were you doing emotionally at that point?

8 A. I wasn't doing well at all.

9 Q. All right.

*10 A. I...I tried my best as much as...I don't know if the staff seen it or not but
I*

*11 was trying to hold my composure when I went to the store. And getting
things done and*

*12 trying to do what I could. But I believe, and I...I have no idea...but I
believe that they've*

13 seen the difference in me.

14 Q. Yeah. So did you take the transfer to the Stellarton store?

15 A. I went, yes.

16 Q. And do you recall when you started at the Stellarton store?

17 A. May 5, 2006...or 2008, sorry.

Mr. Whittemore testified concerning on the transfer to the Stellarton store as follows:

*16 Q. Mr. Whittemore, you eventually decided to transfer Ms. Kelly to a
different*

17 store. Which store did you decide to transfer her to?

18 A. I transferred her to the Stellarton store.

*19 Q. Okay. Now, can you give us the geography that...where the New
Glasgow*

20 store is in relation to the Stellarton store?

1 A. Well, it's probably about two to three kilometres away.

2 Q. Okay.

*3 A. So I'll try to explain the...so the Stellarton store is Exit 24 off the highway.
4 the New Glasgow store is Exit 25, the next exit.*

5 Q. Okay. And they're about two or three kilometres apart?

6 A. I would say, yeah.

7 Q. And what are the class differences in store?

8 A. They're both Class 2 stores.

9 Q. Why did you transfer Ms. Kelly from one store to the other?

*10 A. Well, there was an opening at the Stellarton store and I just seen it as an
11 opportunity...*

13 A. There was a retirement...

19 A. Yes, so there's an opening, needed a manager.

20 Q. Okay, so now you're going to say why you decided to make the transfer.

*1 A. So I thought it was an opportunity...it was a very well run store.
Absolutely*

*2 no issues, a strong staff in the store, so I thought it would be a great
opportunity for*

*3 Pearl to go work in that store. She could just walk in and it would be smooth
sailing and*

*4 if she's able to maintain it at that level it should be no problem for her to,
you know,*

5 improve her performance review also.

Ms. Arthur testified as to the state of the Stellarton store prior to Ms. Kelly's transfer:

*19 A. Stellarton is a Class 2 store, and New Glasgow was a Class 2 store, so
20 although Ms. Kelly held a Class 4 classification, it really was a lateral
move from Class 2*

1 to Class 2.

2 Q. Was her compensation or benefits or classification of manager affected?

3 A. No.

4 Q. What can you tell us about that type of a transfer? Was that transfer...is
5 that a common type of transfer?

6 A. Yes, we do transfer people for various reasons, and some of them are not
7 being very successful in one store and putting them in a situation that we
8 would feel

8 they'd be more successful in. So, you know, our aim is always to have our
managers

9 be successful, so that...that's why that transfer was done.

10 Q. Would the transfer at all have been motivated by Ms. Kelly's gender?

11 A. No.

It is clear that the transfer of Ms. Kelly to the Stellarton store was not handled very effectively by Mr. Whittemore. It is also clear that the Corporation has a right to equilaterally transfer employees from store to store and there is no evidence before me to support the proposition that the transfer to the Stellarton store was based on Ms. Kelly's gender. I suspect that the reason for the transfer was the performance issues that Mr. Whittemore was diligently observing. However, there is nothing to suggest or support the proposition, even circumstantially, that the transfer was linked to Ms. Kelly's gender.

b. The Fallout from the Transfer

Ms. Kelly testified that she started at the Stellarton store on May 5th, 2008. On May 6th, 2008 there was a break and enter at the store, May 17th, 2008 there was a car that jumped the curb and hit the front window of the store, and on May 22nd, 2008 she brought an air quality issue to Mr. Whittemore. Ms. Kelly had been off work because she had an injury. But on May 22nd, 2008, her son had a doctor's appointment and she discussed with the doctor the symptoms that she was experiencing. Her evidence was that the family doctor told her that it sounded like air quality and when she returned to the store after the appointment, Mr. Whittemore was leaving the parking lot. She advised Mr. Whittemore that there were air quality issues in the store, she required an air quality test, and his response was that it was the first that he had ever heard of it.

Ms. Kelly testified that she emailed Mr. Whittemore the next day when she returned to work to remind him that she was looking for an air quality test. The email bounced back to her because it was over the mailbox size. She then started to delete the emails from the

previous manager and she found pictures of mould and dust in the store that were sent to Mr. Whittemore six weeks before she arrived there as the manager. The previous manager, Paul Wright, had stated in his email to Mr. Whittemore, that there were others in the store experiencing health issues.

Ms. Kelly testified concerning her follow up:

*14 A. That was on the 23rd. That day, that morning when I found the pictures,
15 I*

*16 had contacted my ERO, Michelle Kehoe, and I made it clear to her that I
17 basically was saying to her, listen, Michelle, do you...now, I'm going to
forward you*

*18 some pictures. This is...this is what I'm talking about the communication
problem*

*19 we're having, me and Donny. He stands there and he tells me, no, he's
never heard*

20 about it, and then I find that he's lying to me.

21 Q. Okay.

*22 A. You know. And when I did that, Michelle reviewed 1 the pictures and she
2 forwarded them off to Mairi Arthur and asked for the issue to be addressed.*

3 Q. All right. And was it?

4 A. Yes, in a roundabout way. I'll get to it.

5 Q. What happened next?

*6 A. Okay. E-mails transpired between the two, and they said it was the first
7 they ever heard of it. She checked with Donny Whittemore and the pictures
were six*

*8 month old pictures that I sent them to represent current conditions in the
store, that I*

*9 was the only one complaining. There was a lot of e-mails that transpired
between the*

*10 liquor corporation and my ERO. What did take place was on May 27th
11 they called me into a meeting.*

12 Q. Who's they?

13 A. Mairi Arthur and Donny Whittemore.

14 Q. All right.

15 A. I got...I went to work that morning because I had called my...I talked to
16 Robert Ferguson because he was the OH&S representative on Friday,
that's the 23rd. I

17 talked to Jody MacLellan, I talked to Jack Brett at the union, and Jack
Brett's

18 recommendation was go to work, document your symptoms for three days,
and we'll go

19 from there. And I said, okay, right. And he said see how long you can stay
inside the

20 store if we want some, and I said, yeah, okay. I went to work on the 27th. I
received a

phone call five minutes into my shift telling me that Donny was...he said I I'm
in the area,

2 I have Mairi Arthur with me, and we would like to have a meeting with you
at the

3 Heather Hotel at one o'clock.

Ms. Kelly's evidence was that there was a meeting between herself, Mr. Whittemore, and Ms. Arthur that day over her communications concerning the air quality issue. Ms. Kelly testified concerning the meeting:

11 A. And she asked me later who do you work for? And I said the NSLC. And
12 she said to me, she said, so let me get this straight. You work for us but you
contact

13 your union. And I said, yes, because they represent me.

14 Q. Yes, okay.

15 A. And a few other exchanges occurred, and stuff, and then at the end of the
16 meeting she looked at me and told me, Mairi did, you better start towing
the company

17 line or else.

Ms. Kelly's evidence was that she spoke with her staff upon her return to the store, who advised her they had never spoken to Mr. Whittemore about her. At that point she called

her ERO, Ms. Kehoe, to advise that from her perspective the meeting that she just had with Ms. Arthur and Mr. Whittemore was a disciplinary one in nature, and she did not have her ERO with her. She felt, after her meeting with Ms. Arthur and Mr. Whittemore:

*3 A. I tried to. I think I sat back and just let them say what they had to say at
4 one point and just...because I felt totally intimidated, belittled, degraded,
and they were
5 just raking me over the coals with no union representation because they told
me it was
6 a non-disciplinary meeting.*

Mr. Whittemore testified that he had stopped by the store on May 22nd, 2008 and made notes of his visit. Ms. Kelly was off on special leave and his evidence was that she required special approval from him that she had not asked for approval for her to be away from the store. Mr. Whittemore testified concerning conversation with Karen Mackenzie:

15 A. I talked mostly with the full time clerk, her name is Karen Mackenzie.

16 Q. Okay.

17 A. She wanted to talk to me that day.

18 Q. Okay. And what did Ms. Mackenzie want to talk to you about?

*19 A. She wanted to talk to be about what's exactly going on in the store since
20 Pearl has arrived in the store.*

1 Q. And what were some of the issues?

*2 A. Some of the issues that she brought to my attention was Stephen, who
3 was an RPT.*

4 Q. And what's that mean, RPT?

5 A. Regular part time employee.

6 Q. Okay.

*7 A. Was receiving all the relieving pay, and what that means is if the
manager's*

8 not there on weekends that that person would be in charge of the store and
get an

9 increase in pay when the manager's not there. So in the past it was Karen
and Kelly

10 who were in charge, so there's been a...it was a change there and Karen
was upset.

11 She also said the inventory is much higher than what it used to be.

12 Q. Was there any truth to that, that the inventory was higher?

13 A. Yeah, I did go back and have a look and it was quite a bit higher, so
Karen

14 said there was 24 pallets of beer last week, 70 pallets from the distribution
centre that

15 came in and typically in a smaller store, like they wouldn't see that much
inventory.

16 Q. Okay.

17 A. More...she stated that more hours were being used than ever before in
the

18 store. Karen said Pearl is...spends a lot of the time in the office on the
phone. She said

19 that Pearl's running me down and Suzanne and Joanne, and Suzanne and
Joanne are

20 managers.

Mr. Whittemore's evidence was that he wished to obtain Ms. Kelly's side of the story, contacted Human Resources, spoke to Ms. Arthur and they decided to set up a meeting with Ms. Kelly at the Heather Hotel in Stellarton. Ms. Kelly, according to Mr. Whittemore's evidence, asked whether or not the meeting was disciplinary or non disciplinary, and he stated in his testimony, that he advised Ms. Kelly that it was a non disciplinary meeting. Mr. Whittemore testified concerning the meeting:

11 Q. Was it animated, was there shouting and any...any disrespect or
anything

12 of that...

13 A. No. it was...just a...we didn't really resolve anything.

14 Q. Okay. Did you raise the issues with Ms. Kelly?

15 A. Yes.

16 Q. Did you ask her about the special leave issue?

17 A. Yes.

18 Q. And what was her response?

19 A. I can't recall what the exact response was.

*20 Q. Did you ask her about the issue about her running you down and the
1 NSLC down?*

*2 A. I did and there was one comment that we asked her is...and Karen said to
3 us that she hates me and I hate her, and Pearl said hate is a strong word.*

*4 Q. Would that be an...at that point in time would that have caused you
5 concern that employees were hearing that you hated an employee, would
that be...*

*6 A. Yeah, I don't think that's good for a manager who's supposed to be
7 providing leadership in a store to be talking like that around the staff.*

8 Q. And so did you put that to Ms. Kelly?

9 A. Yes.

10 Q. And what was her response?

11 A. No reaction.

12 Q. So as a result of that meeting what did you decide to do?

*13 A. We went back to the office and talked about the meeting and decided to
14 write a letter.*

15 Q. Okay. And what was the purpose of the letter?

16 A. To discuss the topics at the meeting and there was some discipline.

The reason Mr. Whittemore offered for the letter being sent by registered mail to Ms. Kelly, was she was off on sick leave at the time it was written. It was Mr. Whittemore's evidence that Human Resources made the decision to send the letter to Ms. Kelly.

Ms. Arthur described her and Mr. Whittemore's meeting with Ms. Kelly at the Heather Hotel:

14 Q. Okay. So who met with her?

15 A. Don Whittemore and I met with her.

16 Q. Okay. And do you recall where and when that meeting took place?

17 A. Yes, it was in New Glasgow in the Heather Hotel.

18 Q. Okay. And do you recall...did anybody have any discussions with Ms.

19 Kelly prior to that meeting?

20 A. I think Don Whittemore did, yes.

Q. And what was the intent and purpose of the meeting?

*2 A. So here we have this really well run store and it...staff are saying there's
3 issues, so Mr. Whittemore wants to go and explore that, you know, he's on
the one had*

*4 got staff with issues, he wants that resolved fairly quickly so the best way is
to sit down*

5 and discuss what the issues are.

*6 Q. And can you take us through...well, I guess was the purpose of the
7 meeting disciplinary?*

8 A. No, it wasn't.

*9 Q. Can you take us through the meeting, what transpired during the
meeting?*

*10 A. So, Don Whittemore had a list of things prepared that he wanted to talk
11 about, and we're not far into the meeting where I received these e-mails
around dust, so*

*12 I asked Ms. Kelly about the dust. I remember asking her did she attempt to
clean the*

13 dust...

14 Q. Hm...mm.

15 A. ...for example, and had she reported it through the OC Health, so I
16 brought those up. And then we proceeded with the meeting. And on two of
the issues

17 in the meeting Mr. Whittemore was really concerned. He was really
concerned about all

18 this time spent bashing him and the NSLC, and he...he had had
conversations with Ms.

19 Kelly about that, and he wanted that to stop. It just was not good for her,
the staff, and

20 for himself. Just let me think what the other one was. The other one was
around him

appearing at the store and Ms. Kelly not being there and people generally I
not knowing

2 where she was. He had instructed her if she was going to be off that he
would like the

3 courtesy of her letting him know.

4 Q. Okay.

5 A. So those two issues in particular. And also Ms. Kelly's demeanour around
6 ...when he asked her, because staff had reported that she said she hated him,
and

7 when he asked her did you say to staff you hate me, she said, well, hate's a
strong

8 word, you know. And a bit flippant around things, so you know, how do
you...how do

9 you get across that you're serious, and he was serious then and decided that
those two

10 issues were worthy of discipline.

11 Q. Was discipline imposed?

12 A. It was.

Mr. Whittemore's testified, in relation to the dust issue, that the previous store Manager, Paul White had brought the dust issue to his attention approximately six months prior to Ms. Kelly and he instructed Mr. White to clean the dust in the venting and on the roof and the sprinkler heads with a feather duster. He further testified that it was the responsibility of the Manager of the store to deal with the cleanliness of it. Ms. Kelly brought it to his attention on May 22nd, which was the day he was at the store visiting with Ms. Mackenzie.

Ms. Arthur was aware of the dust issue as a result of receiving the emails from Michelle Kehoe, the ERO of Ms. Kelly. Ms. Arthur's evidence was that clearly Ms. Kelly did not go through Occupational Health and Safety channels in her workplace, but went instead to her ERO Department of Labour. In effect, Ms. Kelly did not follow the proper channels within the Corporation, which was irritating to Ms. Arthur.

c. The Registered Letter

Ms. Kelly received a registered letter dated June 2nd, 2008 while she was on sick leave. This letter is found at tab 8, page 45 of the Exhibit book, and stated:

This letter serves as notice that I am deeply concerned about your ability to operate an NSLC store. The standards required and the failure to improve your performance will result in further action, including demotion, and potential termination of employment.

The following paragraph in the letter stated:

In addition, this letter also serves as notice as a result of her disregard for established procedure on the proper reporting of need, and the most important because of your persistent attempts to portray myself and the NSLC in a negative light to staff and customers alike, I am imposing a two day suspension without pay as discipline.

Ms. Kelly's evidence was she took this letter and went to Mr. Mackenzie's office, who was the health and safety investigator with the Department of Labour. Ms. Kelly filed a complaint against the Corporation with the Department of Labour under the **Occupational Health and Safety Act**, and also through Ms. Kehoe, filed a grievance. It was Ms. Kelly's evidence that Mr. Mackenzie issued a Retaliation Order under the **Occupational Health and Safety Act** against the Corporation, which they appealed to the Director, and which appeal was eventually lost. Ms. Kelly was diagnosed by her family

doctor, Dr. Fuhrman, with acute situational anxiety or panic disorder. This was the point that Ms. Kelly began seeing her psychologist, Dr. Chris Tragakis. Ms. Kelly won her grievance and the June 2nd, 2008 letter was removed from her employment file.

Ms. Arthur admitted that the Corporation had procedurally erred in its meeting because it administered discipline without the employee having a ERO present, which was Ms. Kelly's right under the Collective Agreement.

d. Conclusion

Given Ms. Kelly's recent transfer to Stellarton and the state of her relationship with Mr. Whittemore, she cannot be faulted for exercising her right as a unionized employee and contacting her ERO concerning the health and safety issue in her workplace. The Corporation was clearly disciplined for its actions in relation to Ms. Kelly under the ***Occupational Health and Safety Act*** and lost the grievance that was filed by Ms. Kelly concerning the discipline letter. There is nothing however in the evidence to suggest that the issuance of the discipline letter was motivated by Ms. Kelly's gender. I suspect it was motivated by the state of her relationship with Mr. Whittemore and more generally with the state of her relationship with her employer, the Corporation, however, she has not established a *prima facie* case that the issuance of the discipline letter in relation to the meeting at the Heather Hotel was motivated by her gender.

B. DISCRIMINATION BASED ON DISABILITY

In paragraph 35 of the complaint form, Ms. Kelly stated:

I also allege that the Respondent is now disciplining me in relation to frivolous concerns that have not been fully investigated while on an approved medical leave for anxiety related reasons. I allege that these actions constitute discrimination and that they are prohibited under section 5 (1) (d) (m) and (o) of the Nova Scotia Human Rights Act.

1. Was There a Mental Health Issue at the Workplace?

It is clear from the evidence given by Ms. Arthur that there were signs of tearfulness and emotional upset at every meeting that Ms. Kelly had with her in relation to her performance issues. It was Ms. Arthur's clear testimony however, that there was no indication that she did not observe any potential mental health issues with Ms. Kelly. However, it is clear from the correspondence which Mr. Whittemore wrote to Ms. Kelly in 2007 that references were made in relation to Ms. Kelly's stress level. There is no

evidence to support a finding that the observations of tearfulness and/or emotional upset and references to stress were connected to any underlying mental health issue.

What is clear from the evidence, however, is that Ms. Kelly went out on sick leave in May 28, 2008. Dr. Fuhrman did not testify, but her medical report states that Ms. Kelly was suffering from acute situational anxiety effective May 28, 2008.

It is true that the Workers Compensation documentation, which was filed after May 28, 2008, makes no reference to any alleged discriminatory harassing or bullying conduct by anyone in the employ of the Corporation. But it does set out a number of events which led to Ms. Kelly being off work. The lead up to her transfer, the events that occurred after she was transferred to the Stellarton store, and her meeting at the Heather Hotel, created a “perfect storm” for Ms. Kelly. Regardless of why or how she ended up off work, she was put off work for medical reasons. Counsel for the Corporation argued vigorously that medical evidence was lacking to establish that Ms. Kelly had mental health issues, which would potentially trigger duty to accommodate. What follows is a review of the medical evidence of Dr. Tragakis.

a. Medical Evidence

Dr. Chris Tragakis was the only medical practitioner who testified concerning Ms. Kelly’s mental health issues and the issue of accommodation. He was qualified as an expert in adult and adolescent psychology and to give opinion evidence on those topics. Dr. Tragakis obtained his Bachelor’s Degree from Brown University in Psychology in 1966 and a Master’s Degree and Ph.D. in Psychology from the University of Iowa in 1968 and 1969. He is a member of the Nova Scotia Board of Examiners in Psychology and has been a registered psychologist from 1982 onward. He is a professor at St. Francis Xavier University and also worked in private practice since 1976.

Dr. Tragakis’ evidence was that he had treated individuals who were suffering with depression and anxiety. Dr. Tragakis testified that he started treating Ms. Kelly in August of 2008 and continues to treat her. He confirmed the factual information provided in the medical report of Dr. MacDonald. He confirmed that Ms. Kelly had withdrawn from her usual activities except those involving her children, had suffered sleep disturbance, had difficulties with concentration and focus around other areas except her work related difficulties, that she is totally preoccupied by the events of her work relationship with the Corporation.

Dr. Tragakis wrote in his report to Mr. MacDonald, Barrister for Nova Scotia Workers Advisors Program, dated October 9th, 2008 that Ms. Kelly was suffering from acute situational anxiety which was brought on by (a) work related stress including a difficult relationship with her supervisor and (b) workplace health issues. He further stated that Ms. Kelly was experiencing serious limitations around those issues. She was emotionally very labile, had panic attacks, and wasn't able to work. He further stated that there was no doubt that the stressors leading to Ms. Kelly's inability to function at work are related to work. He cited the store as having a break and enter, a car driving through the front window, and air quality issues. He further cited Ms. Kelly's complaints about lack of support and suggestions that she might not be suitable for a job that she had done quite well for several years.

Dr. Tragakis, in his letter of April 25, 2013, to Ms. Kelly's Counsel stated:

Dr. Fuhrman and later, Dr. Dianne MacDonald both diagnosed Pearl with a major depressive and anxiety disorder that was situationally triggered by problems in her work environment. My work with Pearl since that time has been to support her attempts to resolve her work-based difficulties with the Nova Scotia Liquor Corporation...

I did not take an investigative nature regarding these complaints. I am not a forensic psychologist. I am a clinician and my job has been to support my client and help her to cope with the stressor she identified in her work life.

The stress created by her work environment greatly increased Pearl's level of anxiety so that she has difficulty concentrating, she was hyper vigilant, and prone to anxiety attacks. She was unable to work, especially since the NSLC had not made changes to accommodate her needs.

Dr. Tragakis stated that he had treated individual with situational anxiety and that in situational anxiety a person with an anxiety disorder can function quite well until a situation triggers that anxiety, then functioning is more difficult. Dr. Tragakis further testified that for individuals who suffer with situational anxiety that is work related, for them to return to work, a number of factors would have to occur. The individual would have to learn coping mechanisms and coping skills, such as breathing mechanisms, stress reduction mechanisms, and exercises as examples. He further stated that if he treated a person with anxiety and gave that person coping skills, but they went back to the situation which has the same conditions in which the anxiety arose in the first place, they are not

likely to be successful in coping and the anxiety experienced previously would be retriggered.

Dr. Tragakis stated that for an individual like Ms. Kelly, who is intelligent, a prognosis for a full recovery is quite promising. He clearly stated that getting rid of the immediate supervisor and providing Ms. Kelly with a different supervisor would get rid of her stressor. In relation to the Back to Work Protocol, ideally Ms. Kelly should have a different supervisor, which was not part of the Protocol. His evidence was that for the Protocol to have success Ms. Kelly required some assurance that if it did not work, that she would not lose her job. Dr. Tragakis testified, even though he did not see the letters that Ms. Kelly had been sent, while she was off work, by the Corporation, that the letters were causing extreme anxiety for her. His evidence was that Ms. Kelly continued to suffer from hyper vigilance and was prone to anxiety attacks.

In cross-examination, Counsel for the Corporation made a concerted effort to attack the underpinnings of Dr. Tragakis' medical opinion. Counsel for the Corporation challenged the accuracy of the information provided to Dr. Tragakis upon which he formed his opinion. Dr. Tragakis stated that anxiety is a consequence of trauma; he freely admitted that his job as a psycho-therapist was neither investigative nor adversarial and he did not investigate the veracity of the truth of the patient's story. Dr. Tragakis' evidence in cross-examination was that the Back to Work Protocol was not satisfactory, that he had questions about it, but that Ms. Kelly was willing to give it a try. The problem from his perspective was that Ms. Kelly would be reporting to the same supervisor within a year.

Dr. Tragakis advised that he did not provide Dr. MacDonald with a copy of the Protocol. Counsel for the Corporation questioned why Dr. Tragakis had not previously, in his various reports, stated that Ms. Kelly had been discriminated against on gender, but that in the report that had been prepared for the purpose of this hearing, he made that statement.

Dr. Tragakis stated:

Q. I guess my question for you is why in...if I suggest I to you if you read 2 this...the file we've looked through, there's an excess of 18 letters from you to Mr.

3 Mason, to Canada Life, to the Workers' Compensation Board, to Human Rights, to

4 creditors, and in no time in those do you suggest discrimination on the basis of gender.

5 In any of those previous 18 letters why all of a sudden are you bringing this
up now, five

6 years later, not mentioning the 18 letters, but who's telling you this now five
years later?

7 A. It's not recent information, it's a good point you're making. I suppose
8 these letters, all 19 of them were bothering for me. I don't like doing...

9 Q. Yes.

10 A. And the process of getting to this room has taken years, and this letter
that

11 you're referring to now was more complete, more well documented
because it was

12 coming here. And this is an important event.

13 Q. So when you were writing to the NSLC, you never thought it was
important

14 to mention gender discrimination?

15 A. No. Pearl represented her issues quite well herself. I didn't need to
16 represent them.

17 Q. When you were writing to the Workers' Compensation Board, and we've
18 already spent time talking about a car, a break and enter, a threat in air
quality, you

19 never thought...and I'm going to add this fifth one which I'm aware of
which is gender

20 discrimination?

1 A. No, I didn't.

2 Q. You purposely omitted it?

3 A. It wasn't purposeful, it was an omission.

4 Q. Okay. Then when you were writing to creditors, insurance companies,
5 you never thought it important to mention that? And you were writing to the
Human

6 Rights Commission, and I'll suggest there's two letters in here to the Human Rights

7 Commission who governs that type of work, and you never thought it important to

8 mention that to the Human Rights Commission either.

9 A. It should've been in those letters.

10 Q. And once again though, your conclusion of discrimination that was based

11 entirely on information you learned from Ms. Kelly?

12 A. That's correct.

13 Q. The other thing that you mentioned here today was you talked in your
14 direct evidence about a Wine Fair matter.

15 A. Hm..mm.

16 Q. And I'm just going to put to you that in one of your previous
17 correspondence did you ever reference that issue previously?

18 A. Most directly. I rarely evidenced or referred to evidence in any of my
19 letters. I was talking about symptoms and treatment mostly.

The letter of Dr. Dianne MacDonald, psychiatrist is found at tab 16, Exhibit 1(b). She wrote her medical opinion for the purpose of Ms. Kelly's long term disability benefits. Ms. Kelly had been referred to Dr. MacDonald by the insurance company for an independent psychiatric medical examination. At page 5 of the report, Dr. MacDonald recorded the following concerning the mediation process:

Ms. Kelly stated that the process of mediation had taken place, but she was not happy with how this process had occurred. She did not feel that she had an adequate chance to tell her side of the story. She stated that she was also told by the mediator that the "people at the Nova Scotia Liquor Corporation wanted her fired". She stated that the mediation, a work Protocol was set up for her, but she had not agreed to return to work or to accept the Protocol by the time of her assessment on September 30th, 2009. She was to meet with her psychologist on October 3rd to evaluate the Protocol, particularly because she had significant concerns about the timeline set out in this. She was also

extremely concerned because there was no indication or description about what would happen if her return to work was not successful.

It is clear from the report that Dr. MacDonald was advised of the existence of the Protocol when she met with Ms. Kelly for the independent medical examination.

Dr. MacDonald diagnosed her on an axis one with a major depressive disorder chronic with associated symptoms of anxiety. She further stated at page 8 of her report:

It certainly would appear from Ms. Kelly's description of the ongoing difficulties in her workplace that, in fact, these workplace issues are the precipitating factor for her present symptoms of depression and anxiety.

There is also concern that her increasing depression and apprehension in the workplace may well have altered her interactions with management level, in particular, it is my clinical opinion that the major factors in her present situation were the ongoing difficulties she experienced in her work environment.

Dr. MacDonald wrote at the conclusion of the report under the topic heading "WRRWI":

It will be very important that Ms. Kelly sees that her concerns regarding her workplace environment be addressed appropriately, and that she feels adequately supported in this regard.

She has expressed a strong desire to return to work and is motivated to do so, if the workplace concerns can be appropriately addressed.

The services of a vocational rehabilitation consultant may be helpful to her in this regard.

Counsel for the Corporation strongly argued that no reliance should be made on the report of Dr. MacDonald because she did not testify and because Dr. Tragakis is not qualified to confirm her diagnosis.

b. The Admissibility of Dr. Tragakis' Evidence and Dr. MacDonald's and Dr. Fuhrman's Reports

Counsel for the Corporation submitted numerous cases to support the proposition that I should not admit the report and/or the evidence of Dr. Tragakis as an Experts for a number of reasons. The first reason is that Dr. Tragakis did not make a medical

diagnosis. The second reason that Dr. Tragakis did not check “history and symptoms that were presented by Ms. Kelly in his course of treatment of her”. The third reason is that Dr. Tragakis was acting as an advocate on behalf of Ms. Kelly in the writing of numerous letters.

I find that Dr. Tragakis’ evidence was provided in an honest and forthright manner. He clearly admitted his role in the treatment of Ms. Kelly and her symptoms. He also clearly admitted how he treated Ms. Kelly and that he did not engage in a fact finding or truth testing process as part of her treatment. Dr. Tragakis freely admitted that he wrote a number of letters in relation to Ms. Kelly’s mental health status and did not mention the allegation of gender discrimination in all of them except for the Experts Report that was tendered as part of his evidence.

Ms. Kelly is currently off work on long term disability. I presume that the basis of her being off is the report of Dr. MacDonald and/or the ongoing updates of Dr. Tragakis. The insurance company has obviously accepted that she is disabled. I accept, as well, based on the evidence of Dr. Tragakis that she suffers from a mental disability and accept his evidence of his treatment of her and his concerns in relation to the Back to Work Protocol.

I also note that Dr. Tragakis did not have all of the details of Ms. Kelly’s work history or relationship with her superiors, nor did he have full and complete information about the circumstances which lead to her going off work. Regardless, it is not Dr. Tragakis’ role to investigate the truthfulness of Ms. Kelly’s version of events. His role is to treat her, which he has done for a consistent period of time. It is not unusual for physicians or psychologists to write medical reports so that their patients can file applications for benefits that they are potentially entitled to as a result of their illness. This does not move them from the category of treating health provider to advocate. There is nothing in the evidence of Dr. Tragakis to suggest that he crossed that line. His evidence was clearly objective and he freely admitted to the factual short comings upon which his opinion was based. I am not prepared to discount or discredit the evidence of Dr. Tragakis because upon review, six years after the event, he did not get from Counsel for the Corporation’s perspective, a full and complete picture of the circumstances which lead to Ms. Kelly going off work.

On the critical issue of whether or not Ms. Kelly should be under the supervision of Mr. Whittemore under the terms of the Back to Work Protocol, I share the concerns raised by Counsel for the Corporation. Dr. Tragakis did not receive the full and complete picture and he has only heard Ms. Kelly’s version of events. I do not accept Dr. Tragakis’

evidence that Ms. Kelly should not return to the supervision of Mr. Whittemore after the completion of the Back-to-Work Protocol. The reasonableness of Ms. Kelly having to report back to Mr. Whittemore is something that I may eventually have to determine as part of this process and it is not something, based on the information that Dr. Tragakis had, that he is able to comment on, with any degree of certainty.

In relation to the report of Dr. MacDonald, I cannot place much weight on her report, other than to note its contents from a historical perspective, and as well, to note that the LTD insurer relied on it to authorize the continuation of Ms. Kelly's LTD benefits, which I understand still continue. Dr. Tragakis confirms the factual contents of the report, but as he does not diagnose, he cannot be relied upon to confirm the diagnosis contained in Dr. MacDonald's report.

Lastly, Dr. Fuhrman's medical report is helpful from a historical perspective as it confirms that Ms. Kelly went off work on May 28, 2008 for situational anxiety. Again, I note that this report was accepted by Ms. Kelly's medical insurer. Other than providing historical information, because Dr. Fuhrman was not produced to testify subject to cross-examination, little reliance can be made on her report.

c. The Existence of a Disability

I find that effective March 28, 2015 Ms. Kelly was suffering from a mental illness, being situational anxiety and depression. I find as well, that based on the evidence before me that this situational anxiety was brought on by her treatment in the workplace. The decisions that Ms. Kelly made in her behaviour concerning her workplace did contribute to the onset of her illness; however, the conduct of Mr. Whittemore after he took over management responsibilities for her performance sent her down this path. I find that Mr. Whittemore did not deal with Ms. Kelly in a fair, objective, and/or transparent manner. If he had legitimate concerns about her performance, he would have shared with her the photographs and the notes that he had taken of her store in her absence instead of holding them to "create a paper trail". Further, I find that the language in his correspondence and his actions around the development plan were not conducive to addressing Ms. Kelly's performance deficiencies. I find that Ms. Kelly had well documented performance deficiencies. The way that the transfer was handled, in conjunction with Mr. Whittemore's response to Ms. Kelly in relation to the air quality/dust issue in the parking lot of the Stellarton store when she raised it with him, as well as the meeting at the Heather Hotel, sent Ms. Kelly over the edge.

Ms. Kelly should have handled her workplace issues differently. Based on my observations of her throughout the course of the hearing; there is some truth to the statements made by Dr. Fuhrman, the family doctor, in her medical report. However, her immediate supervisor, Mr. Whittemore, did not act in any way which would suggest that he had a legitimate interest in assisting Ms. Kelly with her performance issues.

I also find that there is evidence of a disability (as of May 28, 2008), which is an enumerated ground under the Human Rights Act and could potentially trigger a duty to accommodate when Ms. Kelly is able to return to work. I rely on the medical evidence provided by Dr. Tragakis as to the mental health state of Ms. Kelly as a result of her work experience with the Corporation.

2. Discriminatory Conduct While Suffering from a Disability

a. The Gossiping Letter

A letter was sent to Ms. Kelly by Mr. McMillan on October 20th, 2008. In the letter, it is stated:

Your co-workers have complained about your continued “gossiping” and it has been reported to me that you have again made negative comments about another store manager, and your supervisor; and have discussed the confidential NSLC matter with a person outside of the organization. I consider those actions to be detrimental to the organization, to the well being of our co-workers, and reflect badly on the NSLC.

Mr. McMillan made reference to the letter written by Mr. Whittemore of November 20th, 2007. Mr. McMillan further wrote:

I have also been made aware that you contacted our internal audit department and requested information on the New Glasgow stores audit, after you had been reassigned from that store. I understand this information was rightly denied to you, and that you also commented to the internal auditor in a negative way about your relationship with your supervisor, Don Whittemore... In the meantime I ask that you please cease any further inappropriate behaviour, specifically spreading negative “gossip” about the NSLC, its employees, and your supervisor Don Whittemore.

Mr. McMillan, in the letter also stated Ms. Kelly was on sick leave and unable to attend a meeting to discuss these issues, it also stated “if you would like to meet right away to resolve any workplace issues, please let me know”.

Ms. Kelly, in her testimony, stated that she considered the letter from Mr. McMillan as a disciplinary letter. She denied that she was continuing to be gossiping and stated in her evidence “when I received this letter I had no idea what he was talking about”. Ms. Kelly’s evidence was:

*5 A. I was upset. I was hurt. I was, like, my God, here I am off on sick leave,
6 using my medical and the...they had...my...my version of how they should’ve
7 handled
8 things, I...I could be incorrect, but I believe that with...if they had received
9 anything that
10 they say that they received, that where I was off, I truly believe they
11 should’ve went
12 through my union to contact me and ask me about things. And ask my union
13 if I can
14 comment on these issues and investigate it that way instead of writing me a
15 registered
16 letter outlining all these things without any...getting my side of the story. I
17 had...when I
18 received this, it was so vague that I had no idea what he was talking about.*

Mr. McMillan’s testified evidence concerning this letter:

*4 Q. Would you have written this letter?
5 A. Personally written it?
6 Q. Yes.
7 A. No.
8 Q. Would you have had assistance in writing it?
9 A. Yes, I would’ve had assistance from Mairi Arthur in writing this...HR.
10 Q. Okay.
11 A. Yes.*

12 Q. And can you tell us what was going on, what's underlying this document,

13 what was it about?

14 A. Sure. Can you give me a minute?

15 Q. Yeah, sure.

16 A. Okay. Yes, so this incident here was I guess addressing Pearl gossiping,
17 talking about another employee who was disciplined, yeah.

18 Q. Do you know the situation involving another employee?

19 A. Yes, I do, yeah.

20 Q. What was it?

A. The other employee was a manager in the Pictou County area. Behaviour
2 of discounting breakage beer and giving it to customers. Breaking policy, a
long story

3 short. Pretty serious because we take our inventory and our policies a
pretty...so, yeah,

4 forced retirement. There was discipline, so at the end of the day the manager
left the

5 Corporation, with retirement, and this was...it came forward through the
regional

6 manager to me that Ms. Kelly was telling people about this. You know, we
respect our

7 employees whether retired or whatever, so she's basically gossiping and
spreading

8 around what had happened in that store.

9 Q. Was it public knowledge what had happened to...

10 A. No.

11 Q. ...Mr...this employee? What was the employee's name, the person we're
12 talking about?

13 A. Bruce Wallis.

14 Q. And was it public knowledge that people knew?

15 A. No. Not at all.

16 Q. This letter was sent to Ms. Kelly's home address?

17 A. Yes, it was.

18 Q. Is that common or uncommon?

*19 A. Yeah, it's common we don't send letters to stores or nothing if it's
20 confidential like this. Well, if it's confidential we use home addresses for
that.*

Mr. McMillan stated that the letter was not a disciplinary letter because Ms. Kelly was off and he hadn't done an investigation.

b. The Wine Incident Letter

Ms. Kelly testified that since she became a Manager 4, there was regularly a Christmas bonus that varied from year to year. Ms. Kelly testified that on December 10th, 2008 she went into the store after she was out shopping for supper. Lynda White, who was the acting manager, was there with Tim Macumber. She poked her head into the office and asked Ms. White if there was a record of employment for her or any mail for her. There was a conversation about how she was feeling, and when she would be back to work, to which she responded that she would not be back to work until the doctor cleared her, and it was not likely to occur before Christmas, which was two weeks away. Ms. Kelly testified that she asked if there was anything out back, meaning the Christmas bonus, and Ms. White responded that there was something out back. Ms. Kelly responded that she did not have time to pick it up, that she had to go because her son was playing hockey. There was then a conversation concerning her son playing hockey with Mr. Macumber.

It was Ms. White's evidence that when she spoke with Ms. Kelly on December 10, 2008 that she told her that she would check on the wine and call her. Ms. Kelly, in cross-examination, denied that Ms. White told her that. It was Ms. Kelly's evidence that Ms. White told her that her wine was "out back".

Ms. Kelly testified concerning the incident on December 12, 2008:

*15 A. On December 12th I had a...I have to...I have to relay everything that I
did*

16 that day. That's the only way I can put it in timeline for me. On December
12th I had a
17 doctor's appointment with Chris in Antigonish. My daughter had a hair
appointment,
18 and I have to say it, the weather was very windy, it was warm, but it started
getting cold,
19 and after the hair appointment I went over to Sobeys to get some chips
because we
20 were renting movies that night and stuff, and it was the night before the
Westville
Parade of Lights. When I was in the...I detoured in through the liquor I store
on the west
2 side into Sobeys, and when I was there Hal had met me and Donna had met
me, and I
3 seen the tasting guy, and then I went in and got my chips and stuff. And then
I went
4 over...Hal had mentioned...he said, did you get your wine yet? And I said to
him, I said
5 no, are they out or...and he said, yeah, he said yeah. And I said, well, I have
to go over
6 to Stellarton anyway for the lottery to give Nancy some money, I'll go over
there. So I
7 went over to Stellarton and when I got there I walked in and I asked Karen
Mackenzie
8 for Linda, and Linda wasn't there.

9 Q. All right. Okay.

10 A. So then I...I said to Karen, I said I understand the wines are out back
and
11 our Christmas bonus, and she said yeah, they're out back, and I said
well...I said is
12 Nancy here, and she said no, Nancy's out to dinner. And I said, oh, and she
stopped
13 me. I said, well, I said, you know is she passing them out? She said I have
no idea
14 what she's doing really, and I said, well, I said is...there's got to be a list
for us to...for

15 us to check off that we receive our wine or our names got to be on them or something.

16 And she said, all I know, Pearl, is there's a box out back, and...and she said if you want

17 to go out back and look at them, and I said sure, okay. So we both went out back

18 together, me and Karen, and I went looking for the list...

19 Q. All right.

20 A. ...to sign off on.

1 Q. Did you find one?

2 A. No, I did not.

3 Q. All right. And did you take your wine at that time or...

4 A. I counted them, and I realised that from the list that I had that there was
5 one there for me.

6 Q. Okay.

7 A. And I had said...Karen had said to me, well, you're still the manager. And
8 I looked at her and I said, well, I am but I said just tell Linda that I took my wine. If

9 there's any concerns she can come back and she can call me, just let her know. I

10 passed...when I came out the door, heading out the door I stopped Karen. I said, oh,

11 by the way, here's the \$20, give that Nancy...Nancy Boudreau for the lottery fund. And

12 she said, okay, and I never heard another word from anybody until I received this

13 registered letter.

14 Q. And when you received this letter, how did that make you feel?

15 A. This put me at the crisis centre of the Aberdeen Hospital. I wanted to be
16 dead again. It was like...it wasn't accurate. It had nothing right. It was copied to Linda

17 White. I was, like, what are they doing to me?

Karen Mackenzie testified concerning the wine incident:

Q. Do you recall an incident Ms. Kelly and some bottles of wine?

A. Yes.

Q. Can you describe the incident to us?

A. She came in to the Stellarton liquor store. It was around a couple of weeks before Christmas, and she said she was going out back, and I came with her, and there was papers on the wall, something to do with whatever's going on here now, and she just kind of glanced at them and there was the bags of wine on the table for the staff, and she just picked one up and said I'm fucking taking this wine.

Q. Do you recall her specifically using the F-word, 'fucking'?

A. Yes.

Q. Okay. All right. So you passed the message along then, is that right?

A. To a couple people, yes, I did.

This is the same Karen Mackenzie who Mr. Whittemore was consulting with on May 22, 2008 concerning the state of the store under Ms. Kelly's management.

In response to Ms. Mackenzie's version of events concerning the wine incident, Ms. Kelly stated:

*3 Q. Okay. And you suggested to...you said to Ms...I'm going to suggest this I
4 what you said to Ms. Mackenzie, I'm taking the fucking wine.*

5 A. I did not say that at all.

6 Q. Okay.

7 A. I would know if I cursed and I did not say that at all.

8 Q. Okay. Did Ms. Mackenzie give you permission to take the wine?

9 A. Ms. Mackenzie was out there. There comment that Ms. Mackenzie did
10 say to me, she said, well, you are still the manager of the store. And I said,
well, I said

11 there's no list to sign on...to sign off that I got mine, and stuff. Karen, just
tell Linda that

12 I was in, I got my wine, and if there's any concerns to call me.

13 Q. So if Ms. Mackenzie were to say that you said I'm taking the fucking
wine,

14 you're saying that did not happen?

15 A. If Ms. Mackenzie gets on this stand and says that, I will tell you no, I did
16 not say that at all.

17 Q. Okay.

A letter dated December 17, 2008, was written by Daniel McMillan, in relation to the pickup of the wine on December 12, 2008 by Ms. Kelly, being Exhibit 2 (b), tab 90. At the end of the letter, despite not hearing Ms. Kelly's version of events, Mr. McMillan wrote:

The acting manager was in the process of making inquiries to solve the issue, but the fact that you disregarded her, did not wait for her call, and proceeded to take wine that was not meant for you, demonstrates a lack of integrity. You are currently absent from work due to illness, your actions are clearly disruptive so I would ask that you refrain from visiting that store until you are cleared to return to work. We will discuss the issue when you return.

It was Ms. Kelly's evidence that she received this letter on December 19, 2008, which resulted in her attendance at the crisis centre at Aberdeen Hospital.

c. Wally Proctor Incident

At tab 110, Exhibit 2 (b), there is a letter dated June 29th, 2010 from Daniel McMillan, Vice President of Operations. The relevant portions of the letter states:

It has come to my attention that on June 7th, 2010, you sent Walter Proctor, acting manager of the Antigonish store, an email requesting that he forward your attached email to all the members of local 1670 of the NSGEU. It appears...

... as an NSLC manager, you are aware of retail store standards and procedures 1.3.6. that states in part that: "internet and email access is restricted to NSLC – related duties and business "and," all store email communications are for internal use only."

I understand that you were requesting Mr. Proctor to circulate this information you were acting in your capacity as chair of the EAG Regional Counsel of the NSGEU. However, the NSLC does not permit the use of our internal email network for this purpose. By circulating this information through the NSLC internal communications network it may be construed that the NSLC is taking a position of supporting these workers, when in fact the NSLC has taken no such position.

In the future please limit your workplace contact with the NSLC staff to matters pertaining to the NSLC...

Ms. Kelly testified that she received this letter by registered mail and the receipt of the letter made her feel horrible because she did not ask Mr. Proctor to violate Corporation policy.

d. Post Sick Leave Letters – Evidence of Discrimination

I have little difficulty with the correspondence sent by Mr. McMillan in relation to the gossiping incident which is dated October 20, 2008. As is clearly established by the case law, submitted by Counsel for the Corporation, the employer has the right to communicate with the employee even when they are on sick leave. The contents of the correspondence may have been upsetting to Ms. Kelly; however, the wording of that correspondence is appropriate under the circumstances particularly where Ms. Kelly does not deny that she was in affect gossiping with individuals who could report her conversations back to her employer. Although I have not cited her evidence in the decision, it is clear from review of her evidence that she was aware of the situation concerning Mr. Wallis and his departure from employment with the Corporation. It was not appropriate for Ms. Kelly to engage in a public discussion concerning Mr. Wallace because she was still an employee of the Corporation.

The letter that I have concern with is the wine incident letter. The timing of the sending of the letter was insensitive. I suspect that the truth of what happened lies somewhere between the evidence of Ms. Kelly and Mc. McKenzie. Ms. Kelly had been a long standing employee of the Corporation and it would have been petty and mean spirited not

to have made arrangements for her to receive the Christmas bonus the Corporation provided yearly for their employees, and not tell her that it was forthcoming. However, I find that Ms. Kelly overstepped the appropriate boundaries by taking the wine without speaking with the acting Manager, Ms. White.

Ms. Kelly had been a long standing employee of the Corporation. Sending a registered letter without making inquiries as to Ms. Kelly's health status, given the contents of the letter, was not appropriate particularly given Ms. Kelly's described behaviour in the store. If her behaviour was as described by Ms. McKenzie, her behaviour was completely out of context to Ms. Kelly's previous behaviours in the workplace. Her conduct that day should have been a red flag that all was not well with Ms. Kelly. From the contents of the letter, Mr. McMillan already decided who's version of events he was going to believe. He suggests that her actions lacked integrity when there is no history of Ms. Kelly taking something that she was not entitled to previously. Given Ms. Kelly was absent from work due to acute depression and situational anxiety and given, as early as June 16, 2008, the Corporation was put on notice that Ms. Kelly had filed a Workers Compensation claim based on her symptoms of work related anxiety, the Corporation should have chosen it's words more carefully. Further, if one reviews the emails of Lynda White and Donnie Whittemore of Saturday, December 13, 2008, the tenor of those emails is more about Ms. Kelly going behind the back of the current Manager versus acting in the way described by Karen McKenzie.

I find that the Corporation ought to have known, that Ms. Kelly's behaviour in the store was as a result of her disability, because there was no previous history of Ms. Kelly behaving in that way. Given the timing and the tone of the correspondence, the Corporation should have contemplated the effect that the correspondence would have on Ms. Kelly. The sending of the discipline letter was evidence of ongoing discriminatory conduct towards Ms. Kelly, this time based on her disability. The Corporation has not established a credible and rational explanation demonstrating on the balance of probabilities that its actions were not discriminatory.

The Wally Proctor letter is another example of Ms. Kelly engaging in activity that the Corporation disapproved of and is in violation of her employment relationship with the Corporation. However, there is nothing inappropriate in the actions of the Corporation in either writing the letter or in the tone of the letter and there is nothing to suggest that the contents of and/or the sending of the letter.

3. Duty to Accommodate

a. Mediation – Return to Work Protocol

A decision was made by the Corporation, the NSGEU, and Ms. Kelly to participate in a two day mediation conducted by Milton Veinot, Q.C.. The event which triggered the initiation of the mediation process was the denial of Ms. Kelly's continuing long term disability benefits. The intent of the mediation was as well, to resolve the human rights complaint, and as well, the return to work of Ms. Kelly. Ms. Kelly's Counsel for the human rights complaint was not present during the mediation. Ms. Kelly did, however, have representation through her union. Kimberly Turner, Q.C. acted for the NSGEU and Ms. Kelly's ERO was present throughout.

Mairi Arthur testified concerning the Back to Work Protocol. She stated that when she learned that Ms. Kelly's LTD was ceasing on March 2nd, 2009, she contacted the union and her ERO, Tina Webber to discuss Ms. Kelly's return to work. There was an agreement to retain a mediator to resolve Ms. Kelly's return to work. Because the Corporation had received the human rights complaint in January of 2009, the Corporation asked the Commission about the possibility of dealing with the human rights complaint as part of the mediation process. It was Ms. Arthur's evidence that the Parties were to deal with both at the same time, bearing in mind that the Commission would reserve the right afterwards to determine whether or not the outcome of the mediation was satisfactory or not. It was Ms. Arthur's evidence that the human rights complaint was not addressed as part of the mediation process because Ms. Kelly's Counsel, Mr. Mason, could not be present for the mediation. It was Ms. Arthur's evidence that the Corporation had never engaged in this type of mediation to negotiate a back-to-work Protocol before.

The Return to Work Protocol is found at tab 95 of Exhibit 2(b). The Return to Work Protocol described the process by which Ms. Kelly would be returned to work from her sick leave. Paragraphs 4, 5, 6, 7, 8, and 9 are the key components of the Return to Work Protocol. Paragraph 5 states:

Ms. Kelly shall return to her position as Manager (Class 4) of the Stellarton, Nova Scotia (store 375). Ms. Kelly shall be transitioned to supervision by Mr. Don Whittemore through a twelve (12) month period of co-management by Mr. Gordon MacEwen (Regional Manager, Region #2) and Mr. Don Whittemore. During this twelve (12) month period there shall be a monthly meeting between Ms. Kelly, Ms. Tina Webber (or the Employee Relations Officer assigned to Local 1670), and Ms. Kelly's manager/co-managers to

discuss Ms. Kelly's and the store's performance, related operational issues and any issues raised by the Union or Ms. Kelly. Although Mr. Whittemore will be accompanying Mr. MacEwen to all Stellarton store visits and operational reviews, the twelve (12) monthly meetings shall be conducted as follows:

- a. During the first three (3) of the 12 monthly meetings, Ms. Kelly, Ms. Tina Webber (or the Employee Relations Officer assigned to Local 1670), Mr. MacEwen and another NSLC representative will attend in lieu of Mr. Whittemore;*
- b. During the second three (3) of the 12 monthly meetings, Ms. Kelly, Ms. Tina Webber (or the Employee Relations Officer assigned to Local 1670), Mr. MacEwen and Mr. Whittemore will attend; however, Mr. MacEwen will take the lead on all discussions with Mr. Whittemore attending as an observer; and*
- c. During the final six (6) of the 12 monthly meetings, Ms. Kelly, Ms. Tina Webber (or the Employee Relations Officer assigned to Local 1670), Mr. MacEwen and Mr. Whittemore will attend, with both Mr. MacEwen and Mr. Whittemore jointly leading the discussion.*

Paragraph 7 states:

Ms. Kelly agrees to recognize the NSLC's performance expectations and commit to the necessary developmental measures to obtain the "fully satisfactory" and/or "met standards" level of performance. Discussions in this regard shall occur during the monthly meetings specified at paragraph #5.

Paragraph 9 states:

Prior to Ms. Kelly being transitioned back to supervision by Mr. Whittemore, Ms. Kelly and Mr. Whittemore will meet with Mr. Milton Veniot, Q.C. to discuss how they will communicate and interact in the future. Mr. Veniot's costs will be borne equally by the NSGEU and NSLC. Both the NSLC and the NSGEU may have one (1) representative in attendance at this meeting.

Paragraphs 10, 11 and 12 also addressed the alleged performance issues and pending discipline matters:

10. Nothing in this Protocol shall prevent the NSLC from conducting its regular business, including any additional visits and operational reviews of the Stellarton, Nova Scotia store. Although Mr. Whittemore will conduct visits to the Stellarton store at any time during this Protocol:

a. All (i) private, one-on-one meetings, and/or (ii) discussions relating to Ms. Kelly's performance will be held in accordance with Paragraph #5; and

b. For the first one (1) month period following Ms. Kelly's return to work, any day-to-day operational issues noted by Mr. Whittemore during his visits to the Stellarton store will be communicated to Ms. Kelly via Mr. MacEwen.

11. It is understood that Ms. Kelly is subject to the same expectations as to work performance as all other NSLC managers including, but not limited to, abiding by NSLC policies and procedures, and observing appropriate managerial boundaries regarding discussions and employees and third-parties about NSLC matters or personnel.

12. The NSLC agrees to waive any potential discipline with respect to any matters predating the execution of this Protocol, including, but not limited to, any matters noted in the June 2, October 20, and December 17, 2008 NSLC correspondence. In addition, the Employer shall remove from Ms. Kelly's personnel file the letters of March 16, 2007, April 11, 2007, June 2, 2008, October 20, 2008 and December 17, 2008.

Paragraph 16 of protocol states:

Ms. Kelly has indicated her agreement and principle with this protocol, but wishes to consult with her professional advisors prior to signing the protocol. It is anticipated that she will be in a position by August 28th, 2009 to advise whether she is in final agreement with the above.

Dr. Chris Tragakis wrote to Kimberly Turner, Q.C., Counsel for the NSGEU which was received by Ms. Turner on September 21st, 2009. This letter states:

I have discussed the protocol made between the NSLC, the NSGEU, and Pearl Kelly with my client and she is ready to sign it and give the protocol a try. She

is asking first, however, for a written statement, that if the protocol fails, she will not be terminated and another plan will be created and put in place. This statement would greatly reduce her anxiety and significantly increase her ability to establish a trusting relationship with the Nova Scotia Liquor Corporation. Pearl is ready to return to work as soon as she receives these assurances.

In a letter dated November 22nd, 2009 found at tab 98 of Exhibit 2(b), Ms. Turner wrote to Corporation Counsel Mr. Proctor, enclosing Dr. Tragakis' letter. The letter states:

The Union has advised Ms. Kelly that the employer's duty to accommodate does not end with this return-to-work protocol and that her situation will have to be assessed should the medical evidence suggest that she is unable to work within the return of the protocol in the future.

It would be very helpful if you could confirm the employer understands that the return to work protocol as subject to its obligations under the Human Rights Act. As you can see, upon receipt of this assurance, Mr. Tragakis believes that Ms. Kelly is ready to return to work.

Mr. Proctor, Counsel for the Corporation wrote to Ms. Turner, on September 30th, 2009. His letter is found at tab 99 of Exhibit 2(b). It states:

In your September 22nd, 2009 correspondence you request the NSLC's confirmation of its duty to accommodate pursuant to the Human Rights Act. Ms. Kelly should rest assured that the NSLC is aware of its legal obligations in this regard; however, in the interest of managing all Parties' expectations, the NSLC wants Ms. Kelly to be cognisant that the NSLC views the Protocol as a significant accommodation. It is the NSLC's position that the accommodations set out in the protocol are nearing the point of undue hardship. However, the NSLC is not prejudging any requested accommodation that may come as the Parties work through the Protocol and the NSLC notes that the other options, which have not yet been explored (such as Ms. Kelly transferring to another region), may need to be explored at that time period.

Finally, in correspondence found at tab 102 of Exhibit 2(b), Ms. Turner wrote confirming that she had been advised that Ms. Kelly's medical practitioners have stated that she was totally disabled from work and unable to return to work at the present time. In a letter

dated October 26th, 2009, found at tab 103 of Exhibit 2(b), Counsel for the Corporation outlined the Commission's efforts to accommodate Ms. Kelly and as well, advised that the medical information was outstanding and the Corporation was able to consider other applicable accommodations, which would return Ms. Kelly to the workplace, because the Protocol had not been completed by her.

I find that the Back-to-Work Protocol is a significant accommodation of Ms. Kelly's ongoing disability being depression and situational anxiety, brought on by her contact with Mr. Whittemore. Further, it was agreed that the offending letters written by Mr. Whittemore and/or Mr. McMillan, being the January 16, 2007, April 11, 2007, June 2, 2008, October 20, 2008, and December 17, 2008 correspondence, were removed from her personnel file, and potential discipline was waived any actions of Ms. Kelly prior to the execution of the Protocol, including the June 2, 2008, October 20, 2008, and December 17, 2008 correspondence. The Protocol was a significant concession in relation to Ms. Kelly's alleged performance issues and her behaviours post sick leave. Her personnel file, from a discipline perspective, would be wiped clean.

The issue for Ms. Kelly was whether or not it was reasonable for her, at the end of the year long Back-to-Work Protocol to return to the supervision of Mr. Whittemore.

b. Evidence – The Issue of a Different Regional Manager

Ms. Arthur's evidence in relation to the duty to accommodate in cross-examination was:

4 Q. So why not give Ms. Kelly a different regional manager?

*5 A. I mentioned about the...the process and accommodation, so the process
6 and accommodation, which we followed which was very valid at the time,
7 the three*

*7 parties get together and we decide on the accommodation, what is doable.
8 So the*

*8 employer has to accommodate, the union has to accommodate, and Ms.
9 Kelly has to*

*9 accommodate. We all have an obligation to accommodate. So if we're going
10 to give*

*10 Ms. Kelly a different regional manager we have to consider how that will
11 be done. So*

*11 will the manager in Sydney travel regularly to Ms. Kelly's store, or will a
manager in*

12 Halifax travel regularly outside the region, and bearing in mind that
this...you know,
13 regions have goals that they set, so this now a different regional manager,
so it's doable
14 but it's not the...the first thing we look at is...is there some other way. I
mean Ms. Kelly
15 put in four transfer requests for Antigonish which are all in Mr.
Whittemore's region, so
16 we're looking reasonably at can we...can we make that relationship work
so that we
17 don't have to have that kind of disruption.

Ms. Arthur on the question of accommodation made the following statements:

2 A. The process we start in at the beginning and what is doable, and at the
3 time we went through the mediation it was agreed by Ms. Kelly at the
mediation that that
4 was doable, and so we never had an...We never had a chance to enact that.
We have
5 always maintained all this time that we're willing to accommodate, we're
willing to look
6 at other ways to accommodate. We've never said we won't look at that.
We've...Ms.
7 Kelly has just not come back.

8 Q. Well, why not offer a different regional manager since it's doable?

9 A. That...that may well be something in...in terms of an accommodation that
10 can be accomplished. It was not where we started. We didn't start on the
outside.

In response to questions of the Chair, Ms. Arthur gave the following evidence:

7 THE CHAIR: All right. Okay, so the other question I wanted to ask you,
8 Ms. Arthur is just on the issue...the question of accommodation because at
some point I
9 have to make a decision.

10 A. Yes.

11 Q. And one of the things that I have to consider is...is if, you know, depending

12 on not how all of this goes, is what if anything the Corporation has to potentially do to

13 accommodate...

14 A. Yes.

15 Q. ...Ms. Kelly... if...

16 Dr. Tragakis was pretty clear

17 that in his evidence, my recollection of it was anyway, that for him Ms. Kelly having to

18 report back to Mr. Whittemore was a real barrier. And your evidence, as we would

19 down in your cross-examination was...that was an

20 accommodation that, you know, could be made. Is that your evidence to me today?

A. Most certainly could be considered for sure.

2 Q. That she would not have to potentially report to Mr. Whittemore?

3 A. Yes. Yes.

4 Q. And that's something within the liquor corporation's ability...I'm not

5 suggesting it would be convenient or ideal, but it's something that could be done?

6 A. It could be done. There's...there's...I mean we...we didn't get to exploring 7 was Ms. Kelly at all interested in her moving to a different region. I mean there are

8 different things that we can consider and we have...we are no closed mind about what

9 those provisions might be.

Roderick J. McDonald testified on the question of accommodation, and his evidence is certainly a step back from the evidence of Ms. Arthur. He stated:

1 Q. Could the NSLC have had Ms. Kelly report to a different supervisor?

2 A. Having Ms. Kelly report to a different regional manager, we have never
3 considered that before on a permanent basis and that's kind of way out there
on the
4 scale of accommodation. I'm not at all clear that doing that is the effective
or
5 reasonable accommodation. It's...it is potentially a resolution but as
suggested by the
6 physician, but it's...when we look at accommodation we...we would identify
7 accommodations in the workplace kind of in an iterative basis to find the
one that is
8 effective and the least disruptive rather than necessarily jumping way out to
the...to...to
9 one way out on the scale like that would be.

In cross-examination Mr. McDonald stated that it was “not feasible on a long term basis to have two bosses running the store”. It was his view that the injected Regional Manager and the regular Regional Manager could work together “in the short term”, as provided for in the Protocol.

c. Case Law – Duty to Accommodate

In Jeffrey v. Dofasco Inc. [2004] O.H.R.T.D. No. 5 (O.H.R.T.) paragraph 183 of the decision stated:

In accommodating the needs of an employee, he or she must cooperate in the facilitation of such accommodation by providing the required information to the employer on which the latter can originate a solution and participate meaningfully in the accommodation dialogue...

An employee cannot simply remain silent when decisions are made in good faith that affect his or her interests.

Further, at paragraph 184 of the decision it stated:

The search for accommodation is a two-way street entailing shared responsibility, and the disabled employee does not have a right to expect a perfect solution.

Further, in Martin v. Carter Chevrolet Oldsmobile, 2001 B.C.H.R.T. No. 37 it stated at paragraph 29 of the decision:

In my opinion, an employer is not obligated to inquire into whether an employee's disability is affecting performance before making a decision based on that performance unless the employer knows or reasonably ought to have known of the relationship between the disability and the performance.

In Walkinshaw v. Complex Services Inc. [2011] O.H.R.T.D. No. 1947, it stated at paragraph 30 of the decision:

In my view, to impute knowledge of a disability to Mr. Ferro in these circumstances simply places too heavy a burden on a person who should not be expected to indulge in speculation on whether an employee has a disability, what that disability might be, and what accommodations might be necessary. Such speculation or inquiries would at best be misinformed, and might well be resented by an employee who is receiving medical attention but working with no restrictions ... In the absence of any request for accommodation from the applicant, and in the absence of any obvious behaviour that would suggest a disability, Mr. Ferro did not venture any opinions or possible medical issues and instead focused on the problems presented by the applicant's inability to do the job. I find nothing improper in this.

Further, at paragraph 33 of the decision it stated:

At most, there might have been a suspicion that medical issues were affecting her performance, but in circumstances where she had been returned to work after two absences with no restrictions, I find the facts insufficient to impute knowledge to the respondent or to impose an obligation to inquire further or to grant accommodations that had not been requested.

Further, in Saran v. Delta Cedar Products Ltd. [1995] B.C.C.H.R.D. No. 3 (B.C.C.H.R.) it was held at paragraph 99 of the decision:

The search for accommodation is a two-way street entailing shared responsibility, and the disabled employee does not have a right to expect a perfect solution. The nature of Saran's physical, education, motivational and aptitudinal limitations precluded him from being transferred to another position at the Respondent. In light of his limitations, Saran's insistence on a

guarantee of employment was, in my view, unreasonable, and made his re-employment with the Respondent effectively impossible.

In Snow v. Cape Breton-Victoria Regional School Board [2006] N.S.H.R.B.I.D. No. 5, Board Chair Rogers stated at paragraph 72-73 of the decision:

In the Renaud case, supra, at para. 43-44 the Supreme Court of Canada noted the interactive nature of the duty to accommodate as follows:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty of the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in O'Malley, supra. At p. 555, 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 of his employment.

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

This does not mean that, in addition to bringing 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 flounder, the complain will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley, supra. 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.

It follows from this that the Complainant does not have the right to refuse a reasonable accommodation even if there is an alternate reasonable accommodation, which would not cause undue hardship of the employer, which the employee would prefer: See Hutchinson, supra, at para. 77 and Tweten v. R.T.L. Robinson Enterprises Limited (No. 2) (2005), C.H.R.R. /D05-233 at para 29.

In Central Alberta Dairy Pool v. Alberta (Human Rights Commission) [1990] 2 S.C.R. 489, in relation to the duty to accommodate for religious reasons, Chief Justice Dickson, for the Supreme Court of Canada stated at paragraphs 62 - 63 of the decision:

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar – financial costs, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. The list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

In the case at bar the Board of Inquiry found as a fact that concerns of cost, disruption of a collective agreement, employee morale and interchangeability of work force did not pose serious obstacles to accommodating the complainant's religious needs by permitting him to be absent on Monday, April 4, 1983...

Further, the Supreme Court of Canada in Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 case stated at paragraphs 19 and 20 of the decision, in relation to undue hardship:

The extent to which the discriminator must go to accommodate is limited by

the words “reasonable” and “short of undue hardship”. These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. Wilson J., in Central Alberta Dairy Pool at p.521, listed factors that could be relevant to an appraisal of what amount of hardship was undue as:

.. financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer’s operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.

She went on to explain at p.521 that “[t]his is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case”.

The concern for the impact on other employees which prompted the Court in Hardison to adopt the de minimis test is a factor to be considered in determining whether the interference with the operation of the employer’s business would be undue. However, more than minor inconvenience must be shown before the complainant’s right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.

Further Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ) [2008] 2 S.C.R. 561 (S.C.C.) the following statement was made at paragraph 18 of the decision:

Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.

In Trask v. Nova Scotia (Department of Justice, Correctional Services) [2010] N.S.H.R.D.I.D. No. 2 (Oliver) Mr. Trask was employed by correctional services and alleged discrimination based on section 5 (1) (d) (o) of the Act, Board of Inquiry Chair Donald H. Oliver, Q.C. stated at paragraph 136 of the decision:

The Respondent contended throughout this Inquiry that the employer had not been provided with any medical documentation relating to Mr. Trask's mental illness. The evidence was clear that the outward symptoms of his illness were violent outbursts in the workplace. There was an abundance of evidence that his behaviour in the workplace had become verbally aggressive. He was loud and rude and verbally aggressive. Evidence indicated that this condition had been growing more intense and worse over a period of many months.

Further, at paragraphs 143-144, Chair Oliver stated:

Although there is no statutory duty to accommodate found in the Human Rights Act, the jurisprudence holds that there is a duty to accommodate disabled employees. Since the Supreme Court of Canada decision in British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U. (1999), 35 C.H.R.R. D/257 (S.C.C.) ("Meiorin"), the test for accommodating disability has involved three steps: establishing that the impugned standard was rationally connected to and reasonably necessary to carrying out the job, and that the respondent is unable to accommodate the employee to the point of undue hardship. The analysis most often focuses on the accommodation, as the court in Meiorin stated that the standard is impossibility short of undue hardship.

The starting point for dealing with the duty to accommodate is the Supreme Court of Canada decision in Central Okanagan School Dist. No. 23 v. Renaud (1992), 16 C.H.R.R. D/425 (S.C.C.). The court there (at 43-44) held that the search for accommodation is a multi-party inquiry, and the complainant has a duty to assist in securing appropriate accommodation. The complainant doesn't have to originate a solution, but does have to facilitate the implementation of a reasonable proposal by the employer and to accept reasonable accommodation. If the complainant turns down a proposal for reasonable accommodation, then his or her complaint will be dismissed.

Further Chair Oliver accepted that panic attacks constituted a disability under the Human Rights Act and that even minor mental disabilities which have no permanent

manifestation can be considered disabilities under the legislation, but there still needs to be sufficient evidence to establish the existence of that disability.

d. Conclusion

Counsel for Ms. Kelly suggested through the course of the closing argument that the employees of the Corporation should have known that Ms. Kelly was suffering from a disability at the time that Mr. Whittemore reviewed her performance appraisal with her and even as far back as when Ms. Kelly met with the Corporation as part of a grievance process to obtain the list of competencies that she needed to address. However, I am satisfied that there was no warning or behaviours that were observed by Mr. Whittemore or anyone else in the employ of the Corporation in advance of Ms. Kelly going out on sick leave on May 28, 2008, that in fact she was suffering from a disability. I do accept that the stress of her work environment, some of which was brought on by her own behaviours, some of it brought on by the actions of the Corporation, resulted in Ms. Kelly going off on stress leave. However, this is not an “ought to have known” case prior to May 28, 2008. There were no previous absences from work based on mental health issues. There were work performance issues but there were no behaviours of Ms. Kelly or admissions by her that the Corporation could draw from to wonder if these issues were linked to any ongoing mental health difficulties being experienced.

I accept the argument of Counsel for the Corporation that the Corporation has made concerted efforts to accommodate Ms. Kelly, as is evidenced in the Back-to-Work Protocol. I reiterate my previously expressed concern is relying on Dr. Tragakis’ evidence to come to the conclusion that she should not have to report back to Mr. Whittemore under any circumstances. Based on the short comings in the information that he received about Ms. Kelly’s workplace I don’t believe that Dr. Tragakis is in a position to express anymore than concern of what the outcome might be if Ms. Kelly went back to work at the end of the Back to Work Protocol under the supervision of Mr. Whittemore.

Further, there are four cases that have been submitted by Counsel for the Corporation being Pisoney v. London Life Insurance Co. [2003] B.C.J. No. 1691 (B.C.S.C.), Ontario Nurses’ Assn. v. Orillia Soldiers Memorial Hospital [1999] O.J. No. 44 (O.C.A.), Maple Leaf Consumer Foods Inc. v. Schneider Employees’ Assn. (Karges Grievance) [2007] O.L.A.A. No. 436, and McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l’Hopital general de Montreal [2007] S.C.J. No. 4, which stand for the principle that the obligation to accommodate a suspended while someone is disabled and unable to work, until they are able to return to work. If and when Ms. Kelly is able to return to work, the Back to Work Protocol is an appropriate accommodation,

particularly based on the contents of paragraph 9 and paragraph 14 of the Protocol, which allowed Mr. Veinot to meet with Ms. Kelly and Mr. Whittemore to discuss how they will communicate and interact in the future, and as well, provided that Mr. Veinot maintained jurisdiction to address issues regarding interpretation or implementation of the Protocol. Further, it would have been more than reasonable to expect that Ms. Kelly would give the Back to Work Protocol a try knowing the contents of the communication between her union lawyer, Ms. Turner and Counsel for the Corporation.

As to whether or not a potential reporting to Mr. Whittemore at the end of the one year period is an undue hardship to the Corporation, on the face of it, I believe that it is without giving the Protocol a try and without myself or another independent mediator agreed to by the Parties, maintaining the same level of involvement that was anticipated in the Back-to-Work Protocol for Mr. Veinot to determine the issue at a future date. It made sense for the mediator to retain jurisdiction. What wasn't addressed in the Back-to-Work Protocol is the process at the end of the twelve month period if Ms. Kelly was of the view that she can no longer work under Mr. Whittemore's supervision.

I find that the Back to Work Protocol is a significant attempt to accommodate Ms. Kelly which was made based on the presumption that she (a) would not be receiving long term disability benefits and (b) was available and ready to return back to work. There is nothing in the evidence or in the case law to suggest that without having given the Back to Work Protocol a try that Ms. Kelly should never have to report back to Mr. Whittemore as her Regional Manager.

C. SUMMARY OF FINDINGS AND CONCLUSIONS

The Complainant, Pearl Kelly, alleged that she has been discriminated against and that the actions of the employer, the Nova Scotia Liquor Corporation, are prohibited under section 5 (1) (d) (m) (o) of the Nova Scotia Human Rights Act. Section 5 (1) (d) (m) (o) of the Act states:

No person shall in respect in respect of:

(g) employment

Discriminate against an individual or class of individuals on account of sex, physical disability, or mental disability.

Under section 3 of the Act it states:

- (l) "physical disability or mental disability" means an actual or perceived*
- (i) loss or abnormality of psychological, physiological or anatomical structure or function,*
- (ii) restriction or lack of ability to perform an activity...*
- (vi) mental disorder...*

Section 3 (n) of the Act defines “sex” as including pregnancy, possible pregnancy, and pregnancy-related illnesses.

I find the following:

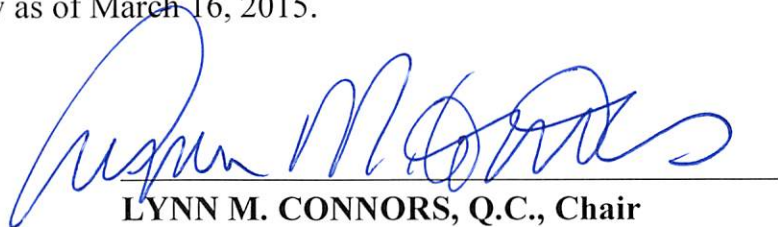
1. That the wine fair incident is not a standalone act of discrimination and is statute barred, but as previously stated, is evidence to prove ongoing misconduct by the Corporation;
2. In relation to Ms. Kelly’s performance appraisal prepared by Mr. Whittemore for 2006-2007 and in comparison to Mr. LeBlanc’s performance appraisal for 2007-2008 she was discriminated against because of her sex, because Mr. Whittemore made a distinction that had the effect of imposing a burden upon Ms. Kelly that was not imposed upon Mr. LeBlanc. Ms. Kelly was held at a much higher standard in the preparation of her performance appraisal than Mr. LeBlanc. Ms. Kelly had significantly less serious performance issues than Mr. LeBlanc. Mr. LeBlanc’s performance appraisal rating was the same as Ms. Kelly’s. Further, the lack of direction provided by the Corporation to Ms. Kelly, in relation to her development plan, as compared to Mr. LeBlanc, was discriminatory based on her sex. The lack of support provided to Ms. Kelly and imposed a burden upon her that was not imposed on Mr. LeBlanc;
3. In relation to the acronym “Pregnant Pearl in Pictou” I find that the statement made by Mr. Barnhill at the Managers meeting to the effect that whenever Ms. Kelly became pregnant she would receive a promotion, was a discriminatory statement because it negatively linked her position as a Manager 4 within the Corporation to her gender and/or pregnancy. Ms. Kelly was the only female Manager 4 in that region. There was no evidence of any specific burden having been imposed upon Ms. Kelly because this statement was made, however, it is evidence of a sexist attitude towards her within her male dominated managerial work environment;

4. That as of May 28, 2008 Ms. Kelly was suffering from a mental disability, which is a prohibited ground under section 5 of the Act. I find that the December 17 2008 discipline letter was evidence of discriminatory conduct towards Ms. Kelly because of her disability;
5. I find that the Back-to-Work Protocol complies with the legal requirements of the duty to accommodate, if and when, Ms. Kelly is deemed able to return to work. I find that, on the face of it, a prohibition from never having to never report to Mr. Whittemore as Ms. Kelly's regional manager is an undue hardship, however before a final determination is made, the protocol should be implemented and evidence of how the protocol has been implemented and how Ms. Kelly and Mr. Whittemore have done should be lead and adjudicated on before a final determination is made on the question of undue hardship.

I have not heard from Counsel in relation to damages and/or remedy. I reserve on those two issues and the Board of Inquiry will reconvene to hear submissions on those two outstanding issues at a mutually agreed to date and time for Counsel for the Commission, Counsel for the Complainant, and Counsel for the Corporation.

DATED by the Board of Inquiry as of March 16, 2015.

ISSUED by the Board of Inquiry as of March 16, 2015.



LYNN M. CONNORS, Q.C., Chair
Human Rights Board of Inquiry